Federal Register

1–4–05 Tuesday
Vol. 70 No. 2 Jan. 4, 2005

Pages 249–660

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

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 02–125–2]

Emerald Ash Borer; Quarantined Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the emerald ash borer regulations by adding areas in Indiana, Michigan, and Ohio to the list of areas quarantined because of emerald ash borer. As a result of this action, the interstate movement of regulated articles from those areas is restricted. This action is necessary to prevent the artificial spread of this plant pest from infested areas in the States of Indiana, Michigan, and Ohio into noninfested areas of the United States.

DATES: This interim rule was effective December 28, 2004. We will consider all comments that we receive on or before March 7, 2005.

ADDRESSES: You may submit comments by any of the following methods:

- EDOCKET: Go to *http://www.epa.gov/feddocket* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once you have entered EDOCKET, click on the ''View Open APHIS Dockets'' link to locate this document.
- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 02–125–3, 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. 02–125–2.
- E-mail: Address your comment to *regulations@aphis.usda.gov.* Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 02–125–2'' on the subject line.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the instructions for locating this docket and submitting comments.

Reading Room: You may read any comments that we receive on this docket in our reading room. 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.

Other Information: You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: Ms. Deborah McPartlan, Operations Officer, Pest Detection and Management Programs, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236; (301) 734–4387.

SUPPLEMENTARY INFORMATION:

Background

The emerald ash borer (EAB) (*Agrilus planipennis*) is a destructive wood-boring insect that attacks ash trees (*Fraxinus* spp., including green ash, white ash, black ash, and several horticultural varieties of ash). The insect, which is indigenous to Asia and known to occur in China, Korea, Japan, Mongolia, the Russian Far East, Taiwan, and Canada, eventually kills healthy ash trees after it bores beneath their bark and disrupts their vascular tissues.

In an interim rule effective on October 8, 2003, and published in the **Federal Register** on October 14, 2003 (68 FR 59082–59091, Docket No. 02–125–1), we amended the Domestic Quarantine Notices in 7 CFR part 301 by adding a new ''Subpart—Emerald Ash Borer'' (§§ 301.53–1 through 301.53–9, referred to below as the regulations). The regulations designated 13 counties in the southeastern portion of the State of Michigan as quarantined areas because of EAB and restricted the interstate movement of regulated articles from the quarantined areas.

Quarantined Areas

Recent surveys conducted by inspectors of State, county, and city agencies and by inspectors of the Animal and Plant Health Inspection Service (APHIS) have revealed that infestations of EAB have occurred outside the 13-county quarantined area in Michigan. Specifically, infestations of EAB have been detected in Berrien, Branch, Calhoun, Eaton, Kent, Roscommon, and Saginaw Counties, MI; LaGrange and Steuben Counties, IN; and Defiance, Fulton, Henry, and Lucas Counties, OH. Officials of the U.S. Department of Agriculture (USDA) and officials of State, county, and city agencies in Indiana, Michigan, and Ohio are conducting intensive survey and eradication programs in the infested areas. Indiana, Michigan, and Ohio have quarantined the infested areas and have restricted the intrastate movement of regulated articles from the quarantined areas to prevent the spread of EAB within each State. However, Federal regulations are necessary to restrict the interstate movement of regulated articles from the quarantined areas to prevent the spread of EAB to other States and other countries.

The regulations in § 301.53–3(a) provide that the Administrator of APHIS will list as a quarantined area each State, or each portion of a State, where EAB has been found by an inspector, where the Administrator has reason to believe that EAB is present, or where the Administrator considers regulation necessary because of its inseparability for quarantine enforcement purposes from localities where EAB has been found.

Less than an entire State will be designated as a quarantined area only under certain conditions. Such a designation may be made if the Administrator determines that: (1) The State has adopted and is enforcing restrictions on the intrastate movement of regulated articles that are equivalent to those imposed by the regulations on the interstate movement of regulated articles; and (2) the designation of less

than an entire State as a quarantined area will be adequate to prevent the artificial spread of the EAB.

In accordance with these criteria and the recent EAB findings described above, we are amending § 301.53–3(c) to add portions of Berrien, Branch, Calhoun, Eaton, Kent, Roscommon, and Saginaw Counties, MI; LaGrange and Steuben Counties, IN; and Defiance, Fulton, Henry, and Lucas Counties, OH, to the list of quarantined areas. An exact description of the quarantined areas can be found in the rule portion of this document.

Regulated Articles

In the October 2003 interim rule in which we established the EAB quarantine and regulations, we designated, among other things, firewood of all hardwood species as regulated articles. In that interim rule, we explained that we were designating all hardwood species as regulated articles because as hardwood is dried and cut into firewood, it is difficult to identify the species of the tree from which the firewood was derived.

In its State quarantine, Indiana refers to firewood of any non-coniferous species, rather than hardwood species, as a regulated article. While we consider the two terms to be essentially synonymous, we are adding the word ''(non-coniferous)'' after the word ''hardwood'' in the list of regulated articles in § 301.53–2(a) in response to a request from plant health officials in Indiana.

Emergency Action

This rulemaking is necessary on an emergency basis to help prevent the spread of EAB 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.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review under Executive Order 12866.

We are amending the EAB regulations by adding areas in Indiana, Michigan, and Ohio to the list of quarantined areas. As a result of this action, the interstate movement of regulated articles from those areas is restricted. This action is necessary to prevent the artificial spread of this plant pest into noninfested areas of the United States.

While most information about the effects of EAB are based on what has happened in Michigan where the initial U.S. outbreak occurred, similar effects can be expected anywhere the pest occurs.

EAB is a highly destructive, wood-boring insect pest that attacks several species of ash (*Fraxinus* spp.). White ash (*Fraxinus americana* L.), black ash (*Fraxinus nigra* Marsh.), and green ash (*Fraxinus pennsylvanica* Marshall.) are known to be susceptible in the United States; however, there are indications that other varieties of ash may also be at risk. Therefore, the regulations place restrictions on certain articles of the genus *Fraxinus.* If the EAB spreads from infested areas to the surrounding forests of the northeastern United States, where nursery, landscaping, and timber industries and forest-based recreation and tourism industries play a vital economic role, its impact would be severe.

The pest has the potential to destroy entire stands of ash, and any incursion of the pest can result in substantial losses to forest ecosystems, urban trees, and the timber industry. Adults bore D-shaped holes up to a diameter of 1 centimeter into sapwood, and these holes create pathways for pathogens and insect vectors. Domestically, black, green, and white ash serve as an important component in the forests of the northeast. Further, the wood is used for a variety of applications that require a strong, hard wood with less rigidity than maple.

White ash is one of the primary commercial hardwoods used for the production of tool handles, baseball bats, furniture, antique vehicle parts, containers, railroad cars and ties, canoe paddles, snowshoes, boats, doors, and cabinets. Green ash is a valued species for solid wood products, pulp and paper requiring hardwood fibers, crating, boxing, handle stock, and rough lumber. Black ash, while not as strong as other varieties, is regularly used for interior furnishings, furniture, and cabinets. Damage left by the EAB reduces the quality and market value of wood products, and dying and dead trees are useless for manufacturers.

Beyond manufacturing, ash trees play an important role in the urban landscape. Ash is known for its natural resistance to many other trees' pests and its hardiness in cities. Many of the ash trees that now serve as ornamental, street, shade, and landscape beautification trees were planted to replace elm trees destroyed because of Dutch elm disease. Ash trees are vital sources of food and shelter for wildlife and livestock, and they have been planted in the rehabilitation of damaged natural areas. Because of the EAB, these natural and aesthetic values are at risk in affected regions.

Damage to ash trees in the lots owned by the landscape industry and wood lots in southeast Michigan over the past 5 years is estimated at $11.6 million. In Michigan and Canada, we estimate that between 250,000 and 2 million trees are already affected by the pest. In the six counties originally quarantined by the State of Michigan, 26.1 million trees are at risk, and the replacement value of those trees is estimated to be $11.7 billion; this figure, of course, excludes their aesthetic, oxygen-producing, and habitat-providing values. Already, because of EAB infestation and subsequent damage and the effects of the quarantine placed by the State of Michigan, producers have lost approximately $2 million in nursery stock sales. While ash species other than black, green, and white ash have not been attacked in North America, we believe the remaining 13 species may also be susceptible, and in 2002 the Canadian Food Inspection Agency confirmed that theory in the results of an EAB pest risk assessment. In Japan, EAB has also affected trees in the genera *Ulmus* (elms), *Juglans* (walnuts and butternuts), and *Pterocarya* (wingnuts).

The pattern and significant numbers of trees harmed or destroyed because of the pest suggest that EAB has been established in Michigan for at least 5 years, though it was definitively identified only in July 2002. We are not aware of the capability for EAB's natural spread in North America, and information on EAB biology in Asia is scarce. Studies on the pest in both North America and Asia are underway.

Current research suggests that EAB typically completes one generation per year in northeastern China and that females lay 68 to 90 eggs in their lifetime. Usually, trees die 2 to 4 years after an EAB attack. We know that adult beetles are capable of dispersing by flight in 8 to 12 meter bursts, and we are aware of EAB ''bursting'' distances of several kilometers in search of new ash host material. Since EAB appears to survive well in North American climatic

conditions, it is probable that EAB could continue to disperse among various contiguous corridors of host material in natural and urban environments. In northeastern China, EAB has successfully built severely damaging populations and traveled great distances in search of new hosts. Especially troubling in North America is the apparent lack of natural predators and other biological factors that would contribute to EAB mortality. A relative of EAB, the bronze birch borer (*Agrilus axius*), is capable of a natural spread of 10 to 20 miles per year, and this might be a possible estimate of EAB's spreading capability.

The spread of EAB can be accelerated through human-assisted movement and trade of nursery stock, lumber, and logs. Solid wood packing materials (SWPM), especially if those materials include bark, pose a special concern. From 1985 to 2000, APHIS personnel reported 38 interceptions of species of the genus *Agrilus* in shipments of SWPM at ports of entry in 11 different States, and those shipments originated in at least 11 countries. Since EAB larvae can overwinter in the sapwood they burrow into, it is uncertain whether debarking of lumber is an effective way to destroy the pest.

Specific Risks to Urban Forests

Urban areas of the United States cover approximately 3.5 percent of the total land area of the country, contain more than 75 percent of the population, and support an estimated 3.8 billion trees valued at $2.4 trillion. Michigan's total urban tree population is estimated at 110,858,000 trees, and ash is a vital component of this urban forest. Trees in urban Michigan, like trees in any city, sequester gaseous air pollutants and particulate matter, help people conserve energy through the shade they provide, assist in the dispersal of storm water, provide protective shelter belts for urban fauna, and contribute aesthetic pleasure to the lives of city-dwellers and tourists. Field data from eight cities suggests that ash trees comprise up to 14 percent of the total leaf area of those cities.

Specific Risks to Timber

Within Michigan, there are 693 million EAB-susceptible trees grown on timberland, with an undiscounted compensatory value estimated at $18.92 billion. In the 6 counties first quarantined by the State of Michigan, there are more than 31 million ash trees at risk. We are investigating possible monetary losses to forestry interests based on stumpage [1] value. These losses are likely to be less than monetary losses based on compensatory value, since stumpage values are usually applied to older trees that are greater than 5 inches in diameter, and compensatory values are applied for trees greater than 1 inch in diameter. Should the EAB continue to spread or be artificially introduced to areas outside of Michigan, monetary losses could grow significantly. Ash trees for timber products are predominantly concentrated in the East, and available data on production volumes for ash were available only for this region.

In 1996, a net volume of 113,916 million board feet of ash sawtimber was grown in the Eastern region, comprising 7.5 percent of the volume of all hardwoods. The average stumpage price for sawtimber sold from national forests in 2000 was $220.30 per 1,000 board feet for all eastern hardwoods.

Based on the establishment of the EAB in Michigan and its range in Asia, it should be able to survive in most of the eastern United States. In Michigan, an estimated 7.7 billion board feet of ash timber is harvested annually. A widespread outbreak in Michigan alone could see a loss of $1.7 billion in timber trees.

Other Effects

We must also consider the value of ash trees as important environmental and recreational resources. The recreational use of national forest lands amounted to 341.2 million visitor days [2] in 1996, the most recent year for which data were available. In Michigan, 4.87 million visitor days were spent in the national forests in 1997. While not specifically attributable to the presence of ash trees, these statistics illustrate the importance of forest-based recreation in the United States. Ash trees are important components of U.S. forests; in addition to their aesthetic value, they provide food and shelter for wildlife. Citizens may also be affected by the presence of EAB in their own yards and neighborhoods. Removing dead or infested trees is costly and inconvenient, and replacement trees may have to grow for years before they offer the same amount of shade and ornamental value. Further, the quarantine restricts people from freely moving firewood and ash products through Michigan.

Ash wood is used for all traditional applications of hardwood from flooring and cabinets to baseball bats. A viable portion of the market for ash in Ohio is centered around the tool handle market. Ohio has two major tool handle plants which receive approximately 25 percent of its ash from Ohio.

Ohio has approximately 2.1 billion board feet (the usable lumber within a log) of standing ash timber (between 11 and 29 inches in diameter) that is worth almost $1 billion at the sawmill (USDA Forest Service).

Effects on Nursery Stock

An estimated $2 million in annual nursery stock sales were lost in the six Michigan counties first quarantined by the State. The Michigan Nursery and Landscape Association reports that nursery, plant production, and landscaping industries employ 347,000 individuals and contribute $3.7 billion to the State's economy. Michigan's nursery producers generate about $711 million in annual sales and distribute their products to 35 U.S. States, Mexico, and Canada; these producers are the second largest agricultural group in Michigan and the fifth largest nursery industry in the United States. Losses could be larger if the EAB were allowed to spread to other areas of the country. We now know that EAB is capable of infesting small diameter nursery stock.

In Ohio, the nursery/horticulture and the wood/paper/furniture manufacturing industries contribute a combined $15.5 billion to the State's economy. The horticulture and nursery segment employs 96,000 individuals according to the Ohio Nursery and Landscape Association. According to an Ohio State University estimate, 81,680 people are employed in wood, paper, and furniture manufacturing in Ohio. Ohio's nursery growers in 2003 estimated that ash trees contribute $20 million (wholesale value) to Ohio's economy each year. According to the 2003–2004 Nursery Stock Survey, 17 different varieties of ash trees are currently in production in the State (*http://www.ohioagriculture.gov/pubs/divs/plnt/curr/eab/plnt-eab-economic.stm*).

Economic Effects on Small Entities

The Regulatory Flexibility Act requires that agencies specifically consider the economic effects of their rules on small entities. The Small Business Administration (SBA) has established size criteria based on the North American Industry Classification

[1] Stumpage value refers to the commercial value of trees standing in the forest. Stumpage prices may be offered in reference to board foot volume ($/m.b.f.), weight ($/ton), or truck loads ($/load). (From: *http://extension.usu.edu/forestry/Management/Timber_Valueterms2Know.htm)*

[2] A visitor day aggregates 12 visitor hours, which may entail 1 person visiting for 12 hours, 12 persons visiting for 1 hour, or any equivalent combination of individual or group use, either continuous or intermittent.

(NAICS) for determining which economic entities meet the definition of a small firm. The small entity size standard for nursery and tree production (NAICS code 111421) is $750,000 or less in annual receipts, and $5 million or less in annual receipts for forest nurseries and gathering of forest products (NAICS code 113210). The SBA classifies logging operations (NAICS code 113310), sawmills (NAICS code 321113), and wood product manufacturers generally (NAICS subsector 321) as small entities if fewer than 500 people are employed.

The number of firms considered small entities by the SBA that are affected within the counties or portions of counties quarantined for EAB is not known. These entities must meet certain requirements before moving regulated articles from the quarantined areas. Regulated entities may incur additional costs to dispose of articles such as wood debris from tree pruning and removal. Nurseries are currently prohibited from moving ash trees under State quarantines. Of the nurseries within the 6 counties originally quarantined in Michigan, only 10 to 20 operations having a substantial amount of ash nursery stock in the ground are expected to be significantly affected. These entities represent only 0.2 to 0.5 percent of the number of nurseries in the six counties first quarantined. Counties added to the quarantine by this rule are expected to have similar effects. Very few nursery operations having a substantial amount of ash nursery stock in the ground are expected to be significantly affected.

Conclusions

Damage caused to EAB-affected ash trees in the landscape and woodlots in southeast Michigan over the past 5 years is estimated at $11.6 million. In addition, $2 million of nursery stock was restricted from sale due to the infestation. Similarly, estimates of the value of nursery stock in Ohio exceed $15 billion. The monetary values at risk are $11.7 billion in replacement costs in 6 counties first quarantined for EAB in Michigan; similar effects are expected for the newly quarantined areas.

Overall, this rule will help safeguard United States ash trees from the EAB by restricting the interstate movement of the nursery stock, logs, and lumber that can serve as its vectors. Although, at this time, we are not able to evaluate the specific effects of this rule on the counties most recently added to the EAB quarantine, we expect that those counties contain entities similar to those we have considered in this analysis. Therefore, we believe any economic effects on small entities will be small and are outweighed by the benefits associated with preventing a larger U.S. EAB infestation.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

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

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

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. 7701–7772; 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).

§ 301.53–2 [Amended]

■ 2. In § 301.53–2, paragraph (a) is amended by adding the word ''(non-coniferous)'' after the word ''hardwood''.

■ 3. In § 301.53–3, paragraph (c) is revised to read as follows:

§ 301.53–3 Quarantined areas.

* * * * *

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

Indiana

LaGrange County. Clay Township, Van Buren Township.

Steuben County. Jamestown Township.

Michigan

Berrien County. St. Joseph area: That portion of the county bounded by a line drawn as follows: Beginning at the intersection of Interstate 94 and Maiden Lane; then west on Maiden Lane to Red Arrow Highway; then west along an imaginary line along the south boundaries of properties known as Sunset Shores, Woodgate by the Lake, The Shores North, and Shoreham Condominiums to Lake Michigan; then northeast along the Lake Michigan shoreline to the St. Joseph River; then east along the southern shoreline of the St. Joseph River to the west channel shoreline; then southeast along the west channel shoreline to a point opposite of West May Street; then east along an imaginary line across the St. Joseph River to West May Street; then east on West May Street to Windsor Road; then south and east on Windsor Road to Colfax Avenue; then south on Colfax Avenue and continuing south along an imaginary line to Interstate 94 at a point near Hollywood Road; then southwest on Interstate 94 to the point of beginning.

Branch County. Quincy area: That portion of the county bounded by a line drawn as follows: Beginning at the intersection of State Road and North Briggs Road; then south on North Briggs Road to East Central Road; then west on East Central Road to South Wood Road; then north on South Wood Road to Dorrance Road; then west on Dorrance Road to North Fiske Road; then north on North Fiske Road to State Road; then east on State Road to the point of beginning.

Calhoun County. (1) Albion area: That portion of the county bounded by a line drawn as follows: Beginning at the intersection of 27 Mile Road and D Drive North; then east on D Drive North to the point where it intersects with the Calhoun/Jackson County line; then south from that point along an imaginary line to D Drive South; then west on D Drive South to 25½ Mile Road; then northeast on 25½ Mile Road to B Drive South; then west on B Drive South to 25½ Mile Road; then north on 25½ Mile Road to B Drive North; then east on B Drive North to 26½ Mile Road; then north on 26½ Mile Road to C Drive North; then east on C Drive North to 27 Mile Road; then north on 27 Mile Road to the point of beginning.

(2) Marshall area: That portion of the county bounded by a line drawn as follows: Beginning at the intersection of F Drive North and 15 Mile Road; then south on 15 Mile Road to C Drive North; then south from that point along an imaginary line to A Drive North; then east on A Drive North to West Hughes Street; then east on West Hughes Street to South Kalamazoo Street/M–227; then north on South Kalamazoo/M–227 to Old U.S. 27 North; then north on Old U.S. 27 North to F Drive North; then west on F Drive North to the point of beginning.

Eaton County. (1) Delta Township area: That portion of the county bounded by a line drawn as follows: Beginning at the intersection of Nixon Road and Willow Highway; then east on Willow Highway to North Canal Road; then south on North Canal Road to East Saint Joseph Highway; then west on East Saint Joseph Highway to Upton Road; then north on Upton Road to East Saginaw Highway; then west on East Saginaw Highway to Nixon Road; then north on Nixon Road to the point of beginning.

(2) Potterville area: That portion of the county bounded by a line drawn as follows: Beginning at the intersection of Otto Road and East Gresham Highway; then east on East Gresham Highway to North Royston Road; then south on North Royston Road to Interstate 69; then south from that point along an imaginary line to the intersection of Vermontville Road and the southern portion of North Royston Road; then south on North Royston Road to Packard Highway; then west on Packard Highway to Otto Road; then north on Otto Road to the point of beginning.

Genesee County. The entire county.

Ingham County. The entire county.

Jackson County. The entire county.

Kent County. Kentwood/Wyoming area: That portion of the county bounded by a line drawn as follows: Beginning at the intersection of 36th Street SW. and Byron Center Avenue SW.; then east on 36th Street SW., across U.S. Highway 131, and continuing east on 36th Street SE. and 36th Street NW. to Eastern Avenue SE.; then south on Eastern Avenue SE. to 68th Street SW.; then west on 68th Street SW. to Burlingame Avenue SW.; then north on Burlingame Avenue SW. to 64th Street SW.; then west on 64th Street SW. to Byron Center Avenue SW.; then north on Byron Center Avenue SW. to the point of beginning.

Lapeer County. The entire county.

Lenawee County. The entire county.

Livingston County. The entire county.

Macomb County. The entire county.

Monroe County. The entire county.

Oakland County. The entire county.

Roscommon County. Saint Helen area: That portion of the county bounded by a line drawn as follows: Beginning at the intersection of Marl Lake Road and North Saint Helen Road; then south on North Saint Helen Road to the School Road; then east on School Road to Meridian Road; then south on Meridian Road to Carter Lake Road; then west on Carter Lake Road to Michigan Route 76; then south on Michigan Route 76 to Interstate 75; then west on Interstate 75 to Maple Valley Road; then north on Maple Valley Road to its terminus; then north from the terminus of Maple Valley Road along the Higgins/Richland Townships boundary line across Lake St. Helen to the intersection of Richland Township, Sections 18 and 19, and Higgins Township, Sections 13 and 24; then east along the southern boundary of Higgins Township Section 18 to Moore Road; then north on Moore Road to Marl Lake Road, then east on Marl Lake Road to the point of beginning.

Saginaw County. (1) Saint Charles area: That portion of the county bounded by a line drawn as follows: Beginning at the intersection of South Raucholz Road and Marion Road; then east on Marion Road, across Michigan Route 52, then continuing east along an imaginary line to West Birch Run Road; then east on West Birch Run Road to Turner Road; then north on Turner Road to Ryan Road; then continuing north from that point along an imaginary line to the boundary line between Saint Charles Township and James Township; then west along the boundary line between Saint Charles Township and James Township to West Townline Road; then west on West Townline Road to South Raucholz Road; then south on South Raucholz Road to the point of beginning.

(2) Shields area: That portion of the county bounded by a line drawn as follows: Beginning at the intersection of Kennely Road and Geddes Road; then east on Geddes Road to North River Road; then south on North River Road and continuing on South River Road to Dutch Road; then west on Dutch Road to South Miller Road; then south on South Miller Road to Ederer Road; then west on Ederer Road to Van Wormer Road; then north on Van Wormer Road to Gratiot Road (Michigan Route 46); then west on Gratiot Road (Michigan Route 46) to Kennely Road; then north, west, and north on Kennely Road to the point of beginning.

Shiawassee County. The entire county.

St. Clair County. The entire county.

Washtenaw County. The entire county.

Wayne County. The entire county.

Ohio

Defiance County. Hicksville Township.

Fulton County. (1) That portion of Fulton Township east of Township Road 5.

(2) That portion of Swan Creek Township north of County Road B and east of County Road 5.

Henry County. That portion of Henry County east of State Route 109 and north of the Maumee River.

Lucas County. (1) That portion of Monclova Township west of Weckerly Road.

(2) That portion of Springfield Township west of Crissy Road.

(3) Swanton Township.

Done in Washington, DC, this 28th day of December 2004.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 05–38 Filed 1–3–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1486

RIN 0551–AA62

Emerging Markets Program

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This final rule establishes regulations applicable to the Emerging Markets Program (EMP). The regulations provide details concerning program administration, including participant eligibility, application requirements, review and allocation process, reimbursement rules and procedures, financial reporting and project evaluation requirements, appeal procedures, and program controls.

DATES: *Effective date:* February 3, 2005.

Applicability date: This rule does not apply to projects approved prior to the effective date.

ADDRESSES: Denise Huttenlocker, Director, Marketing Operations Staff, Foreign Agricultural Service, United States Department of Agriculture, 1400 Independence Avenue SW., Ag Box 1042, Room 4932–S, Washington, DC 20250–1042. Fax: (202) 720–9361; e-mail: *mosadmin@fas.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Douglas Freeman by phone at (202) 720–4327, by fax at (202) 720–9361, or by e-mail at *emo@fas.usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule is issued in conformance with Executive Order 12866. It has been determined that this final rule will not have an annual economic effect in excess of $100 million; will not cause a major cost increase in costs to consumers, individual industries, Federal, State or local government agencies, or geographic regions; and will not have an adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or foreign markets.

Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The rule would have preemptive effect with respect to any State or local laws, regulations or policies which conflict with such provisions or which otherwise impede their full implementation; would not have retroactive effect; and would require administrative proceedings before suit may be filed.

Executive Order 12372

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

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this rule because the Commodity Credit Corporation (CCC) is not required by any provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

The Unfunded Mandates Reform Act of 1995

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 204 of the UMRA.

Executive Order 13132

It has been determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism impact statement. The provisions contained in this rule will not have a substantial direct effect on States or their political subdivisions, or on the distribution of power and responsibilities among the various levels of government.

Paperwork Reduction Act of 1995

In accordance with provisions of the Paperwork Reduction Act of 1995, the Foreign Agricultural Service (FAS) submitted an information collection package to the Office of Management and Budget (OMB). OMB assigned control number 0551–0043 to the information collection and record keeping requirements. Copies of the information collection may be obtained from Kimberly Chisley, the Agency Information Collection Coordinator, on (202) 720–2568 or by e-mail to *Kimberly.Chisley@fas.usda.gov.*

Government Paperwork Elimination Act

The Foreign Agricultural Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. Accordingly, applications for participation in the Emerging Markets Program may be submitted online. Payment transactions will be handled both electronically and in paper form.

Background

The EMP is authorized by Section 1542(d) of the Food, Agriculture, Conservation, and Trade Act of 1990. The Act directs the Secretary to make available to emerging markets the expertise of the United States to ''identify and carry out specific opportunities and projects,'' including potential reductions in trade barriers, ''in order to develop, maintain, or expand markets for United States agricultural exports.'' The EMP provides funding for technical assistance activities that develop, maintain, or expand the export of U.S. agricultural commodities to overseas emerging markets, and which benefit primarily U.S. industry as a whole.

The EMP is administered by personnel of the Foreign Agricultural Service. FAS implements this provision by providing CCC funds for specific projects to various entities, including government agencies and U.S. private entities, representing a wide range of agricultural commodities and products.

Summary and Analysis of Contents

On June 22, 2004, CCC published a rule in the **Federal Register** (69 FR 34616) proposing to establish regulations for the Emerging Markets Program. That rule also requested interested parties to submit comments by July 22, 2004. CCC received 10 comments on the proposed rule. Following is a summary of the comments that specifically address the proposed rule and CCC's responses to these comments. General comments relating to the value of the program, editorial suggestions, and non-substantive comments have been omitted.

Discussion of Comments

General Information

Comment: Does the Emerging Markets Program support both public and private applications equally?

Response: While the EMP is available to assist both public and private entities, its primary purpose is to support the market development efforts of the U.S. private sector. CCC has clarified this point in section 1486.100.

Eligibility, Applications and Funding

Comment: Under what conditions may ''profit-making'' entities (section 1486.200) apply for program funding? Section 1486.201 references research and consulting firms, but does not discuss other for-profits.

Response: CCC has revised section 1486.201 to include other for-profit entities. CCC also clarified that such entities must justify the use and need for federal funding assistance and that the use of program funds to supplement the costs of normal day-to-day operations is prohibited.

Comment: If the basic objective of the EMP is the expanded export of value-added foods, why does section 1468.100 refer to agricultural commodities which is more inclusive?

Response: CCC assumes reference is to section 1486.100, not 1468.100.

The first sentence under section 1486.100 clearly states that the EMP is not limited to value-added products, but to assist in the export of all U.S. agricultural commodities and products except tobacco.

Comment: No foreign involvement should be tolerated.

Response: Foreign organizations, government or private, may participate as third parties in activities carried out by U.S. entities. Their participation is often critical to the success of a given project. Foreign entities are not, however, eligible for funding assistance from the program.

Contributions and Reimbursements

Comment: Will the Emerging Markets Program pay for the cost of commodity

samples for an Emerging Markets funded project?

Response: The EMP will reimburse the cost of commodity samples for an approved project assuming that the expense is reasonable and it is included in the application budget. However, the shipping costs for commodity samples are not eligible for reimbursement, but can be included as a contribution to the project. CCC has revised section 1486.403 by adding paragraph (b) (8) to clarify this point.

Comment: There should never be advance payments.

Response: The EMP is primarily intended to assist small- and medium-sized agricultural entities that may not have the available funds to implement a project without assistance from the EMP. Therefore, while the majority of the program's funds are disbursed on a reimbursement basis, the program allows advances on a limited basis and for short periods of time. CCC is adopting the rule as proposed.

Reporting, Evaluation and Compliance

Comment: There is a need for a repository for the conclusions and outcome of these completed projects.

Response: Reporting is required for each project, and final performance reports must contain a description of the findings and evaluations resulting from completed projects. Final reports are made available to the public on the program's Web site accessed through *http://www.fas.usda.gov.*

Comment: Performance reports should be closely monitored. Reports last audited by Government Accountability Office (GAO) show severe fraud irregularities. GAO should audit this program every three (3) months for several years.

Response: Approved projects are monitored regularly by EMP staff for the full duration. In addition, the Foreign Agricultural Service's Compliance Review Staff conducts regular reviews of EMP-funded projects to ensure compliance with all applicable federal regulations, requirements and terms of the agreements including financial integrity and accountability. CCC is not aware of any GAO report that cites findings related to fraud or other irregularities under the EMP. Therefore, CCC is adopting the rule as proposed.

This rule includes other clarifying changes to accompany the substantive changes discussed herein.

List of Subjects in 7 CFR Part 1486

Agricultural Commodities, Exports, Grant Programs—Agriculture, Technical Assistance.

■ Title 7 of the Code of Federal Regulations is amended by adding a new part 1486 to read as follows:

PART 1486—EMERGING MARKETS PROGRAM

Subpart A—General Information

Sec.
1486.100 What is the Emerging Markets Program?
1486.101 What special definitions apply to this program?
1486.102 Is there a list of eligible emerging market countries?
1486.103 Are regional projects possible under the program?

Subpart B—Eligibility, Applications, and Funding

1486.200 What entities are eligible to participate in the program?
1486.201 Under what conditions may research and consultant organizations, individuals, or any other for-profit entity apply to the program?
1486.202 Are there any ineligible entities?
1486.203 Which commodities/products are eligible for consideration under the program?
1486.204 Are multi-year proposals eligible for funding?
1486.205 What types of funding are available under the program?
1486.206 What is the Quick Response Marketing Fund?
1486.207 What is the Technical Issues Resolution Fund?
1486.208 How does an entity apply to the program?
1486.209 How are program applications evaluated and approved?
1486.210 Are there any limits on the funding of proposals?

Subpart C—Program Operations

1486.300 How are applicants notified of decisions on their applications?
1486.301 How is the working relationship established between CCC and the Recipient of program funding?
1486.302 Can changes be made to a project once it has been approved?
1486.303 What specific contracting procedures must be adhered to?

Subpart D—Contributions and Reimbursements

1486.400 What are the rules on cost sharing?
1486.401 What cost share contributions are eligible?
1486.402 What are ineligible contributions?
1486.403 What expenditures may CCC reimburse under the program?
1486.404 What expenditures are not eligible for program funding?
1486.405 How are Recipients reimbursed for project expenditures?
1486.406 Will CCC make advance payments to Recipients?

Subpart E—Reporting, Evaluation, and Compliance

1486.500 What are the reporting requirements of the program?
1486.501 What is the rule on notifying field offices of international travel?
1486.502 How is project effectiveness measured?
1486.503 How is program compliance monitored?
1486.504 How does a Recipient respond to a compliance report?
1486.505 Can a Recipient appeal the determinations of the Director, CRS?
1486.506 When will a project be reviewed?
1486.507 What is the effect of failing to make required contributions?
1486.508 How long must Recipients maintain original project records?
1486.509 Are Recipients allowed to charge fees for specific activities in approved projects?
1486.510 What is the policy regarding disclosure of program information?
1486.511 What is the general policy regarding ethical conduct?
1486.512 Has the Office of Management and Budget reviewed the paperwork and record keeping requirements contained in this part?

Authority: 7 U.S.C. 5622 note.

Subpart A—General Information

§ 1486.100 What is the Emerging Markets Program?

(a) The principal purpose of the EMP is to assist U.S. entities in developing, maintaining, or expanding the exports of U.S. agricultural commodities and products by providing partial funding for technical assistance activities that promote U.S. agricultural exports to emerging markets, a consistent with U.S. foreign policy interests. The Program is intended primarily to support export market development efforts of the private sector, but the Program's resources may also be used to assist public agricultural organizations as well. Technical assistance may include activities such as feasibility studies, market research, sector assessments, orientation visits, specialized training, business workshops, and similar undertakings.

(b) The EMP may be used to support exports of U.S. agricultural commodities and products only through generic activities.

(c) Only initiatives that support the export of U.S. agricultural commodities and products are eligible for assistance from the program. The program's resources may not be used to support the export of another country's products to the United States, or to promote the development of a foreign economy as a primary objective.

(d) The program is administered by personnel of USDA's Foreign Agricultural Service.

§ 1486.101 What special definitions apply to this program?

For purposes of this subpart, the following definitions apply:

Activities—components of a project which, when implemented collectively, are intended to achieve a specific market development objective.

Administrator—the Administrator of FAS, or designee.

Advisory Committee—a group of representatives from the private sector appointed by the Secretary of Agriculture whose primary mission is to review proposals requesting funding under the EMP and make recommendations on projects and programs that can enhance exports through the use of program funds.

Agreement—a written assistance agreement under this part.

Agricultural Commodity—an agricultural commodity, food, feed, fiber, wood, livestock, or insect, and any product thereof; and fish harvested from a U.S. aquaculture farm or harvested by a vessel as defined in Title 46, United States Code, in waters that are not waters (including the territorial sea) of a foreign country.

Attache/Counselor—the Foreign Agricultural Service employee representing United States Department of Agriculture interests in the foreign country in which promotional activities are conducted.

CCC—Commodity Credit Corporation.

Compliance Review Staff—the office within the Foreign Agricultural Service responsible for performing reviews of Recipients to ensure compliance under this part.

Constraint—a condition in a particular country or region which inhibits the development, expansion, or maintenance of exports of a specific U.S. agricultural commodity or product.

Cost Share/Contribution—the amount of funding (cash and in-kind) U.S. entities are willing to commit from their own resources in support of an approved project.

Deputy Administrator—the Deputy Administrator, Commodity and Marketing Programs, Foreign Agricultural Service, or designee.

Emerging Market—any country or regional grouping that is taking steps toward a market-oriented economy through the food, agriculture, or rural business sectors of the economy of the country; has the potential to provide a viable and significant market for United States agricultural commodities or products; a population greater than 1 million; and a per capita income level below the level for upper middle-income countries as determined by the World Bank.

EMP—Emerging Markets Program.

FAS—Foreign Agricultural Service.

Generic Promotion—an activity that does not involve or promote the exclusive or predominant use of an individual company name or logo or brand name.

Project—an approach or undertaking made up of one or more activities which, taken together, are intended to achieve a specific market development objective.

Project Funds—the funds made available to a Recipient by the Commodity Credit Corporation under an agreement, and authorized for expenditure in accordance with this part.

Proposal—an application for funding.

Recipient—a U.S. entity receiving financial assistance directly from the Commodity Credit Corporation or Foreign Agricultural Service to carry out a project.

SRTG—State Regional Trade Group.

STRE—sales and trade relations expenses including meals, receptions, refreshments, checkroom fees, tips, and dining decorations.

UES—Unified Export Strategy.

USDA—United States Department of Agriculture.

§ 1486.102 Is there a list of eligible emerging market countries?

The World Bank periodically redefines the income limits on upper middle-income economies. Consequently, an absolute list of ''emerging market'' countries has not been established. However, CCC will provide general guidance on country eligibility in each program announcement.

§ 1486.103 Are regional projects possible under the program?

Projects that focus on regions, such as the Caribbean Basin, rather than individual countries, are eligible for consideration provided such projects target qualifying emerging markets in the specified region. CCC may consider activities which target qualified emerging markets in a specific region, but are conducted in a non-emerging market because of its importance as a central location and ease of access to that region.

Subpart B—Eligibility, Applications, and Funding

§ 1486.200 What entities are eligible to participate in the program?

To participate in the EMP, U.S. private or government entities must demonstrate a role or interest in the exports of U.S. agricultural commodities or products. Government organizations consist of federal, state, and local agencies. Private entities include non-profit trade associations, universities, agricultural cooperatives, state regional trade groups, and profit-making entities and consulting businesses.

§ 1486.201 Under what conditions may research and consultant organizations, individuals, or any other for-profit entity apply to the program?

(a) Proposals from research and consulting entities will be considered for funding assistance only with evidence of substantial participation in and financial support by U.S. industry to a proposed project. Such support most credibly is provided in the form of actual monetary contributions to the cost of a project.

(b) For-profit entities shall not use program funds to conduct private business or to promote private self-interests. For-profit entities may not use program funds to supplement the costs of normal day-to-day operations or to promote their own products or services beyond specific uses approved in a given project.

§ 1486.202 Are there any ineligible entities?

Foreign organizations, whether government or private, may participate as third parties in activities carried out by U.S. entities, but are not eligible for funding assistance from the program.

§ 1486.203 Which commodities/products are eligible for consideration under the program?

All U.S. agricultural commodities/products except tobacco are eligible for consideration. Agricultural product(s) should be comprised of at least 50 percent U.S. origin content by weight, exclusive of added water, to be eligible for funding. Projects which seek support for multiple commodities are also eligible.

§ 1486.204 Are multi-year proposals eligible for funding?

Proposals for projects exceeding 1 year in duration may be considered. If approved, funding for multi-year projects is normally provided 1 year at a time, with commitments beyond the first year subject to interim evaluations intended to assess the progress of the project toward meeting its intended objectives.

§ 1486.205 What types of funding are available under the program?

CCC has established three pools of funding within the EMP—the Central Fund, the Quick Response Marketing Fund, and the Technical Issues Resolution Fund. Each year CCC will

inform the public of the process by which interested eligible entities may submit proposals for funding under the Central Fund. Because of the time sensitive nature of issues intended to be addressed, the Quick Response Marketing Fund and the Technical Issues Resolution Fund will be available continuously with no application deadline.

§ 1486.206 What is the Quick Response Marketing Fund?

(a) This fund was established to address priority constraints to market access that arise because of unforeseen events; market conditions in emerging markets are often less predictable than in more developed countries. It allows responsiveness to time-sensitive marketing problems or opportunities, such as a change in an import regime or the removal of a trade embargo; an unexpected or unusual change in the political or financial situation in a country; or a significant change in crop conditions—any of which may have an immediate impact on the access of particular commodities or products to specific markets.

(b) Proposals for the Quick Response Marketing Fund must identify specific market access issues that also face time constraints. Application content, evaluation, and reporting requirements are the same as for the Central Fund.

§ 1486.207 What is the Technical Issues Resolution Fund?

(a) This fund was established to address technical barriers to trade in emerging markets worldwide by providing technical assistance, training, and exchange of expertise. These include plant quarantine, animal health, food safety, and other technical barriers to U.S. exports based on unsound or incomplete scientific information.

(b) Funding priorities are principally those issues that are time sensitive and are strategic areas of longer term interest. Funding decisions are determined primarily through a review process that includes FAS and relevant regulatory agencies. The review is based upon the following criteria:

(1) The activity occurs in an eligible country or region of market priority;

(2) The trade constraint warrants intervention;

(3) The proposed activity is likely to achieve an impact in the short-or long-term;

(4) The Recipient is qualified to undertake the proposed activity;

(5) The budget requested is reasonable and includes leveraged resources;

(6) If applicable, a U.S. domestic constraint or trade issue can be resolved in support of a proposed activity; and

(7) The activity has support from USDA field offices.

(c) Because of the time sensitive nature of the issues intended to be addressed by these funds, proposals, whether private or government, may be submitted at any time during the year. Reviews of proposals are scheduled on a monthly basis. An expedited review may be requested but must be justified.

(d) Application content, evaluation, and reporting requirements are the same as for the Central Fund.

§ 1486.208 How does an entity apply to the program?

CCC will periodically announce that it is accepting proposals for participation in the EMP. All relevant information, including application deadlines (for the Central Fund) and proposal content, will be noted in the announcement, and proposals must be submitted in accordance with the terms and requirements specified in the announcement. CCC may request any additional information it deems necessary from any applicant in order to evaluate properly any proposal.

§ 1486.209 How are program applications evaluated and approved?

(a) *General.* Proposals received by the application deadline stated in the announcement for the Central Fund undergo a multi-phase review by FAS staff and the EMP Advisory Committee to determine qualifications, quality and appropriateness of projects, and reasonableness of project budgets.

(b) *Evaluation criteria.* FAS will consider a number of factors when reviewing proposals, including:

(1) The ability of the entity to provide an experienced U.S.-based staff with knowledge and expertise to ensure adequate development, supervision, and execution of the proposed project;

(2) The entity's willingness to contribute resources, including cash and goods and services of the U.S. industry, with greater weight given to cash contributions (for private sector proposals only);

(3) The conditions or constraints affecting the level of U.S. exports and market share for the agricultural commodity/product;

(4) The degree to which the proposed project is likely to contribute to the development, maintenance, or expansion of U.S. agricultural exports to emerging markets;

(5) Demonstration of how a proposed project will benefit a particular industry as a whole; and

(6) Past program results and evaluations, if applicable.

(7) The following priority technical assistance activities:

(i) Projects and activities which use technical assistance designed specifically to improve market access in emerging markets such as activities intended to mitigate the impact of sudden political events or economic and currency crises in order to maintain U.S. market share;

(ii) Marketing and distribution of value-added products, including new products or new uses. Examples include food service development, market research on potential for consumer-ready foods or new uses of a product, and export feasibility studies.

(iii) Studies of food distribution channels in emerging markets, including infrastructural impediments to U.S. exports; such studies may include cross-commodity activities which focus on problems which affect more than one industry, *e.g.*, grain storage handling and inventory systems development;

(iv) Projects that specifically address various constraints to U.S. exports, including sanitary and phytosanitary issues and other non-tariff barriers;

(v) Assessments and follow-up activities designed to improve country-wide food and business systems, to reduce trade barriers, to increase prospects for U.S. trade and investment in emerging markets, or to determine the potential use for general export credit guarantees;

(vi) Projects that help foreign governments collect and use market information and develop free trade policies that benefit American exporters as well as the target country or countries; and

(vii) Short-term training in agriculture and agribusiness trade that will benefit U.S. exporters, including seminars and training at trade shows designed to expand the potential for U.S. agricultural exports by focusing on the trading system.

(c) *Approval decision.* CCC will approve those applications that it determines best satisfy the criteria and factors specified in paragraph (b) of this section. All decisions regarding the disposition of an application are final.

§ 1486.210 Are there any limits on the funding of proposals?

(a) The EMP is a relatively small program intended primarily to promote access to qualified emerging markets. Its funds are intended for focused projects with specific activities, rather than expansive concept papers which contain only broad ideas. Large, overly expensive projects (*e.g.*, in excess of approximately $500,000) are rarely appropriate for the program.

(b) CCC will not reimburse 100 percent of the cost of any project undertaken by the private sector. The program is intended to provide appropriate assistance to projects which also have a significant amount of financial contributions from other sources, especially U.S. private industry.

(c) Funding for continuing and substantially similar projects is generally limited to 3 years. After that time, the project is assumed to have proven its viability and, if necessary, should be continued by the Recipient with its own or with alternative sources of funding.

Subpart C—Program Operations

§ 1486.300 How are applicants notified of decisions on their applications?

FAS will notify each applicant in writing of the final decision on its application. For approvals, letters will contain the notice of approval and any required qualifications or adjustments to the original proposal. For rejections, letters will explain reasons why the proposals were not approved for funding.

§ 1486.301 How is the working relationship established between CCC and the Recipient of program funding?

(a) FAS will send an approval letter followed by a project agreement to each approved applicant. The approval letter and agreement will specify the terms and conditions applicable to the project, including the levels of EMP funding and cost-share contribution requirements. The applicant is authorized to begin implementation of the project as of the date of the approval letter, unless otherwise indicated.

(b) An applicant who accepts the terms and conditions contained in the agreement should so indicate by having the appropriate authorizing official sign the agreement and submit it to the Director, Marketing Operations Staff, FAS, USDA. The applicant may not be reimbursed for approved project expenses until the Recipient's authorizing official and CCC have signed the agreement.

§ 1486.302 Can changes be made to a project once it has been approved?

(a) Approved projects may be modified if circumstances change in such a way that they would likely affect the progress and ultimate success of a project. All requests for project modifications must be made in writing to FAS and must include:

(1) A justification as to why changes to the project as originally designed are needed;

(2) An explanation of the necessary adjustments in approach or strategy;

(3) A description of necessary changes in the project's time line(s); and

(4) Necessary changes to the project's budget (*e.g.*, shifting of budgetary resources from one line item to another in order to accommodate the changes).

(b) Extensions of project time lines must be approved and made by FAS.

§ 1486.303 What specific contracting procedures must be adhered to?

(a) The Recipient has full and sole responsibility for the legal sufficiency of all contracts it may enter into with one or more third parties in order to carry out an approved project and shall assume financial liability for any costs or claims resulting from suits, challenges, or other disputes based on contracts entered into by the Recipient. Neither CCC nor any other agency of the United States Government or any official or employee of CCC or the United States Government has any obligation or responsibility with respect to Recipient contracts with third parties.

(b) Recipients are responsible for ensuring to the extent possible that the terms, conditions, and costs of contracts constitute the most economical and effective use of project funds.

(c) All fees for professional and consulting services paid to third parties in any part with project funds must be covered by written contracts.

(d) A Recipient shall:

(1) Ensure that all expenditures for goods and services in excess of $25 reimbursed by CCC are documented by a purchase order, invoice, or contract;

(2) Ensure that no employee or officer participates in the selection or award of a contract in which such employee or officer, or the employee's or officer's family or partners has a financial interest or gains a financial benefit;

(3) Conduct all contracting in an open manner. Individuals who develop or draft specifications, requirements, statements of work, invitations for bids, or requests for proposals for procurement of any goods or services shall be excluded from competition for such procurement;

(4) Base each solicitation for professional or consulting services on a clear and accurate description of the requirements for the services to be procured;

(5) Perform some form of fee, price, or cost analysis, such as a comparison of price quotations to market prices or other price indicia, to determine the reasonableness of the offered fees or prices; and

(6) Document the decision-making process.

Subpart D—Contributions and Reimbursements

§ 1486.400 What are the rules on cost sharing?

(a) The EMP is intended to complement, not supplant, the efforts of the U.S. private sector. Therefore, no private sector proposal will be considered without the element of cost-share from the participant and/or U.S. partners.

(b) There is no minimum or maximum amount of cost share. The degree of commitment to a proposed project represented by the amount and type of private funding are both used in determining which proposals will be approved. The type of cost share is also not specified, though some contributions are ineligible (§ 1486.402 below). Cost-share may be actual cash invested or professional time of staff assigned to the project. Proposals in which the private sector is willing to commit funds, rather than in-kind items such as staff resources, and those with higher amounts of cost-share, will be given priority consideration.

(c) Cost-sharing is not required for proposals from federal, state, or local government agencies. It is mandatory from all other eligible entities, even when they are party to a joint proposal with a government agency.

(d) Contributions from federal, state, or local government agencies or programs may not be counted toward the cost share requirement. Similarly, contributions from foreign (non-U.S.) organizations may not be counted toward the cost share requirement, but may be included in the total cost of the project.

(e) An activity that is initiated by FAS, and undertaken by an entity at the request of FAS, may be exempted from the contribution requirement. This determination is made at the discretion of FAS.

§ 1486.401 What cost share contributions are eligible?

(a) Eligible contributions are those expenses that:

(1) Have not been or will not be reimbursed by any other source outside of the Recipient or other participating U.S. entity;

(2) Are incurred during the period covered by the project agreement;

(3) Are directly related to activities necessary to implement an approved project; and

(4) Are not proscribed under § 1486.402.

(b) Contributions must be included in a project's line item budget.

§ 1486.402 What are ineligible contributions?

(a) The following are not eligible as contributions:

(1) Normal operating expenses and other costs not directly related to the project;

(2) Any portion of salary or compensation of an individual who is the focus of a promotional activity;

(3) Depreciation, *e.g.,* office equipment;

(4) The cost of insuring articles owned by private individuals;

(5) The cost of product development or product modifications;

(6) Slotting fees or similar sales expenditures;

(7) Funds, services, capital goods, or personnel provided by any U.S. government agency;

(8) Capital investments made by a third party, such as permanent structures, real estate, and the purchase of office equipment and furniture;

(9) The value of any services generated by a third party which involve no expenditure by the Recipient or third party, *e.g.,* free publicity;

(10) The cost of developing any application/proposal for EMP funding;

(11) Costs included as contributions for any other federally-assisted project or program;

(12) Membership fees in clubs and social or professional organizations; and

(13) Any expenditure made prior to approval of an EMP-funded project.

(b) The Deputy Administrator shall determine, at his or her discretion, whether any cost not expressly listed in this section may be included as an eligible contribution.

§ 1486.403 What expenditures may CCC reimburse under the program?

(a) A Recipient may seek reimbursement for an expenditure if:

(1) The expenditure is reasonable and is specified in the project budget in furtherance of an approved activity; and

(2) The Recipient has not been or will not be reimbursed for such expenditure by any other source.

(b) Subject to paragraph (a) of this section, CCC will reimburse, in whole or in part, the cost of:

(1) Salaries and benefits of the Recipient's existing personnel or any other participating entity that are assigned to EMP-funded projects; however, reimbursement is limited to:

(i) The actual daily rate paid by the Recipient for the employee's salary or the daily rate of a General Schedule U.S. Government employee, GS–15/Step 10 in effect during the calendar year in which the project or activity is approved for funding, whichever is less;

(ii) The actual assigned time of the employee to the project; and

(iii) Benefits at a maximum rate of 30 percent of the existing salary of the employee, prorated to the time assigned to the project. In addition, reimbursement for an employee's time spent on an EMP-funded project must be in lieu of compensation from the Recipient or any other participating entity.

(2) Consulting fees for professional services; however, reimbursement for consulting fees is limited to the daily rate of a General Schedule U.S. Government employee, GS–15/Step 10 in effect during the calendar year in which the project or activity is approved for funding. Reimbursement is authorized only for actual days worked and is not authorized for travel and rest days. Benefits are not reimbursable.

(3) STRE, including breakfast, lunch, dinner, and refreshments when part of an approved overseas trade activity; miscellaneous courtesies such as checkroom fees, taxi fares, and tips; and representation expenses such as the costs of social events or receptions that are primarily attended by foreign officials, and which are held at foreign venues. Such expenses must conform to the American Embassy representational funding guidelines as the standard for judging the appropriateness of STRE event costs. STRE incurred in the United States is not authorized for reimbursement, but may be counted as a cost-share contribution to the project.

(4) Travel expenses, subject to the following:

(i) Air travel, limited to the full-fare economy class rate and must comply with the Fly America Act, 49 U.S.C. App. 1517. The CCC will not reimburse any portion of air travel in excess of the full fare economy rate or when the participant fails to notify the Counselor/Attache in the destination country in advance of the travel unless the Deputy Administrator determines it was impractical to provide such notification.

(ii) Per diem, limited to the allowable rate for each domestic or foreign locale (41 CFR Chapter 301). Expenses in excess of the authorized per diem rates may be allowed in special or unusual circumstances (41 CFR Chapter 301, subpart D), and must be approved in advance.

(iii) All other expenses while in travel status must conform to U.S. Federal Travel Regulations (41 CFR Chapters 301 and 304).

(5) Direct administrative costs.

(6) Indirect costs not identified as direct costs but which are necessary to the implementation of a project. Indirect costs must be specified to be eligible for reimbursement. Indirect costs incurred by private entities (other than those identified below) may be reimbursed up to a maximum of 10 percent of the EMP funded portion of the project budget, excluding indirect costs. Market development cooperators, state regional trade groups, for-profit entities, and government Recipients (excluding FAS) may not be reimbursed for indirect costs. Indirect costs are not reimbursable for any project funded under the Technical Issues Resolution Fund or the Quick Response Marketing Fund.

(7) Rental costs for equipment necessary to carry out approved projects. Equipment rentals must be returned by the Recipient to the supplier in accordance with the lease agreements, but in no case later than 90 calendar days from the completion date of the project.

(8) Procuring samples of specific commodities or agricultural products, which are appropriate and necessary to the success of a technical assistance activity.

§ 1486.404 What expenditures are not eligible for program funding?

(a) CCC will not reimburse expenditures made prior to approval of a Recipient's proposal, unreasonable expenditures, or any cost of:

(1) Branded product promotions—in-store, restaurant advertising, labeling, etc.;

(2) Administrative and operational expenses for trade shows;

(3) Advertising;

(4) Preparation and printing of magazines, brochures, flyers, posters, etc., except in connection with specific approved activities such as training;

(5) Design, development, and maintenance of Internet Web sites;

(6) Purchase and depreciation of equipment, *e.g.* office equipment or other fixed assets;

(7) Subsidizing or otherwise providing funds for graduate programs at colleges and/or universities (salaries or fees for individual students who are directly assigned to specific project activities appropriate to their backgrounds may be covered on a pro-rated basis);

(8) Subsidizing normal, day-to-day operating costs of an entity; exception: indirect costs incurred during implementation of an approved project;

(9) Honoraria for speakers;

(10) Costs of product research or new product development;

(11) Costs of developing technical assistance proposals submitted to the program;

(12) Refundable deposits or advances;

(13) STRE expenses within the United States;

(14) All costs related to the shipping, over land and sea, of commodity samples;

(15) Expenses, fees, fines, settlements, or claims resulting from suits, challenges, or disputes emanating from contractual terms, conditions, provisions, and related formalities;

(16) Legal fees, including fees and costs associated with trade disputes;

(17) Real estate costs other than allowable costs for office space whose use is assigned specifically to a project funded by the EMP; and

(18) Any expenditure that has been or will be reimbursed by any other source.

(b) The Deputy Administrator may determine whether any cost not expressly listed in this section will be reimbursed.

§ 1486.405 How are Recipients reimbursed for project expenditures?

(a) After implementation of an EMP project for which CCC has agreed to provide funding, Recipients may submit claims for reimbursement of the expenses incurred to the extent CCC has agreed to pay for such costs. Reimbursement for approved project expenses is limited to 85 percent of the amount specified in the project agreement. The Recipient may be reimbursed for the remaining 15 percent of the funds after the final performance report containing the information required by the agreement is submitted to and approved by FAS.

(b) A format for reimbursement claims is available from the Marketing Operations Staff, FAS, USDA.

(c) Final reimbursement claims must be made no later than 90 days after the completion date of the project, and are subject to a complete final performance report acceptable to FAS.

(d) Any duplicate payment or overpayment made by CCC shall be returned by the Recipient promptly after discovery of the overpayment by the Recipient or within 30 days after notification by FAS, either by submitting a check made payable to the Commodity Credit Corporation and referencing the applicable project, or by offsetting as a credit on the next reimbursement claim. All checks shall be mailed to the Director, Marketing Operations Staff, FAS, USDA.

§ 1486.406 Will CCC make advance payments to Recipients?

(a) *Policy.* In general, CCC operates the EMP on a cost reimbursable basis.

(b) *Exception.* Upon request, CCC may make advance payments to a Recipient against an approved project budget. Up to 40 percent of the approved project budget may be provided as an advance, either at one time or in incremental payments. Advances should be limited to the minimum amounts needed and requested as close as is administratively feasible to the actual time of disbursement by the Recipient. Reimbursement claims will be used to offset advances. Recipients shall deposit and maintain advances in insured, interest-bearing accounts.

(c) *Refunds due CCC.* A Recipient shall expend all advances within 90 calendar days after the date of disbursement by CCC. A Recipient shall return all interest earned by advances plus any unexpended portion of the advance within 90 calendar days after the date of disbursement by CCC by submitting a check payable to CCC. All checks shall be mailed to the Director, Marketing Operations Staff, FAS, USDA.

Subpart E—Reporting, Evaluation, and Compliance

§ 1486.500 What are the reporting requirements of the program?

(a) *Performance Reports.* (1) Recipients are required to submit regular progress reports in accordance with the project agreement. Quarterly progress reports are required for all projects with a duration of 1 year or longer. Projects of less than 1 year in duration generally require a mid-term report.

(2) Final performance reports must be submitted no later than 90 days after completion of the project, both electronically (preferably in PDF format) and in hard copy.

(3) Reporting requirements and formats for both quarterly progress reports and final performance reports are specified in the project agreement between CCC and the Recipient entity.

(4) All final performance reports will be made available to the public.

(b) *Financial Reports.* Final financial reports must be submitted no later than 90 days after completion of the project. Such reports must provide a final accounting of all project expenditures by cost category, and include the accounting of actual contributions made to the project by the Recipient and all other participating entity or entities.

§ 1486.501 What is the rule on notifying field offices of international travel?

The Recipient must advise the Agricultural Counselor(s) or Attache(s) in the country or countries of any planned visits by the Recipient or its consultants or other participants to such country or countries under terms of its agreement. Failure to notify the Counselor/Attache may result in disallowance of the travel expenditures.

§ 1486.502 How is project effectiveness measured?

Project evaluations may be carried out by FAS at its option with or without Recipients. FAS may also seek outside expertise to conduct or participate in evaluations.

§ 1486.503 How is program compliance monitored?

(a) The CRS, FAS, performs periodic on-site reviews of Recipients to ensure compliance with this part, applicable federal regulations, and the terms of the project agreements. Program funds spent inappropriately or on unapproved activities must be returned to CCC. The CRS will review contributions from Recipients for compliance with project budgets as approved and specified in the agreements.

(b) The Director, CRS, will notify a Recipient through a compliance report when, in the opinion of the Director, CRS, it appears that CCC is entitled to recover funds from that Recipient. The report will state the basis for this action.

§ 1486.504 How does a Recipient respond to a compliance report?

(a) A Recipient shall, within 60 days of the date of the compliance report, submit a written response to the Director, CRS. The Director, CRS, at his or her discretion, may extend the period for response up to an additional 30 days. The response shall include:

(1) Repayment of any funds determined to be due to CCC;

(2) Submission of documentation or evidence of any other required action; or

(3) A request for reconsideration of any finding and the supporting justification.

(b) If after review of the compliance report and response, the Director, CRS determines that the Recipient owes money to CCC, the Director, CRS, will so inform the Recipient and provide a detailed basis for the decision. The Recipient has 30 days from the date of the Director's, CRS, determination to submit any money owed to CCC or to request reconsideration.

(c) If the Recipient does not respond to the compliance report within the required time period, the Director, CRS, may initiate action to collect any amount owed to CCC pursuant to 7 CFR Part 1403, Debt Settlement Policies.

§ 1486.505 Can a Recipient appeal the determinations of the Director, CRS?

(a) A Recipient may appeal the determinations of the Director, CRS, to the Deputy Administrator, CMP. The request must be in writing and be

submitted to the Office of the Deputy Administrator, CMP, within 30 days following the date of the original determination. The Recipient may request a hearing.

(b) If the Recipient submits its appeal and requests a hearing, the Deputy Administrator, or the Deputy Administrator's designee, will set a date and time, generally within 60 days. The hearing will be an informal proceeding. A transcript will not ordinarily be prepared unless the Recipient bears the cost of the transcript; however, the Deputy Administrator or designee may have a transcript prepared at FAS's expense.

(c) The Deputy Administrator or the Deputy Administrator's designee will base the determination on appeal upon information contained in the administrative record and will endeavor to make a determination within 60 days after submission of the appeal, hearing, or receipt of any transcript, whichever is later. The determination of the Deputy Administrator will be the final determination of FAS. The Recipient must exhaust all administrative remedies contained in this section before pursuing judicial review of a determination by the Deputy Administrator.

§ 1486.506 When will a project be reviewed?

Any project or activity funded under the program is subject to review or audit at any time during the course of implementation or after the completion of the project.

§ 1486.507 What is the effect of failing to make required contributions?

A Recipient's contribution requirement is specified in the project agreement. If a Recipient fails to contribute the total specified in the agreement, the difference between the amount contributed and the total must be repaid to the CCC in U.S. dollars. If a Recipient is reimbursed by CCC for less than the amount of funds approved in the agreement, then the final cost share shall equal, on a percentage basis, the original ratio of private contributions to the authorized EMP funding level.

§ 1486.508 How long must Recipients maintain original project records?

Each Recipient shall maintain all original records and documents relating to the project for 3 calendar years following the end of the project's completion. All documents and records related to the project, including records pertaining to contractors, shall be made available upon request.

§ 1486.509 Are Recipients allowed to charge fees for specific activities in approved projects?

Reasonable activity fees or registration fees, if identified as such in a project budget, may be charged for projects approved for program funding. Income or refunds generated from an activity, however, for which the expenditures have been wholly or partially reimbursed, shall be repaid by submitting a check payable to CCC or offsetting the Recipient's reimbursement claim. Any activity fees charged must be used to offset activity expenses. Such fees may not be used as profit or counted as cost-share. The intent to charge a fee must be part of the original proposal, along with an explanation of how such fees are to be used.

§ 1486.510 What is the policy regarding disclosure of program information?

(a) Documents submitted to CCC by Recipients are subject to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, 7 CFR Part 1, Subpart A—Official Records, and specifically 7 CFR 1.11, Handling Information from a Private Business.

(b) Progress reports, final performance reports, and the results of any research or other activity conducted by a Recipient under an agreement, shall be the property of the U.S. Government.

§ 1486.511 What is the general policy regarding ethical conduct?

(a) The Recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent and any member of his or her immediate family, his or her partner, or an entity which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the Recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to sub-agreements. However, Recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the Recipient.

(b) A Recipient shall conduct its business in accordance with the laws and regulations of the country in which an activity is carried out.

§ 1486.512 Has the Office of Management and Budget reviewed the paperwork and record keeping requirements contained in this part?

The paperwork and record keeping requirements imposed by this part have been submitted to the Office of Management and Budget (OMB) for review and under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has assigned control number 0551–0043 for this information collection.

Dated: December 1, 2004.

A. Ellen Terpstra,

Administrator, Foreign Agricultural Service and Vice President, Commodity Credit Corporation.

[FR Doc. 05–39 Filed 1–3–05; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–18515; Directorate Identifier 2004–NE–12–AD; Amendment 39–13921; AD 2004–26–09]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Corporation (formerly Allison Engine Company, Allison Gas Turbine Division, and Detroit Diesel Allison) 250–B and 250–C Series Turboprop and Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for Rolls-Royce Corporation (RRC) 250–B and 250–C series turboprop and turboshaft engines with certain part numbers (P/Ns) of compressor adaptor couplings manufactured by Alcor Engine Company (Alcor), EXTEX Ltd. (EXTEX), RRC, and Superior Air Parts (SAP) installed. This AD requires operators to remove from service affected compressor adaptor couplings. This AD results from nine reports of engine shutdown caused by coupling failure. We are issuing this AD to reduce the risk of failure of the compressor adaptor coupling and subsequent loss of all engine power.

DATES: This AD becomes effective February 8, 2005.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., 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, for questions about Alcor, EXTEX, or SAP compressor adaptor couplings; and John Tallarovic, Aerospace Engineer, Chicago Aircraft Certification Office, FAA, 2300 East Devon Avenue, Des Plaines, IL 60018–4696; telephone (847) 294–8180; fax (847) 294–7834, for questions about RRC compressor adaptor couplings.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR part 39 with a proposed airworthiness directive (AD). The proposed AD applies to RRC 250–B and 250–C series turboprop and turboshaft engines with certain P/Ns of compressor adaptor couplings manufactured by Alcor, EXTEX, RRC, and SAP installed. We published the proposed AD in the **Federal Register** on July 1, 2004 (69 FR 39877). That action proposed to require operators to remove from service affected couplings. That proposal results from nine reports of engine shutdown caused by compressor adaptor coupling failure.

Examining the AD Docket

You may examine the docket that contains the AD, any comments received, and any final disposition in person at the DMS Docket Offices between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone (800) 647–5227) is located on the plaza level of the Department of Transportation Nassif Building at the street address stated in **ADDRESSES.** Comments will be available in the AD docket shortly after the DMS receives them.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments received.

Request To Change the Impeller-to-Coupling Target Fit Tolerance

One commenter, RRC, requests that we change the fit between the compressor impeller and the coupling from 0.0000 to −0.0018 inch, to 0.0000 to −0.0013 inch in the final rule. Based upon rig tests, RRC has changed their recommended fit between the impeller and coupling. We agree. We have changed paragraph (i)(4) and Table 3 of the final rule to reflect these new fit values.

Request To Clarify the Compliance Section

The same commenter, RRC, requests the following wording changes to the AD to clarify the compliance section:

Change Table 3 in the AD by deleting the column titled Impeller ID. There is no need to specify the impeller ID in Table 3. The key dimension is the fit between the impeller and the coupling and the column listing the impeller ID is unnecessary and only adds confusion.

Change paragraph (h) from ''Remove RRC compressor adaptor couplings, P/Ns 23039791–1, –2, and –3 from service at next access but not later than March 1, 2012'' to ''Remove RRC compressor adaptor couplings, P/Ns 23039791–1, –2, and –3 from service next time the compressor rotor is disassembled for any reason but not later than March 1, 2012.'' This change more precisely defines the circumstances when the coupling must be replaced.

Change paragraph (i)(1) from ''Machine the inside diameter (ID) to accept the next larger size outside diameter (OD) compressor adapter coupling'' to ''Select and measure pilot OD of a new larger dash size coupling.''

Change paragraph (i)(4) from ''A fit of 0.0000 to −0.0018 inch must be achieved. No fretting is allowed on the impeller after machining'' to ''Machine inside diameter (ID) of impeller to achieve a fit of 0.000 to −0.0013 inch. No fretting is allowed on the impeller after machining.''

Add a paragraph under (i) that states ''A new coupling must never be installed into a worn impeller.'' These changes to paragraph (i) would clarify what should be done when the impeller and coupling are serviced.

We agree with the intent of these requested changes and have incorporated them in the final rule. We have added paragraph (i)(10) that states the mating surfaces of the impeller and coupling must not have any fretting, and states, do not install a –1 coupling into a used impeller, to address the commenter's concerns to add a paragraph (i).

Request To Correct the Costs of Compliance

One commenter requests that the economic evaluation be revised to better reflect the actual costs of the action. The commenter states that the FAA's economic impact estimate didn't consider engine and compressor removal, and shipping and out-of-service time if compliance doesn't coincide with a scheduled maintenance event.

We do not agree. The costs are for replacing the coupling. We do not include any other costs.

Availability of Improved Couplings

One commenter states that the improved couplings may not be available in sufficient quantities to support the proposed compliance schedule for the parts manufacturer approval (PMA) parts.

We partially agree. The improved couplings may be unavailable in sufficient quantities to support the compliance schedule for the engines with EXTEX, SAP, and ALCOR PMA couplings. However, the compliance schedules are based primarily on our evaluation of field management plans developed by those PMA manufacturers.

Clarification of Field Management Responsibility

EXTEX states that although it has agreed to include SAP couplings in the EXTEX service documents, for clarification, EXTEX requests we note that it is not responsible for the field management of the SAP produced couplings, nor is EXTEX responsible for any costs and liabilities associated with parts produced by SAP.

We agree to note EXTEX's comment.

Request To Return Removed Couplings for Analysis

One commenter requests that all removed, failed, cracked or fretted couplings of any part number should be returned to the manufacturer for analysis and reported to the FAA of any significant findings. This would help to gain more knowledge of the failure mode of couplings.

We do not agree. We have a good understanding of the failure mode of the coupling and the marginal benefit of additional data does not justify the cost burden on the operators to return these couplings.

Request for Explanation of Compliance Time

One commenter requests an explanation of the year 2012 compliance time for the RRC couplings. The commenter states there may be less attention given to this problem if there is a 7.5 year compliance period.

We do not agree. As stated in the proposal, each manufacturer is responsible for their independent component design, design substantiation, component manufacture, and development of a field management plan for its fleet. An important element of the field management plans is the risk

assessment. The varying outcomes of those independent risk assessments lead to differing compliance intervals. The compliance time for Rolls-Royce couplings is not intended to convey the message that there is little risk. Operators are expected to use the compliance time to schedule the maintenance actions required by this AD.

Request To Add a Comment To Explain the Dimension Change for Press Fit and Add Requirement for Surface Finish

One commenter requests we add a comment on how the press fit for the compressor adaptor coupling has changed, and requests we add a requirement for the correct surface finish for the impeller surface. The commenter states that the fit between the compressor adaptor coupling and the impeller is critical.

We partially agree. We specified the change to the press fit for the compressor adaptor coupling in the compliance section of the final rule. Since the surface finish is specified in the Overhaul Manual, we will not include the surface finish of 40 microinches for the machined impeller in the final rule.

Costs of Compliance Could Be Mitigated

One commenter states the costs of compliance could be mitigated by stating the costs occur over 7 years. The commenter gave no specific justification.

We do not agree. The estimated costs of compliance for this AD already takes into account the 6,000 engines affected, without basing estimates over 7 years.

Request for Explanations

One commenter requests that we explain the physical difference between the RRC P/N 23076559–1 and RRC P/N 23039791. The physical difference is that RRC P/N 23076559 has a coating that is more resistant to fretting compared to P/N 23039791.

The commenter also asks why the -1 version of the P/N 23036559 compressor adapter coupling is installed only when a new impeller is installed.

The –1 coupling is the smallest size and will only fit correctly into a new impeller. As stated in the proposal, a used impeller must be machined before a new compressor adaptor coupling can be installed. This action is required to clean all fretting damage from the surface of the impeller that mates with the coupling. Once an impeller has been machined, a larger (–2 or –3) coupling is required.

Also, the commenter requests to allow installation of a ''1 coupling into a used impeller, if the fit is correct.

We do not agree. A –1 coupling cannot be installed in a used impeller even if the fit is correct. The surface of a used impeller that mates to the coupling must be cleaned by machining. After machining, a larger coupling is required.

Conclusion

We have carefully reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

There are about 9,000 RRC 250–B and 250–C series turboprop and turboshaft engines of the affected design in the worldwide fleet. We estimate that 6,000 engines installed on helicopters and airplanes of U.S. registry will be affected by this AD. We also estimate that it would take about 3 work hours per engine to perform the actions when done at time of rotor disassembly, and that the average labor rate is $65 per work hour. Required parts will cost about $1,601 per engine. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $10,776,000.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD 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.

For the reasons discussed above, I certify that this AD:

(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.

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary at the address listed under **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends 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. The FAA amends § 39.13 by adding the following new airworthiness directive:

2004–26–09 Rolls-Royce Corporation (formerly Allison Engine Company, Allison Gas Turbine Division, and Detroit Diesel Allison): Amendment 39–13921. Docket No. FAA–2004–18515; Directorate Identifier 2004–NE–12–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective February 8, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Rolls-Royce Corporation (formerly Allison Engine Company, Allison Gas Turbine Division, and Detroit Diesel Allison) 250–B17, –B17B, –B17C, –B17D, –B17E, 250–C20, –C20B, –C20F, –C20J, –C20S, and –C20W series turboprop and turboshaft engines with the compressor adaptor couplings installed listed in the following Table 1:

TABLE 1.—AFFECTED COMPRESSOR ADAPTOR COUPLINGS

Manufacturer	Affected part numbers
Alcor Engine Company (Alcor)	P/Ns 23039791AL. 23039791AL–1/–2/–3.
EXTEX Ltd. (EXTEX)	A23039791. E23039791. E23039791–1/–2/–3. EH23039791. EH23039791–1/–2/–3.
Rolls-Royce Corporation (RRC)	23039791–1/–2/–3.
Superior Air Parts (SAP)	A23039791.

These engines are installed on, but not limited to, the aircraft in the following Table 2:

TABLE 2.—APPLICABLE AIRCRAFT

Helicopters
Agusta Models.
A109, A109A, A109A II.
Bell Models.
206A, 207B, 206L.
Enstrom Models.
TH–28, 480, 480B.
Eurocopter France Models.
AS355E, AS355F, AS355F1, AS355F2.
Eurocopter Deutschland Models.
BO–105C, BO–105S.
MDHI Models.
369D, 369E, 369H, 369HM, 369HS, 369HE.
Schweizer Model 269D.
Airplanes
B–N Group Ltd. Model.
BN–2T.

Unsafe Condition

(d) This AD results from nine reports of engine shutdown caused by compressor adaptor coupling failure.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified unless the actions have already been done.

Alcor Compressor Adaptor Couplings

(f) Remove Alcor compressor adaptor couplings, P/Ns 23039791AL, 23039791AL–1, –2, and –3 from service as follows:

(1) For couplings with 600 or more operating hours-since-new as of the effective date of this AD, or the operating hours are unknown and cannot be determined, remove couplings from service at next access but not to exceed 50 additional operating hours.

(2) For couplings with fewer than 600 operating hours-since-new on the effective date of this AD, remove couplings from service at next access but not to exceed 649 operating hours-since-new.

EXTEX and SAP Compressor Adaptor Couplings

(g) Remove EXTEX and SAP compressor adaptor couplings, P/Ns A23039791, E23039791, E23039791–1, –2, and –3, EH23039791, and EH23039791–1, –2, and –3, from service as follows:

(1) For couplings with operating hours that are unknown and cannot be determined, remove couplings from service at next access but not to exceed 50 additional operating hours.

(2) For couplings with 600 or more operating hours-since-new as of the effective date of this AD, remove couplings from service at next access but not to exceed 100 additional operating hours.

(3) For couplings with fewer than 600 operating hours-since-new on the effective date of this AD, remove couplings from service at next access but not to exceed 150 additional operating hours.

RRC Compressor Adaptor Couplings

(h) Remove RRC compressor adaptor couplings, P/Ns 23039791–1, –2, and –3 from service next time the compressor rotor is disassembled for any reason, but not later than March 1, 2012.

Installation Requirements for Compressor Adaptor Couplings

(i) Machine the compressor impeller as follows:

(1) Select and measure the pilot outside diameter (OD) of a new larger dash size coupling.

(2) For example, if a –1 coupling was removed, a –2 coupling must be installed.

(3) If a –3 coupling is removed, a new impeller is required.

(4) Machine the inside diameter (ID) of the compressor impeller to achieve a fit of 0.0000 to –0.0013 inch. No fretting is allowed on the impeller after machining.

(5) Due to previous fretting, an impeller with a –1 coupling removed might have to be machined for a –3 coupling. Plating of the impeller ID is not allowed.

(6) Fluorescent penetrant inspect the impeller.

(7) Install a new compressor adaptor coupling, P/N 23076559–2 or –3; or

(8) If a new impeller is installed, then install compressor adaptor coupling, P/N 23076559–1.

(9) Heating of the impeller per the engine overhaul manual is required to install the coupling to achieve the target fit specified in the following Table 3:

TABLE 3.—IMPELLER-TO-COUPLING TARGET FIT

New adaptor	Adaptor OD	Fit (interference)
(i) 23076559–1	0.9000 to 0.9008 inch	0.0000 to –0.0013 inch.
(ii) 23076559–2	0.9020 to 0.9028 inch	0.0000 to –0.0013 inch.
(iii) 23076559–3	0.9040 to 0.9048 inch	0.0000 to –0.0013 inch.

(10) The mating surfaces of the impeller and coupling must not have any fretting. Do not install a –1 coupling into a used impeller.

Definition

(j) For the purposes of this AD, next access is defined as when the compressor module is separated from the engine and disassembled for any reason.

Alternative Methods of Compliance

(k) The Manager, Los Angeles Aircraft Certification Office, has the authority to approve alternative methods of compliance for Alcor, EXTEX, and SAP adaptor couplings addressed in this AD if requested using the procedures found in 14 CFR 39.19. The Manager, Chicago Aircraft Certification Office, has the authority to approve alternative methods of compliance for RRC adaptor couplings addressed in this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(l) Alcor SLB No. 814–3–1, Revision C, dated April 28, 2004, EXTEX Alert Service Bulletin T–081, Revision B, dated May 4, 2004, and RRC CEB-A–1392 and CEB-A–

1334, dated September 9, 2003, pertain to the subject of this AD.

Issued in Burlington, Massachusetts, on December 23, 2004.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 05–14 Filed 1–3–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19050; Directorate Identifier 2004–NM–139–AD; Amendment 39–13900; AD 2004–25–12]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135 and –145 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting a typographical error in an existing airworthiness directive (AD) that was published in the **Federal Register** on December 9, 2004 (69 FR 71339). The docket number of the final rule was incorrectly cited as FAA–2004–19767. This AD applies to all EMBRAER Model EMB–135 and –145 series airplanes. This AD requires a one-time inspection of each passenger service unit (PSU) to determine the serial number of the printed circuit board (PCB) installed in each PSU, replacement of the PCB if necessary, related investigative actions, and other specified actions.

DATES: Effective January 13, 2005.

ADDRESSES: You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA–2004–19050; the directorate identifier for this docket is 2004–NM–139–AD.

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.

Examining the Docket

You can examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: On November 30, 2004, the FAA issued AD 2004–25–12, amendment 39–13900 (69 FR 71339, December 9, 2004), for all EMBRAER Model EMB–135 and –145 series airplanes. The AD requires a one-time inspection of each passenger service unit (PSU) to determine the serial number of the printed circuit board (PCB) installed in each PSU, replacement of the PCB if necessary, related investigative actions, and other specified actions.

As published, the docket number of the final rule is incorrectly cited in the product identification section of the preamble and the regulatory information of the final rule. In the regulatory text, that AD reads ''* * * Docket No. FAA–2004–19767. * * *'' However, that AD should have read ''* * * Docket No. FAA–2004–19050. * * *''

No other part of the regulatory information has been changed; therefore, the final rule is not republished in the **Federal Register**.

The effective date of this AD remains January 13, 2005.

PART 39—AIRWORTHINESS DIRECTIVES

§ 39.13 [Corrected]

On page 71340, in the first column, the product identification line of AD 2004–25–12 is corrected to read as follows:

* * * * *

2004–25–12 Empresa Brasileira de Aeronautica S.A. (EMBRAER): Amendment 39–13900. Docket No. FAA–2004–19050; Directorate Identifier 2004–NM–139–AD.

* * * * *

Issued in Renton, Washington, on December 27, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19 Filed 1–3–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM02–1–005; Order No. 2003–B]

Standardization of Generator Interconnection Agreements and Procedures

December 20, 2004.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on rehearing and directing compliance.

SUMMARY: The Federal Energy Regulatory Commission (Commission) affirms, with certain clarifications, the fundamental determinations in Order No. 2003–A.

EFFECTIVE DATE: January 19, 2005.

FOR FURTHER INFORMATION CONTACT:

Patrick Rooney (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6205;

Roland Wentworth (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8262;

P. Kumar Agarwal (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8923;

Michael G. Henry (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8532.

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Appendix B—Changes to the *Pro Forma* LGIP and LGIA

Before Commissioners: Pat Wood, III, Chairman, Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly.

Order on Rehearing and Directing Compliance

I. Introduction and Summary

1. In this order, we affirm, with certain clarifications, the fundamental determinations made in Order Nos. 2003[1] and 2003–A.[2] Adopting the *pro forma* Large Generator Interconnection Procedures (LGIP) and Large Generator Interconnection Agreement (LGIA) will help prevent undue discrimination, preserve the reliability of the nation's transmission system, and lower prices for customers by increasing the number and variety of generation resources competing in wholesale electricity markets. At its core, the Commission's interconnection policy enunciated in this series of orders ensures that *all* Generating Facilities are offered Interconnection Service on comparable terms.

2. This order reaffirms that an important objective of the Commission's pricing policy is the protection of the Transmission Provider's existing Transmission Customers, including native load, from subsidizing Network Upgrades required to interconnect merchant generators. This order also reaffirms the Order No. 2003–A crediting policy for Network Upgrades. Order No. 2003–A gave the Transmission Provider the option, after five years from the Commercial Operation Date of the Interconnection Customer's Generating Facility, of either fully reimbursing the Interconnection Customer for its upfront payment for Network Upgrades or continuing to make dollar-for-dollar credits against charges for Transmission Service. Order No. 2003–A provided no date certain for full reimbursement of the upfront payment.

3. On rehearing, petitioners[3] argue that a date certain is needed for a variety of reasons. In particular, they state that a date certain is needed to make the crediting policy consistent with the notion that the upfront payment is primarily a mechanism for financing Network Upgrades. This order addresses their concerns by clarifying that if the Transmission Provider chooses not to fully reimburse the Interconnection Customer after five years, it must continue to provide dollar-for-dollar credits to the Interconnection Customer, or develop an alternative schedule that is mutually agreeable and provides for the return of all amounts advanced for Network Upgrades not previously repaid. However, full reimbursement shall not extend beyond twenty (20) years from the Commercial Operation Date.

4. This order takes effect 30 days after issuance by the Commission. As with the Order No. 2003 compliance process, the Commission will deem the open access transmission tariff (OATT) of each non-independent Transmission Provider to be amended to adopt the revisions to the *pro forma* LGIP and LGIA contained herein on the effective date of this order. Unlike the Order No. 2003 compliance process, however, each non-independent Transmission Provider will be required to amend its OATT to include the LGIP and LGIA revisions contained herein within 60 days after issuance of this order by the Commission. Also, within 60 days after issuance of this order, each independent Transmission Provider must submit revised tariff sheets incorporating its revisions to its OATT or an explanation under the independent entity variation standard as to why it is not proposing to adopt each change described in this order.

II. Background

5. Order No. 2003 required all public utilities that own, control, or operate facilities used for transmitting electric energy in interstate commerce to have on file standard procedures and a standard agreement for interconnecting Generating Facilities capable of producing more than 20 megawatts of power (Large Generators) to their Transmission Systems.[4] Order No. 2003 also required that all such public utilities modify their OATTs to include the *pro forma* LGIP and LGIA.

6. Order No. 2003 stated that interconnection plays a crucial role in bringing generation into national energy markets to meet the growing needs of customers and to obtain for customers the benefits of increased competition. It noted that the then-existing interconnection process was fraught with delays and lack of standardization that discouraged merchant generators from entering the energy marketplace, in turn stifling the growth of competitive energy markets. It concluded that the delays and lack of standardization inherent in the then-current system undermined the ability of generators to compete in the market and provided an unfair advantage to utilities that own both transmission and generation facilities. As a result, the Commission concluded that there was a pressing need for a single, uniformly applicable set of procedures and agreements to govern the process of interconnecting a Large Generator to a Transmission Provider's Transmission System.[5]

7. Order No. 2003–A affirmed the legal and policy conclusions on which Order No. 2003 was based. It held that Order No. 2003 did not expand the Commission's jurisdiction beyond that asserted in Order No. 888 and upheld in court.[6] For example, it reaffirmed that

[1] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, Final Rule, 68 FR 49845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003.)

[2] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003–A, Order on Rehearing, 69 FR 15932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004).

[3] Thirteen petitioners filed requests for rehearing of Order No. 2003–A. *See* Appendix A.

[4] Provisions of the LGIP are referred to as ''sections,'' whereas provisions of the LGIA are referred to as ''articles.'' Capitalized terms used in this order have the meanings specified in section 1 of the *pro forma* LGIP and article 1 of the LGIA, as amended herein, or the OATT. Generating Facility means the device for which the Interconnection Customer has requested interconnection. The owner of the Generating Facility is the Interconnection Customer. The entity with which the Generating Facility is interconnecting is the Transmission Provider. A Large Generator is any energy resource having a capacity of more than 20 megawatts, or the owner of such a resource.

[5] In another rulemaking, the Commission proposed a separate set of procedures and an agreement applicable to Small Generators (defined as any energy resource having a capacity of no larger than 20 MW, or the owner of such a resource) that seek to interconnect with facilities of jurisdictional Transmission Providers that are already subject to an OATT. *See* Standardization of Small Generator Interconnection Agreements and Procedures, Notice of Proposed Rulemaking, 60 FR 49974 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 32,572 (2003).

[6] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g,* Order No. 888–A, 62 FR 12274 (Mar. 14, 1997) FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in* relevant part sub nom. Transmission Access Policy

Order No. 2003 applies only to an interconnection with a public utility's Transmission System that, at the time the interconnection is requested, is used either to transmit electric energy in interstate commerce or to deliver electric energy sold at wholesale in interstate commerce under a Commission-filed OATT. It also reaffirmed that dual use facilities (those used both for wholesale and retail transactions) are subject to Order No. 2003 (1) if the facilities are subject to an OATT on file with the Commission when the Interconnection Request is submitted and (2) the interconnection will facilitate a wholesale sale.

8. Order No. 2003–A also generally affirmed the pricing policy adopted in Order No. 2003 for the recovery of the costs of Network Upgrades associated with an interconnection.[7] That is, the Commission's existing pricing policy continues to apply to a non-independent Transmission Provider, but an independent Transmission Provider such as a Regional Transmission Organization (RTO) or an Independent System Operator (ISO) has greater flexibility to propose a customized pricing policy to fit its circumstances. It also reaffirmed that all Distribution Upgrades (upgrades to the Transmission Provider's ''distribution'' or lower voltage facilities that are subject to an OATT) are to be paid for by the Interconnection Customer without reimbursement (direct assignment).

9. In addition, Order No. 2003–A clarified that, consistent with the Commission's transmission ratemaking policy, a non-independent Transmission Provider continues to have the option to charge the Interconnection Customer a transmission rate that is the ''higher of'' an average embedded cost (rolled-in) rate or an incremental cost rate for the Network Upgrades needed for the interconnection. It also explained that incremental pricing is not the same as direct assignment.

10. Order No. 2003–A reiterated that, unless the Transmission Provider and the Interconnection Customer agree otherwise, the Interconnection Customer must initially fund the cost of any Network Upgrades used to interconnect its Generating Facility with a non-independent Transmission Provider's Transmission System. The Transmission Provider must then reimburse the Interconnection Customer on a dollar-for-dollar basis, with interest. This reimbursement is in the form of credits against the rates the Interconnection Customer pays for the delivery component of Transmission Service. In Order No. 2003–A, however, the Commission granted rehearing on two aspects of the mechanics of crediting. First, Order No. 2003–A required the Transmission Provider to provide credits to the Interconnection Customer only against transmission delivery service taken from the interconnecting Generating Facility, as opposed to Transmission Service taken elsewhere on the Transmission System. Second, it eliminated the requirement that transmission credits be refunded at the end of five years from the Commercial Operation Date of the Generating Facility and instead gave the Transmission Provider the option of either (1) reimbursing the Interconnection Customer for the remaining balance of the upfront payment, plus accrued interest, five years from the Commercial Operation Date of the Generating Facility or (2) continuing to provide credits until the upfront payment has been repaid, with accrued interest. Order No. 2003–A also eliminated the requirement that any Affected System Operator refund the Interconnection Customer's upfront payments for Network Upgrades built on the Affected System as a consequence of the interconnection of the Generating Facility, and instead required the Affected System to provide credits toward the Interconnection Customer's upfront payment only when Transmission Service is taken by the Interconnection Customer on the Affected System.

11. Order No. 2003–A also clarified that neither Energy Resource Interconnection Service (ERIS) nor Network Resource Interconnection Service (NRIS) guarantees delivery service. It explained that while both services give the Interconnection Customer the capability to deliver the output of its Generating Facility into the Transmission System at the Point of Interconnection, neither allows the Interconnection Customer the right to withdraw power at any particular Point of Delivery. It also clarified that when an Interconnection Customer wants to deliver the output of its Generating Facility to a particular load (or set of loads), regardless of whether it has chosen ERIS or NRIS, it may simultaneously request Network Interconnection Transmission Service or Point-to-Point Transmission Service under the OATT. Order No. 2003–A also clarified that NRIS is not the same as or a substitute for Network Integration Transmission Service under the OATT.

III. Discussion

A. Jurisdiction

Rehearing Requests

12. SoCal Edison claims that in Order No. 2003–A the Commission rejected its argument that all interconnections of generators intending to sell power to ''wholesale entities,'' except interconnections of Qualifying Facilities that will sell all of their output to host utilities under the Public Utilities Regulatory Policy Act of 1978,[8] should be subject to Commission jurisdiction. In particular, SoCal Edison objects to the Commission's explanation that states have jurisdiction over an interconnection when the facility with which the Generating Facility is being interconnected is not subject to a Commission-approved OATT at the time the Interconnection Request is submitted, even if the Interconnection Customer intends to make a jurisdictional wholesale sale.[9] This conclusion is legally erroneous and a significant departure from established policy and precedent.

13. SoCal Edison further argues that Order No. 888 states that wholesale transmission is within the Commission's exclusive jurisdiction. It cites to *TAPS* v. *FERC*, where the Supreme Court affirmed Order No. 888.[10] Because interconnection is a form of Transmission Service, it should not matter whether an interconnection is with a facility that is subject to an OATT or already in use by a wholesale customer. Furthermore, SoCal Edison claims that it ''can cite to myriad orders involving its distribution system alone where [the Commission] accepted jurisdiction under Section 205 over the interconnection of generation to distribution facilities used at the time by no other wholesale customers but the interconnecting generator.''

Commission Conclusion

14. The passage in Order No. 2003–A that SoCal Edison objects to states as follows: ''States will retain jurisdiction over interconnection to dual use facilities when * * * the facility is not subject to a Commission-approved OATT at the time the Interconnection Request is made, even if the Interconnection Customer intends to make a jurisdictional wholesale sale.''[11]

Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. *New York* v. *FERC,* 535 U.S. 1 (2002) (*TAPS* v. *FERC).*

[7] Network Upgrades reside on the Transmission Provider's side of the Point of Interconnection with the Transmission Provider's Transmission System.

[8] 16 U.S.C. 2601 *et seq.* (2000).

[9] Order No. 2003–A at P 735.

[10] *See also Detroit Edison Co.* v. *FERC,* 334 F. 3d 48, 51 (D.C. Cir. 2003).

[11] Order No. 2003–A at P 735.

This statement was in error. We grant rehearing to clarify that this statement was based on the false premise that a dual use facility may not be subject to an OATT at the time the Interconnection Request is made. In fact, a facility may be considered dual use *only* if it serves both state- and Commission-jurisdictional functions at the time the Interconnection Request is submitted. As a result, a dual use facility must be subject to an OATT. And if an Interconnection Customer seeks to interconnect with a dual use facility to make a wholesale sale, that interconnection will be subject to Order No. 2003. This is consistent with Order No. 2003 and other statements in Order No. 2003–A, where the Commission stated that an interconnection with dual use ''distribution'' facilities [12] that already serve a Commission-jurisdictional transmission function (and are subject to an OATT) for the purpose of facilitating a jurisdictional wholesale sale of electricity is subject to Order No. 2003.[13] In conclusion, Order No. 2003–A incorrectly suggested that a state regulatory agency would have jurisdiction over an interconnection with a dual use facility when the Interconnection Customer intends to make a jurisdictional wholesale sale. Because this is the only statement on which SoCal Edison's request for rehearing is based, there is no need to address its other arguments.

[12] As explained in Order No. 2003 at P 803, the term ''distribution'' is usually used to refer to lower voltage lines that are not networked and that carry power in one direction. The term ''local distribution'' is a legal term, and under Section 201(b)(1) of the FPA, the Commission lacks jurisdiction over ''local distribution'' facilities. The court in *Detroit Edison Co.* v. *FERC,* 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison*), used the terms ''distribution'' and ''local distribution'' interchangeably. The court recognized that certain ''distribution'' and ''local distribution'' interchangeably. The court recognized that certain ''distribution'' facilities serve a dual use function (*i.e.,* they are used for both wholesale and retail sales) and that there could be Commission-jurisdictional uses of ''local distribution'' facilities; in such cse, the court viewed the Commission's jurisdiction as extending only tot he use of the facilities for purposes of the wholesale transaction. *Detroit Edison,* 334 F.3d at 51. Consistent with *Detroit Edison,* the Final Rule applies to a dual use facility only if the facility is already part of a Commission-filed OATT and the interconnection is for the purpose of making a jurisdictional sale of electric energy for resale in interstate commerce.

We note that some facilities labeled by a utility as ''distribution'' may actually carry out a transmission rather than a local distribution function and thus would be subject to Commission jurisdiction for accommodating wholesale as well as unbundled retail transactions. In this circumstance, we do not view the label as controlling.

[13] Order No. 2003 at P 804; Order No. 2003–A at P 730, 736.

B. Pricing and Cost Recovery Provisions

1. Transmission Credits

15. In Order No. 2003–A, the Commission noted that requiring the Transmission Provider to provide the Interconnection Customer with credits against transmission service unrelated to the Generating Facility, and to fully reimburse the Interconnection Customer after only five years, tends to shift risk from the entity in control of the investment (*i.e.*, the Interconnection Customer) to native load and other Transmission Customers. The Commission stated that this shifting of risk may result in inefficient siting decisions, and may require native load or other Transmission Customers to bear the cost of the Network Upgrades when the Interconnection Customer takes little additional transmission service with the new Generating Facility as the source, or where the Interconnection Customer elects to retire the Generating Facility early. Therefore, to place an appropriate level of risk on the Interconnection Customer, the Commission in Order No. 2003–A revised the Final Rule policy (1) to make credits available only for transmission service that has the Generating Facility as the source of the power transmitted, and (2) to eliminate the guarantee of full reimbursement of the upfront payment in five years.

Rehearing Requests

16. Several petitioners object to the revisions made in Order No. 2003–A.[14] Specifically, they argue that the Commission (1) should not have limited the applicability of credits to transmission service that has the Generating Facility as the source, (2) should not have given the Transmission Provider the option to fully reimburse the Interconnection Customer's upfront payment, plus interest, after five years, or to continue to provide credits to the Interconnection Customer until the total of all credits equals the Interconnection Customer's initial payment for the Network Upgrades plus interest, and (3) should not have excused an Affected System from having to provide credits except when transmission service is taken on the Affected System and has the Generating Facility as the source.

17. Calpine states that in Order No. 2003-A, the Commission has destroyed the balance and fairness of the Order No. 2003 policies.[15] It argues that the Commission is now obligating the Interconnection Customer to finance Network Upgrades under terms that virtually guarantee that the Interconnection Customer will not be made whole for its upfront funding.

18. Reliant, PSEG, and Intergen state that, contrary to the Commission's stated rationale, the revised crediting rules will not cause the Interconnection Customer to make more efficient siting decisions, and they are not needed to protect native load or other Transmission Customers from bearing the costs of Network Upgrades if the Generating Facility is retired early. Intergen objects to the new policies for a number of reasons. First, Network Upgrade costs cannot influence siting decisions because the costs are typically unknown when siting decisions are made. Second, the Interconnection Customer must take multiple factors into consideration when making siting decisions. For example, the Interconnection Customer must consider the ability to access particular markets, fuel and water supply access, air quality issues, tax issues, and zoning issues, among other things. Third, because a Generating Facility is a multi-hundred million dollar investment, the Interconnection Customer has tremendous risk exposure, and adding a few million dollars in Network Upgrade costs will not shift the risk of commercial infeasibility or poor siting decisions to others. Fourth, oversight by state regulatory authorities is an important constraint on where the Interconnection Customer chooses to site its facility. Fifth, the amount of Network Upgrades needed is directly tied to the condition in which the Transmission Provider keeps its Transmission System. If the Transmission Provider has been properly upgrading and expanding its facilities, then fewer Network Upgrades are likely to be needed. Also, Reliant claims that continuing to require that the Interconnection Customer fund the Network Upgrade costs upfront mitigates any lack of incentive that the Interconnection Customer may otherwise have to make efficient siting decisions.

19. With regard to the need to protect native load and other transmission customers, Intergen states that an Interconnection Customer has strong incentives to maximize its use of the Transmission System, since it makes money only when it sells the output of its Generating Facility. Even under a worst case scenario, in which all Network Upgrade costs are assigned to existing customers, they would not suffer a significant rate increase. Intergen argues that concerns about

[14] *See, e.g.,* Calpine, EPSA, Integen, PSEG, and Reliant.

[15] Calpine also states that, as a member of EPSA, it endorses and supports EPSA's request for rehearing of Order No. 2003–A.

native load customers being harmed by early retirements are overblown and do not recognize the significant benefits of increased competition in the generation market.

20. PSEG states that, by allowing the full reimbursement of upfront payments to be delayed beyond the five-year period, the Commission is discouraging development of RTOs. What will happen, for example, to an Interconnection Customer's transmission credits when the non-independent Transmission Provider to which it is interconnected joins an RTO? PSEG argues that permitting generators to ''cash out'' their credits on a date certain would alleviate these complexities and engender a smoother transition to an RTO system in which the interconnecting generator receives well-defined property rights rather than credits. Also, Intergen states that allowing the time for repayment to be extended indefinitely is inconsistent with the Commission's underlying ''financing'' policy for Network Upgrades and forces the Interconnection Customer to bear the full costs of a below-market interest rate.

21. Calpine points out that there are also Transmission Systems where the Interconnection Customer does not directly pay for transmission service. As a result, the Interconnection Customer does not receive a bill for transmission services to which credits can be applied. This is the situation, for example, in the California ISO, where load pays for transmission service. However, under Order No. 2003–A, the dollar-for-dollar offset against transmission service payments is the only way explicitly provided to receive transmission credits, and this might allow someone to argue that credits need not be paid in areas such as California. Under the Order No. 2003 language in article 11.4.1 of the *pro forma* LGIA, this argument could not have been made because that provision required that all upfront payments for Network Upgrades had to be refunded within five years, and the Parties had to agree on a mechanism to do so. Because Order No. 2003–A dropped the mandatory five-year repayment provision, there is no explicit provision as to how an Interconnection Customer that does not pay directly for transmission service is to receive its credits. Therefore, Calpine proposes adding the following sentence to article 11.4.1 of the LGIA:

> In the event there is not a direct payment to Transmission Provider or Affected System Operator for transmission service to deliver power from the Large Generating Facility against which a repayment credit may be used, Transmission Provider, Affected System Operator and Interconnection Customer shall agree on a repayment schedule that would be comparable to one where transmission service was directly paid for, or such other mutually agreeable schedule.

22. Reliant and others state that the Commission departed from the balanced approach of Order No. 2003 by deciding that transmission credits must be given by the Transmission Provider only for transmission service that has the Generating Facility as the source of the power transmitted. Reliant argues that certain Generating Facilities, such as peakers, require transmission service on a very limited schedule and, as a result, owners of such facilities may find it difficult to recover the sums advanced to the Transmission Provider under Order No. 2003–A. Reliant claims that the new policy creates a barrier to entry for exactly the type of facility needed during tight supply conditions.

23. Reliant and Intergen argue that the Commission's new policy on credits effectively takes away a fundamental right that Order No. 888 provided to the Transmission Customer. That is, the use of credits for any service taken on a Transmission Provider's system must be equated to the right of a Transmission Customer to change its Point of Receipt or Point of Delivery under Point-to-Point Transmission Service. If the Transmission Provider can provide service from the new points, it grants the service with no additional charge to the Transmission Customer. Petitioners argue that, similarly, the Transmission Customer should be allowed to use its credits at alternate points of receipt or delivery without paying an additional charge to the Transmission Provider.

24. Intergen states that Order No. 2003 mitigated adverse cost impacts by giving the Interconnection Customer flexibility in determining how best to use the credits it received for the costs of Network Upgrades. The ability to transfer credits to other entities for which the Generating Facility is not the source of the power transmitted may be crucial for an Interconnection Customer that must meet its debt obligations, but has limited ability to acquire transmission service or sell its output. Also, because the interest accruing on the credits does not fully compensate the Interconnection Customer for its upfront payment, an Interconnection Customer has a strong incentive to transfer the credits to another entity that can use the credits immediately.

25. TAPS states that a problem would arise if a Transmission Provider were to seek to restrict credits to a Network Customer by basing the credits on the energy output, rather than the capacity, of a Generating Facility used as a Network Resource. TAPS asks the Commission to revise or clarify Order No. 2003–A to provide that a Network Customer that designates an interconnecting Generating Facility as a Network Resource will receive credits based on the full capacity of the Network Resource (or the amount reserved by the Network Customer if it is less), not just the energy delivered from the resource.

26. EPSA states that if the Commission retains the policy of limiting credits to transmission service that has the Generating Facility as the source, there are several issues that must be clarified. First, the Commission should clarify that credits will be applied to the total reservation payment for any service obtained to support the delivery of the generator, whether or not energy is scheduled in any particular hour of the reservation period and whether or not the power customers take advantage of the options to use alternative receipt or delivery points provided under the *pro forma* OATT to all point-to-point customers. Second, the Commission should clarify that credits will be applied to network services whenever a Network Customer designates the Generating Facility as a Network Resource or substitute resource, regardless of whether the Generating Facility produces energy during each hour of the designation. Finally, EPSA asks the Commission to clarify that credits must be provided by the Transmission Provider when it designates the Generating Facility as a Network Resource or substitute resource for meeting its native load requirements, whether or not the Transmission Provider actually enters into a service agreement under the OATT.

27. TAPS states that changes described in P 675 of Order No. 2003-A suggest that only credits equal to the OATT's embedded cost rates must be provided, even if the Transmission Provider charges an incremental transmission rate.[16] The Rule should be revised or clarified to address this discrepancy. A Transmission Provider that seeks transmission charges based on the incremental cost of Network Upgrades should be required to provide the Interconnection Customer that paid for those upgrades upfront with credits

[16] Paragraph 675 stated that credits are to be applied in full to reservation charges set forth in OATT schedule 7—Long-Term Firm and Short-Term Firm Point-to-Point Transmission Service, schedule 8—Non-Firm Point-to-Point Transmission Service, and to the basic transmission charges based on Attachment H-Annual Transmission Revenue Requirement for Network Integration Transmission Service.

applied against the full amount of the incremental transmission charges, until the Interconnection Customer's upfront payment, plus interest, has been completely reimbursed.

28. PSEG states that under Order No. 2003–A, a non-independent Transmission Provider may have an incentive to ''tack on'' unnecessary Network Upgrade requirements (for which ultimate compensation to the generator has now been made considerably less certain) or not to build Network Upgrades that would allow transmission service to be taken from the Generating Facility (for which credits would have to be given). PSEG claims that this will discourage the construction of new generation and create incentives for preferential treatment of affiliated generation.

29. Intergen states that unlike merchant units, the Transmission Provider's generating facilities never had to pay the upfront costs of their Network Upgrades. Thus, Transmission Provider facilities never had to assume any of the risks associated with Network Upgrades that the merchant generators do. To mitigate these competitive disadvantages, Intergen asserts that the Commission should allow the Interconnection Customer to receive credits for service sourcing at points other than the Generating Facility.

30. PSEG argues that Network Upgrades benefit the entire Transmission System, and this common benefit is what distinguishes Network Upgrades from sole use facilities. The Interconnection Customer's financing of investment in the network of a non-independent Affected System benefits all Network Customers and all network transactions. It is unduly discriminatory to limit the Interconnection Customer's recovery of the funds it advances for Network Upgrades on an Affected System simply because the Interconnection Customer is unable to make direct use of them.

31. EPSA urges the Commission to reverse its decision to modify the crediting policy with respect to Network Upgrades funded by an Interconnection Customer on an Affected System. A Generating Facility will be less likely to use transmission service on an Affected System than on the Transmission System to which it is interconnected, and this will unreasonably delay repayment. This is especially true in the West, where network facilities affected by an interconnection are often jointly owned by a number of Transmission Providers. These Transmission Providers are often far removed from the Transmission Provider to which the Generation Facility is interconnected. According to EPSA, an Interconnection Customer is unlikely to take transmission service on the Transmission System of a Transmission Provider that jointly owns these affected facilities. Therefore, the Interconnection Customer will have little ability to use the credits to which it is entitled.

Commission Conclusion

32. In Order No. 2003–A, the Commission revised the rules governing transmission credits to place the Interconnection Customer at greater risk for the cost of Network Upgrades occasioned by the Interconnection Request. The Commission was concerned that to do otherwise would not lead to efficient siting decisions and would not adequately protect native load and other Transmission Customers from having to bear Network Upgrade costs if the Generating Facility were to retire early. In their arguments opposing the modifications, Intergen and others state that the cost of Network Upgrades is typically small compared to the cost of the Generating Facility and that the Interconnection Customer will often embark on a project even though Network Upgrade costs are unknown. This suggests that placing the risk for the cost of Network Upgrades on the Interconnection Customer does not place a significant burden on the Interconnection Customer and thus is completely appropriate. Also, Intergen states that the Interconnection Customer has a strong incentive to maximize its use of the Transmission System because it only makes money if it is selling output from its Generating Facility. The crediting policy, however, reinforces that incentive by linking transmission credits directly to the output of the Generating Facility.

33. We strongly encourage policies that promote efficient investment decisions and protect native load and other Transmission Customers from having to bear the burden of the Interconnection Customer's Network Upgrade costs. Given these concerns, we continue to find that the Order No. 2003–A crediting policy provides a reasonable balance between the objectives of promoting competition and infrastructure development, protecting the interests of Interconnection Customers, and protecting native load and other Transmission Customers.

34. Intergen states that extending the reimbursement timeframe indefinitely is inconsistent with the Commission's determination that the upfront payment is merely a mechanism for financing the cost of the Network Upgrades. In addition, PSEG states that the indefinite timeframe will make the transition to RTO development more complex, and Calpine claims that an uncertain timeframe for reimbursement will create problems in areas such as California where the Interconnection Customer does not receive directly a bill for transmission service to which credits can be applied.

35. These petitioners make valid points. To address the Interconnection Customer's need for a date certain for reimbursement of its upfront payment, we are specifying what the Transmission Provider must do if it elects not to return to the Interconnection Customer any portion of its upfront payment that remains due at the end of five years. Specifically, in order to provide a definite end date for reimbursement that is not to be exceeded, we are revising *pro forma* LGIA article 11.4.1 to state that full reimbursement shall not extend beyond twenty (20) years from the Commercial Operation Date. The portion of this article that describes the Transmission Provider's second repayment option now reads as follows:

> (2) declare in writing that Transmission Provider or Affected System Operator will continue to provide payments to Interconnection Customer on a dollar-for-dollar basis for the non-usage sensitive portion of transmission charges, or develop an alternative schedule that is mutually agreeable and provides for the return of all amounts advanced for Network Upgrades not previously repaid; however, full reimbursement shall not extend beyond twenty (20) years from the Commercial Operation Date.

36. All other crediting rules remain the same. This change addresses Intergen's concern that Order No. 2003–A's removal of a date certain for the repayment of Network Upgrade costs was inconsistent with the notion that the upfront payment is, in essence, a loan to the Transmission Provider designed to facilitate construction of the Network Upgrades. The change also addresses PSEG's concern that the lack of a date certain might create an obstacle to the development of an RTO, which may require the Interconnection Customer's upfront payment to be converted into financial transmission rights. Finally, the change addresses Calpine's concern that, in the absence of a date certain for repayment of Network Upgrade costs, a Transmission Provider could conclude that credits need not be repaid in areas where the Interconnection Customer does not pay directly for transmission service. We further clarify that the Interconnection Customer is entitled to full reimbursement for its upfront payment and the period for reimbursement may

not be longer than the period that would be required if the Interconnection Customer paid for transmission service directly and received credits on a dollar-for-dollar basis, or 20 years, whichever is less. In short, the imposition of a 20-year date certain does not mean that the Commission is switching from reimbursing through credits to reimbursing over 20 years. Rather, if credits have not fully reimbursed the upfront payment within 20 years, there will be a balloon payment at the end of year 20.

37. Reliant argues that the owner of a Generating Facility, such as a peaker, that requires transmission service on a limited schedule may find it difficult or impossible to recover its upfront payment under the Commission's rules as revised by Order No. 2003–A. We disagree. Any Interconnection Customer whose Generating Facility is used as intended, whether or not it is a peaker, normally will be required to take Firm Point-to-Point Transmission Service or Network Integration Transmission Service and therefore will have ample opportunity to use its transmission credits to obtain reimbursement of its upfront payment. Furthermore, reimbursement of any upfront payment must occur no later than 20 years after the Commercial Operation Date.

38. Reliant and Intergen argue that limiting credits to transmission service taken with the Generating Facility as the source takes away the Transmission Customer's fundamental right under Order No. 888 to change its Point of Receipt or Point of Delivery under Point-to-Point Transmission Service without additional charge if the Transmission Provider is able to grant the service at the alternate points. Also, Intergen argues that the ability to transfer credits may be crucial for an Interconnection Customer that must meet debt obligations but is constrained in its ability to acquire transmission service. The new policy does not revoke any rights provided by Order No. 888. If the Interconnection Customer or other Transmission Customer is taking firm Point-to-Point Transmission Service under the OATT with the Generating Facility as the source of the power transmitted, the customer continues to have all of the rights given under the OATT to change temporarily Points of Receipt or Delivery, if capacity is available, and is entitled to continue to receive credits toward the cost of the transmission service while doing so.

39. TAPS and EPSA ask the Commission to revise or clarify Order No. 2003–A to provide that a Network Customer that designates a Generating Facility as a Network Resource will receive credits based on the full capacity of the Network Resource (or the amount reserved by the Network Customer if it is less), not just the energy delivered from the resource. We clarify that when a Generating Facility is designated as a Network Resource or a substitute resource, the Interconnection Customer is entitled to credits for the full amount of the reserved capacity of the Generating Facility regardless of the amount of energy that is scheduled for delivery in any particular hour. Also, TAPS states that changes to the Final Rule described in P 675 of Order No. 2003–A suggest that only credits equal to the Tariff's embedded cost rates would be provided, even if the Transmission Provider chooses to charge an incremental cost rate. We clarify that, if the Transmission Provider chooses to charge an incremental cost rate, the Interconnection Customer is entitled to receive credits, on a dollar-for-dollar basis, at the incremental rate.

40. PSEG states that the new rules may provide a non-independent Transmission Provider with an incentive to ''tack on'' unnecessary Network Upgrades or omit necessary Network Upgrades. Also, Intergen claims that, unlike a merchant developer, the Transmission Provider never had to assume for its Generating Facilities any of the risks associated with Network Upgrades, and this places the merchant developer at a competitive disadvantage. We disagree. The Commission's crediting policy assigns risk and cost responsibility in a reasonable manner and applies to Interconnection Requests by entities affiliated with the Transmission Provider and to Interconnection Requests by unaffiliated merchant generators. We reiterate that the Transmission Provider has an obligation to apply our interconnection policy in a non-discriminatory manner to all new Interconnection Requests, whether the Generating Facility is owned by the Transmission Provider, its Affiliate, or a merchant developer.

41. EPSA and PSEG are concerned that the Interconnection Customer may be unable to recoup upfront payments for Network Upgrades that are constructed on an Affected System. We note that taking transmission service on an Affected System is entirely at the option of the Interconnection Customer. Whether or not the Interconnection Customer exercises its option, the Network Upgrades on the Affected System benefit the Interconnection Customer by making the minimum transmission additions necessary for it to interconnect safely and reliably, as well as by facilitating access to customers and markets that are outside the Transmission Provider's electric system. Furthermore, if the Interconnection Customer were to be reimbursed by the Affected System Operator for the cost of the Network Upgrades without ever taking service on the Affected System, other Transmission Customers on the Affected System would have to bear the cost instead. This would create a disincentive for the Affected System to construct the Network Upgrades necessary for the Interconnection Customer to interconnect, a problem that would be particularly difficult to address if the Affected System were not a public utility.

42. In addition, EPSA states that when an Affected System is jointly owned, an Interconnection Customer is unlikely to take transmission service on the Transmission System of a Transmission Provider that is far removed from the Affected System on which Network Upgrades had to be constructed. We clarify that the Affected System Operator must provide the Interconnection Customer with credits for transmission service taken on the Affected System until the Interconnection Customer's entire upfront payment has been reimbursed. In the case of an Affected System that is jointly owned, it is the responsibility of the Affected System Operator to provide the credits and to seek reimbursement for any amounts that it believes it is owed by the other owners. We note that this problem is not unique to an Affected System. If a Transmission Provider provides transmission service on a Transmission System that is jointly owned, that Transmission Provider must follow a similar procedure.

2. Credits Under Change in Ownership

Rehearing Requests

43. Cinergy requests clarification of LGIA article 11.4.1, which states that if the Generating Facility fails to achieve commercial operation, but it or another Generating Facility is later constructed and uses the Network Upgrades, the Transmission Provider and the Affected System Operator shall at that time reimburse the Interconnection Customer for the amounts advanced for Network Upgrades. Specifically, where a Generating Facility fails to achieve commercial operation, Cinergy argues that it would be difficult for a Transmission Provider to determine who would be entitled to any eventual credit for the costs of Network Upgrades. This is significant because, given the uncertain state of the energy

industry, the original entity constructing the Generating Facility could have been either purchased in whole or in part by another company, bankrupt, or simply no longer be in existence. Cinergy argues that the obligation to keep track of who should receive such reimbursement, if any, should not lie with the Transmission Provider but rather with the Interconnection Customer or its successors.

44. In addition, Cinergy states that article 11.4.1 is not clear as to whether interest accrues on the upfront payment made by an Interconnection Customer whose Generating Facility fails to achieve commercial operation. Cinergy argues that interest should not accrue during what could possibly be an extended period of time where the upgrades remain idle, unused by either another Generating Facility or the Transmission Provider. Cinergy asks the Commission to clarify article 11.4.1 accordingly.

Commission Conclusion

45. We agree with Cinergy that, when a Generating Facility does not achieve commercial operation, the responsibility for keeping track of the entity that is entitled to receive any transmission credits that may be due should lie with the Interconnection Customer, or with any successor entity that may later construct a Generating Facility that makes use of the Network Upgrades. Therefore, we are adding the following sentence to the final paragraph of LGIA article 11.4.1: ''Before any such reimbursement can occur, the Interconnection Customer, or the entity that ultimately constructs the Generating Facility, if different, is responsible for identifying the entity to which reimbursement must be made.''

46. With regard to the accrual of interest on upfront payments in cases where the Generating Facility fails to achieve commercial operation, we clarify that interest continues to accrue provided the interconnection agreement remains in effect. Interest does not accrue after an interconnection agreement has been terminated by either Party or during any period in which no interconnection agreement is in effect.

3. Protecting Native Load and Other Existing Transmission Customers

Rehearing Requests

47. SWTransco and Southern Company argue that the Commission's interconnection pricing policy, in certain circumstances, would not protect native load and other customers from bearing the cost of Network Upgrades required for interconnection.[17] Moreover, these petitioners argue that a policy of allowing the Transmission Provider to charge the higher of an incremental rate or an embedded cost rate does not always protect other customers from subsidizing the Interconnection Customer.

48. SWTransco states that to leave the other Transmission Customers no worse off in certain situations, it is necessary to charge the Interconnection Customer not only the Network Upgrade costs, but also the share of the rolled-in costs attributable to any Generating Facility that is displaced by the new Generating Facility. Also, Southern Company states that charging the Interconnection Customer only an incremental rate would not cover the Generating Facility's use of the rest of the Transmission System.

49. Southern Company states that to truly prevent subsidies, the Commission must either (1) allow the direct assignment of Interconnection Facilities and NRIS facilities (because they do not provide a system benefit) and require the generator (or its customer) to pay the embedded transmission rate for delivery service or (2) allow all Transmission Providers to implement participant funding. Southern Company agrees that any disputes regarding participant funding determinations may need to be resolved by an independent entity, but asserts that, in the absence of an RTO or other independent entity, the Commission is well equipped (and, indeed, charged under sections 205 and 206 of the Federal Power Act) to resolve such disputes.

50. Southern Company states that the subsidization issue is generally not a concern if the Generating Facility is designated a Network Resource of the Transmission Provider, or of its Network Customers, contemporaneously with the execution of its interconnection agreement. Southern Company argues that the subsidization issue arises mainly when a merchant generator has no long-term reservations for transmission delivery service from its plant contemporaneously with the execution of the interconnection agreement, or when the Interconnection Customer and the Transmission Customer are different entities.

51. On a related matter, some petitioners ask for guidance regarding the implementation of incremental pricing in the context of generator interconnections. For example, NRECA seeks answers to the following questions. Over what period of time should the incremental costs be presumed to be amortized? If the Interconnection Customer has only a short-term contract for the output of the Generating Facility, should the costs be amortized over that short period? If the Interconnection Customer has only a short-term contract for the output of the Generating Facility, but the Transmission Customer that requests delivery of the Generating Facility's power is taking service under a long-term transmission contract, should the cost of the Network Upgrades be amortized over the length of the transmission contract? Should the cost of Network Upgrades be amortized over their useful life?

52. SWTransco claims that the interconnection procedures and agreement in Order No. 2003–A do not appear to contain mechanics sufficient to allow the pricing concept to be implemented. Southern Company argues that the Transmission Provider will not be able to calculate an incremental rate with any certainty because it often has no reasonable idea regarding the amount of the delivery service that might ultimately be taken from the facility (or which entities will actually be requesting any such delivery service) or the duration of any such service. This is because, in Southern Company's experience, merchant generators normally do not seek interconnection and transmission delivery services at the same time. At a minimum, the Commission must clarify how the incremental pricing calculation could be performed for a merchant generator that does not make a request for transmission delivery service at the time of the execution of the interconnection agreement or when the Interconnection Customer and the Transmission Customer are separate entities.

53. TAPS states that it is unclear from Order No. 2003–A whether or how the Commission intends that incremental pricing would be applied to network Transmission Customers, given the load ratio share pricing required by the OATT.

[17] Southern Company states that its request for rehearing does not specifically address all of the requirements and issues in Order No. 2003–A that it addressed in its Request for Rehearing filed in response to Order No. 2003. Therefore, instead of restating all of the arguments made in the request for rehearing, Southern Company incorporates them by reference. Because the FPA requires that applications for rehearing ''set forth specifically the ground or grounds upon which such application is based, ''set forth specifically the ground or grounds upon which such application is based, ''16 U.S.C. § 8251 (2000), Southern Company's arguments from its request for rehearing of Order No. 2003 have been considered in this order only to the extent the arguments were specifically presented in its request for rehearing of Order No. 2003–A.

Commission Conclusion

54. Order No. 2003–A clarified that the Commission was not abandoning any of the fundamental principles that have long guided its transmission pricing policy. The Commission's interconnection pricing policy continues to allow the Transmission Provider to charge the Interconnection Customer a transmission rate that is the higher of the incremental cost rate for Network Upgrades required to interconnect the Generating Facility or an embedded cost rate for the entire Transmission System (including the cost of the Network Upgrades). Order No. 2003–A emphasized that this ''higher of'' policy ensures that other Transmission Customers, including the Transmission Provider's native load, will not subsidize Network Upgrades required to interconnect merchant generation.

55. On rehearing, petitioners raise concerns regarding the implementation of this policy and whether other customers are protected from having to bear the costs of Network Upgrades under all circumstances. Petitioners argue that they can devise certain hypothetical cases in which the Transmission Provider must either impose some new transmission costs on existing customers or violate the Commission's prohibition against ''and'' pricing.

56. In response to these petitioners, we first reaffirm that an important objective of our interconnection pricing policy continues to be the protection of existing Transmission Customers, including the Transmission Provider's native load, from adverse rate implications associated with Interconnection Facilities and Network Upgrades required to interconnect a new Generating Facility. Despite the unsupported hypothetical generalizations of some petitioners, we have not been presented with any evidence that native load and other Transmission Customers cannot be held harmless under our existing pricing policy. If a Transmission Provider (or an existing Transmission Customer) believes that, for an actual interconnection, it faces circumstances where native load and other customers are not held harmless, it should make that demonstration in an actual transmission rate filing. The Transmission Provider must explain the facts of the case and the assumptions on which its calculation is based and provide evidentiary support. While we cannot envision any circumstances where our existing pricing policy will not fully protect native load and other Transmission Customers, we are willing to consider alternative pricing proposals under the facts of a specific case. We emphasize that the Transmission Provider bears the full burden of showing that any such proposal is just and reasonable and not unduly discriminatory or preferential, and is appropriate under the circumstances.

57. Similarly, with regard to the calculation of incremental rates, we are not prescribing generic rules at this time. Rather, we invite the Transmission Provider, in the context of an actual interconnection agreement or transmission rate filing, to propose a calculation method that assigns appropriate cost responsibility to the Interconnection Customer and is consistent with applicable Commission policy and precedent.

4. Interconnection Products and Services

Rehearing Requests

58. Some petitioners seek clarification of the provisions of Order No. 2003–A governing NRIS and ERIS.

59. NRECA requests that the Commission clarify that, consistent with the OATT (1) only Interconnection Customers that are load serving entities may request Network Integration Transmission Service under a Transmission Provider's OATT, and (2) only Network Customers can designate Network Resources.

60. TAPS asserts that, as clarified in Order No. 2003–A, the unique feature of NRIS has nothing to do with being a ''Network Resource,'' which is defined by the OATT as a resource designated by a Network Customer under Network Integration Transmission Service. Rather, NRIS provides assurance that even absent any transmission service, ''the Generating Facility, as well as other generating facilities in the same electrical area, can be operated at peak load,'' and that the output of the Generating Facility will not be ''bottled up'' under such conditions. The name ''Network Resource Interconnection Service,'' therefore, is misleading. TAPS recommends an alternative name, such as ''Enhanced Interconnection Service,'' that more accurately describes this Interconnection Service.

61. Also, TAPS states that the references to ''other Network Resources'' in LGIA articles 4.1.2.1 and 4.1.2.2 and LGIP section 3 are particularly confusing, because as noted above, ''Network Resource'' is defined as a resource designated under Network Integration Transmission Service. In other words, the references to ''other'' Network Resources assume something that has not necessarily happened in the case of resources taking NRIS.

62. TAPS states that article 4.1.2.2 suggests that generators taking NRIS are different from generators taking ERIS with respect to their ability to be designated as Network Resources. Specifically, the introductory sentences of article 4.1.1.2, especially if read in conjunction with LGIA article 4.1.2.2, suggest that NRIS is the preferred route to obtaining a Network Resource designation under the OATT. Although the preamble of Order No. 2003–A otherwise makes clear that a resource with ERIS may be designated as a Network Resource, it confusingly states elsewhere that ''Network Resource Interconnection Service makes it possible for the Generating Facility to be designated as a Network Resource.''

63. Similarly, TAPS states that LGIA article 4.1.1.1 and LGIP section 3.2.2.1 continue to describe ERIS as providing ''as available'' access, without restricting application of that limit, *i.e.,* without adding language such as ''unless combined with Network Integration Transmission Service or Firm Point-to-Point Transmission Service,'' which would be consistent with the preamble of Order No. 2003–A. TAPS is concerned that LGIP section 3 lacks any reference to the ability of an ERIS customer to obtain anything other than ''as available'' transmission service. The Commission should modify LGIP section 3 and LGIA articles 4.1.1.1, 4.1.1.2, and 4.1.2.2 to eliminate any confusion.

64. EPSA states that the Commission has introduced some uncertainty as to the additional studies or additional upgrades that might be associated with NRIS. It asks the Commission to clarify that any references to such studies or upgrades apply only to optional upgrades to reduce congestion or to customer-specific delivery issues, not to upgrades related to the designation of a NRIS generator as a Network Resource. If the Commission does not clarify that the Interconnection Customer's responsibility to pay for additional studies and upgrades is to be limited to the circumstances described above, EPSA requests rehearing on this issue. EPSA also urges the Commission to require Transmission Providers to include in their compliance filings the protocols and procedures they will use to determine when additional studies or upgrades are needed.

65. Intergen asserts that the studies associated with NRIS and with Network Integration Transmission Service are essentially identical. Thus, a NRIS customer and a Network Integration Transmission Service customer should

build the same Network Upgrades. However, Intergen interprets the clarification in Order No. 2003–A to mean that the NRIS customer will not receive any delivery assurances despite the fact that it is fronting the costs of the Network Upgrades needed to permit Network Integration Transmission Service. The Commission's statement that the Interconnection Customer's Generating Facility may have to be restudied and pay for additional upgrades once it is designated as a Network Resource, according to Intergen, eviscerates the value of NRIS.

66. In addition, Intergen states that, if the Network Integration Transmission Service studies reveal that the Interconnection Customer cannot acquire Network Integration Transmission Service without significant upgrades, and the Interconnection Customer cannot use its credits for service sourcing elsewhere on the Transmission Provider's Transmission System, the credits could be ''locked'' into a facility that cannot move its power. Intergen asks for further clarification or rehearing of this aspect of Order No. 2003–A. Intergen also asks the Commission to clarify that, because NRIS uses studies similar to those used to determine whether Network Integration Transmission Service is available, and because the Interconnection Customer is paying for the upgrades associated with those studies, an NRIS generator does not need to be restudied and does not need to construct additional Network Upgrades when designated as a Network Resource.

67. NRECA states that NERC and others had stressed in earlier comments to the Commission that the requirement in LGIP section 3.2.2.2 that the Transmission Provider study the Transmission System ''at peak load, under a variety of severely stressed conditions * * *.'' was insufficient to ensure the reliability of the Transmission System. Order No. 2003–A failed to address NERC's concern over the wording of section 3.2.2.2 of the LGIP. NRECA argues that, although the Commission indicates that it will allow a Transmission Provider to petition for changes to the study criteria subject to the ''consistent with or superior to'' standard, such an ad hoc approach to this important reliability issue is insufficient. It notes that Order No. 2003–A indicated that a threshold requirement for obtaining the Commission's permission to deviate from the *pro forma* LGIP will be whether there is an accepted regional practice addressing this issue. However, NRECA claims that in many regions there is no such established practice. Consequently, a Transmission Provider in such regions would be barred from making the necessary changes to the NRIS study criteria.

Commission Conclusion

68. Most of the questions and concerns raised by petitioners concerning interconnection products and services were fully addressed in Order No. 2003–A, and we will not repeat those conclusions here. We remind petitioners that, to gain a full understanding of Order No. 2003–A's treatment of NRIS and ERIS, the preamble, LGIP and LGIA must be read together. To include all of the relevant preamble discussion in the LGIP and LGIA would make those documents unwieldy.

69. In response to TAPS's concerns about the descriptions of NRIS and ERIS and the relationship between NRIS, ERIS and Network Integration Transmission Service, we note that the Commission addressed these matters in detail at P 530–537 of Order No. 2003–A. Also, we disagree with TAPS's assertion that the name ''Network Resource Interconnection Service'' is misleading. The name is suitable given that the principal purpose of the service is to allow the Generating Facility to qualify for designation as a Network Resource by a Network Customer. However, we agree that the use of the word ''other'' as a modifier of ''Network Resources'' in LGIP sections 1 and 3.2.2.1 and LGIA articles 1 and 4.1.2.2 is confusing. Therefore, we are eliminating it from those sections and articles. In response to NRECA, we clarify that we are not changing the requirement of Order No. 888 that only a load serving entity can become a Network Customer and only a Network Customer can designate a Generating Facility as a Network Resource.

70. In response to EPSA's and Intergen's concerns that an Interconnection Customer taking NRIS may be required to pay for additional studies and additional upgrades to have the Generating Facility designated as a Network Resource, we note that the Commission addressed this matter at P 544–545 of Order No. 2003–A; no further response is needed.

71. NRECA argues that the study criteria for NRIS are insufficient, and is concerned that the Commission will not allow a Transmission Provider to adopt different criteria if there is no established practice addressing this issue in the Transmission Provider's region. Our experience with the Order No. 2003 and Order No. 2003–A compliance filings leads us to agree with NRECA that the orders' requirements regarding the Transmission Provider's use of alternative NRIS study criteria are unnecessarily burdensome. In their compliance filings, a number of Transmission Providers proposed to modify the NRIS study criteria to allow them to study the Transmission System under non-peak load conditions. Some of these Transmission Providers supported their requests with references to criteria documented in their reliability region's planning standards, while others explained that the use of their proposed criteria is a generally accepted regional practice. The Commission generally accepted these proposals subject to certain conditions.[18] Based on our experience with these compliance filings, we now conclude that it is no longer necessary to require the Transmission Provider that wishes to include non-peak load criteria in its NRIS study process to demonstrate that the use of such study criteria is consistent with or superior to the requirements of *pro forma* LGIP section 3.2.2.2. Rather, we will allow the non-independent Transmission Provider to adopt study criteria that consider non-peak load conditions if the Transmission Provider, upon request by the Interconnection Customer, agrees to provide the Interconnection Customer with a written justification for doing so. We emphasize, however, that the Transmission Provider must provide comparable service; that is, it must study non-peak conditions for the interconnection of its own and its affiliates' Generating Facilities on the same basis that it studies non-peak conditions for the non-affiliated Interconnection Customer. To implement this change, we are inserting the following sentences after the first sentence of LGIP section 3.2.2.2:

> The Transmission Provider may also study the Transmission System under non-peak load conditions. However, upon request by the Interconnection Customer, the Transmission Provider must explain in writing to the Interconnection Customer why the study of non-peak load conditions is required for reliability purposes.

This should simplify the compliance process and satisfy NRECA's concerns.[19]

[18] *See, e.g.,* Southern Company Services, Inc., 107 FERC ¶ 61,317, order on reh'g and compliance, 109 FERC ¶ 61,014 (2004); South Carolina Electric & Gas Co., 108 FERC ¶ 61,018 (2004); Florida Power & Light Co., 108 FERC ¶ 61,239 (2004).

[19] *See also infra* Part III.D.4 (explaining that a non-independent Transmission Provider on compliance may propose additional operating requirements that are not codified or referencedinit Applicable Reliability council's standards.)

5. Generator Balancing Service Arrangements

72. In Order No. 2003–A, the Commission deleted article 4.3 from the *pro forma* LGIA, thereby eliminating any reference in the LGIA to the Interconnection Customer's obligation to make generator balancing service arrangements before submitting a schedule for delivery service that identifies the Interconnection Customer's Generating Facility as the Point of Receipt for the scheduled delivery.[20]

Rehearing Requests

73. NRECA and Southern Company argue that Order No. 2003–A is at odds with Order No. 888-A, which anticipated that generator balancing service arrangements would be included in the interconnection agreement.

Commission Conclusion

74. We disagree with NRECA and Southern Company. While it is true that Order No. 888-A indicated that the Commission expected the interconnection agreement to include a provision for generator balancing service arrangements, it also included the following:

> This agreement will be tailored to the parties' specific standards and circumstances, and, although such arrangements must not be unduly preferential or discriminatory (*e.g.,* must be comparable for all wholesale sellers, including the transmission provider's own wholesale sales), we prefer not to set these standards generically.[21]

75. The policies as set forth in Order No. 888–A remain unchanged. Thus, we are not including a provision for generator balancing service arrangements in the *pro forma* LGIA. However, we recognize that some Transmission Providers may prefer to include such a provision in the interconnection agreement that it enters into with the Interconnection Customer, rather than in a separate agreement. Therefore, we are permitting the Transmission Provider to include a provision for generator balancing service arrangements in individual interconnection agreements. Such provisions should be tailored to the Parties' specific standards and circumstances, and are subject to Commission approval.

C. Independent Transmission Provider Obligations

76. Order No. 2003–A provided that if a non-independent Transmission Owner's transmission facilities are under the operational control of an RTO or ISO, the RTO's or ISO's Commission-approved standards and procedures govern all interconnections with those facilities. It also provided that a non-independent Transmission Owner that belongs to an RTO or ISO but has operational control over some of its Transmission System must have its own set of interconnection agreements and procedures separate from the RTO's or ISO's that govern interconnections with the portions of its Transmission System over which it retains operational control.

Rehearing Requests

77. NYISO asks the Commission to not apply the *pro forma* LGIP and LGIA to certain facilities under New York Transmission Owners' (NYTO) control for the period between January 20, 2004, which was the date that non-independent Transmission Providers were required to adopt the *pro forma* LGIP and LGIA, and Commission action on NYISO's compliance filing, which occurred August 6, 2004.

78. TAPS states that Order No. 2003–A suggested that a non-independent Transmission Owner that is a member of an RTO or ISO could have its own tariff for interconnections with transmission facilities over which it retains operational control.[22] According to TAPS, the Commission should make clear that where the Interconnection Service is necessary to effectuate service under the OATT of an RTO that has operational control of transmission facilities owned by a non-independent Transmission Owner, that Transmission Owner may not layer on a separate set of interconnection procedures and agreements for facilities over which it maintains operational control. TAPS contends that such layering is inconsistent with Order No. 2003–A and Commission precedent, which provide that the RTO or ISO must offer ''one-stop shopping'' for interconnection.[23] At a minimum, TAPS continues, the Commission should subject any non-independent Transmission Owner within an RTO to a heavy burden to demonstrate why an Interconnection Customer should be unable to obtain through the RTO or ISO the necessary interconnection with the Transmission Owner's facilities that are not subject to the RTO's operational control.

Commission Conclusion

79. NYISO's concerns have been mooted by the Commission's orders in response to compliance filings submitted by the New York utilities.[24] Accordingly, there is no need to address them here.

80. In response to TAPS, we clarify that a Transmission Owner that belongs to an RTO or ISO cannot require a separate set of interconnection procedures or agreement for interconnection with facilities within the RTO's or ISO's operational control; *i.e.*, a transmission facility cannot be governed by two separate sets of interconnection procedures and agreements . If the Transmission Owner retains operational control of some jurisdictional facilities, and those facilities are not subject to the interconnection procedures under the OATT of the RTO or ISO,[25] then the Transmission Owner must have a separate set of interconnection procedures and agreement applicable to these facilities. An Interconnection Customer seeking to interconnect with the facilities within the Transmission Owner's operational control will be subject only to the Transmission Owner's interconnection agreement and procedures. We acknowledge that this may create inconsistent interconnection procedures and agreements within a region controlled by an RTO or ISO, or result in confusion as to which interconnections procedures and agreement applies to the facilities to which the Interconnection Customer wishes to interconnect. To address this issue, we are allowing a Transmission Owner that retains control over some jurisdictional facilities to subject these facilities to an RTO- or ISO-controlled interconnection process. In such instance, the Transmission Owner must agree to transfer to the RTO or ISO control over the significant aspects of the interconnection process under the Transmission Owner's OATT interconnection process, including the performance of all Interconnection Studies and cost determinations applicable to Network Upgrades.[26] Even

[20] Order No. 2003–A at P 663–667.

[21] Order No. 888–A at 30,230.

[22] Order No. 2003–A at P 53.

[23] *Id.* at P 785; *see also Delmarva Power & Light Company,* 106 FERC ¶ 61,290 (2004) (addressing load-side interconnections).

[24] New York Independent System Operator, Inc., 108 FERC ¶ 61,159 (2004), reh'g_pending (NYISO); ISO New England, 109 FERC ¶ 61,147 (2004).

[25] For example, the RTO or ISO conducts all studies, determines costs, identifies necessary Network Upgrades, and controls all aspects of the interconnection process.

[26] *See New England Power Pool,* 109 FERC ¶ 61,155 at P 27, 74 (2004); *see also NYISO* at P 123–124. In *NYISO,* the Commission conditionally waived the requirement that the Transmission Owners adopt the *pro forma* LGIP and LGIA for transmission facilities over which Transmission Owners retained operational control. Waiver was

Continued

under this modified approach, there should be only one applicable interconnection agreement and one set of procedures for each Interconnection Request for a Commission-jurisdictional interconnection.

D. Issues Related to the Large Generator Interconnection Agreement

1. Stand Alone Network Upgrades

81. LGIA article 5.2 in Order No. 2003 provided, among other things, that the Interconnection Customer assumes responsibility for the design, procurement, and construction of Stand Alone Network Upgrades, the Interconnection Customer shall transfer control of such upgrades to the Transmission Provider. Order No. 2003–A revised LGIA article 5.2 to provide that ''[u]nless Parties otherwise agree, Interconnection Customer shall transfer ownership of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades to Transmission Provider.'' [27]

Rehearing Request

82. NRECA seeks clarification that if a transmission-owning Interconnection Customer is a load serving entity that has the right to own or operate the Transmission Provider's Interconnection Facilities or Stand Alone Network Upgrades under existing state or other law or under pre-existing contracts, Order No. 2003–A does not supersede such pre-existing contractual or legal/regulatory rights in a way that would bar such a load serving entity from retaining ownership.

83. TAPS makes similar arguments. It argues that while it may be reasonable for the Transmission Provider to operate and control the Interconnection Facilities and Stand Alone Network Upgrades constructed by the Interconnection Customer, compelling the Interconnection Customer to give up ownership contributes to monopolization of transmission ownership. Allowing Interconnection Customers that are load serving entities to retain ownership does not mean that operation and control of the Transmission System will be fragmented or that reliability will be compromised; indeed, some TAPS members already own transmission facilities. TAPS further notes that while Order No. 2003–A states that allowing the Interconnection Customer to retain ownership is ''inconsistent with existing Commission precedent,'' [28] it does not cite to the precedent.

84. TAPS further argues that where an Interconnection Customer has constructed Interconnection Facilities and Stand Alone Network Upgrades, the customer should have the option of owning the facilities and receiving a lease payment or other credit recognizing the contribution that the facilities make to the Transmission System (*e.g.*, as a credit for customer-owned facilities consistent with section 30.9 of the *pro forma* OATT). Allowing transmission dependent utilities to retain ownership takes advantage of these utilities' solid credit, reduces regulatory conflicts, and facilitates siting through joint planning and ownership of the Transmission System.

Commission Conclusion

85. Under ordinary circumstances, the Transmission Provider assumes the risk and responsibility for reliably operating its Transmission System. Giving the Interconnection Customer the option of owning Transmission Provider's Interconnection Facilities or Stand Alone Network Upgrades without the Transmission Provider's consent raises reliability and liability issues arising from the operation of these types of facilities by an entity not responsible for the rest of the Transmission System.[29] While TAPS highlights some of the benefits that might result from giving the Interconnection Customer the unilateral option of owning the Transmission Provider's Interconnection Facilities or Stand Alone Network Upgrades, on balance, the risks outweigh the benefits.

86. In response to NRECA, Order No. 2003–A did not supersede pre-existing contractual or legal rights that would bar a load serving entity from retaining ownership of any Transmission Provider's Interconnection Facilities or Stand Alone Network Upgrades it constructs. Such pre-existing agreements are grandfathered and are not subject to Order No. 2003.

2. Permits and Licensing Requirements

87. Order No. 2003 required the Transmission Provider to provide the Interconnection Customer with permitting assistance for the Generating Facility.[30] Order No. 2003–A did not change this provision.

Rehearing Request

88. Cinergy notes that Order No. 2003–A rejected its request for rehearing which argued that the Commission should restrict this requirement to the permitting of the Transmission Provider or Transmission Owner's Interconnection Facilities or Network Upgrades.[31] Cinergy requests clarification that, consistent with LGIA article 5.13, which addresses efforts by the Transmission Provider on behalf of the Interconnection Customer regarding lands of other property owners, the costs for any permitting assistance provided per the provisions of LGIA article 5.14 shall be the responsibility of the Interconnection Customer.

Commission Conclusion

89. Although Cinergy's argument is untimely and should have been presented in response to Order No. 2003, we will address the argument to provide clarification. Cinergy points to article 5.13, where the Commission requires the Interconnection Customer to pay for the Transmission Provider's efforts to obtain access to the lands of other property owners; however, the assistance provided under article 5.14 is different. This is because article 5.13 requires the Transmission Provider to participate, on the Interconnection Customer's behalf, in a process that may include lengthy and contentious proceedings and eminent domain proceedings.[32] Article 5.14, on the other hand, requires that the Parties merely assist and cooperate in good faith in their efforts to secure the necessary permits. Such assistance is reciprocal and imposes costs to be borne by each Party. The Commission considers these costs a cost of doing business and is not requiring compensation.

90. Article 5.14 contains language suggesting that the Parties should amend their interconnection agreement to ''specify the allocation of the responsibilities'' to obtain permits, licenses, and authorizations. Because article 14.1 already contains language addressing the Parties' rights and responsibilities, we are amending article 5.14 to eliminate the suggestion that Parties should amend their interconnection agreement to allocate these responsibilities.

granted due in part to the commitment by the Transmission Owners to relinquish operational control over the relevant facilities to the RTO or ISO upon Commission issuance of the *NYISO* order.

[27] Order No. 2003–A, LGIA article 5.2(9).

[28] Order No. 2003 at P 230.

[29] *See, e.g., Virginia Electric & Power Co.*, 94 FERC ¶ 61,164 at 61,589 (2001) (explaining that it is appropriate for the Transmission Provider to construct and own Transmission System facilities, but stopping short of requiring ownership by the Transmission Provider), *order on remand on other grounds sub nom.* American Electric Power Service Corp., 99 FERC ¶ 61,177 (2002), *order on clarification,* 100 FERC ¶ 61,150 (2002); *Cambridge Electric Light Co.,* 96 FERC ¶ 61,205 at 61,874 (2001) (refusing to require generator ownership of certain Interconnection Facilities because of questions of reliability and liability).

[30] LGIA article 5.14.

[31] Order No. 2003–A at P 303.

[32] Order No. 2003 at P 251; Order No. 2003–A at P 300.

3. Tax Issues

a. Security Requirements

91. Order No. 2003 allowed the Transmission Provider to require the Interconnection Customer to provide security, but not after the former receives a private letter ruling from the Internal Revenue Service (IRS) determining that the payments from the Interconnection Customer to the Transmission Provider are not taxable as income to the Transmission Provider. Order No. 2003–A revised the policy and allowed the Transmission Provider to require security even if it secures such a ruling.[33]

Rehearing Requests

92. Southern Company argues that the security requirement, which should reflect the cost consequences of any current tax liability as of January 1 of each year, is impractical and may leave the Transmission Provider with inadequate security. The IRS determines income based on the fair market value, which will be based on all facts at the time the ''subsequent taxable event'' takes place.[34] Southern Company argues that it will be impractical to quantify a security amount that will approximate the fluctuating current tax liabilities as of January 1 of each year because the amount of recognizable income cannot be estimated when the interconnection agreement is signed. The new policy could leave the Transmission Provider at risk if the ''cost consequences'' are underestimated. Therefore, the Commission should restore the original Order No. 2003 language that allowed the Transmission Provider to require security based on estimated, maximum tax liability. Alternatively, additional clarification is needed on the correct methodology for calculating the security that the Transmission Provider may demand from the Interconnection Customer to determine the ''current income tax liability as of January 1 of each year.''

93. Southern Company also argues that the *pro forma* OATT and its own OATT require that appropriate security be provided and maintained.[35] It argues that the phrase ''and maintain'' should be added to LGIA article 5.17.3 to clarify that security not only must be provided, but also maintained.

94. EPSA argues that the Commission should not extend the Transmission Provider's right to require security beyond the point in time when a favorable private letter ruling from the IRS is obtained. Receipt of such a letter ruling significantly reduces the already small risk of tax liability, and thus, the need for security. As an example of the costs associated with the policy, EPSA explains that requiring the Interconnection Customer to post a $3 million credit (assuming a 30 percent tax gross-up[36] rate on a $10 million interconnection) would have an ongoing cost of $20,000 to $60,000 per year to secure the risk. The Commission should restore the Order No. 2003 policy. This would be consistent with the rulings in Order No. 2003–A that the security should track the cost consequences of current tax liability over time and that the security should be eliminated if the Transmission Provider collects an indemnification payment from the Interconnection Customer to cover the taxes payable.

Commission Conclusion

95. Order No. 2003–A concluded that it was unreasonable to allow the Transmission Provider to require security for the maximum amount of potential tax liability.[37] Providing some security helps to address the risk that the Interconnection Customer will not be able to fulfill its full indemnification obligations should the interconnection credits be deemed taxable at some future time. Because the potential tax liability will change over time, it is reasonable that the required level of security also change over time. As Southern notes, there may be a situation where the amount of the payment for Interconnection Facilities deemed taxable can be based on the fair value of the property transferred under IRS policy or procedure. If so, the Interconnection Customer can be asked to pay the Transmission Provider only the present value of the cost consequences of the current tax liability based on that fair value, which also can change over time. The possibility that the potential tax payment may be based on the fair value of the property instead of some other measure does not justify allowing a security requirement to be imposed in excess of the cost consequences of the potential current tax liability determined as of January 1 of each year. Southern's request for rehearing on this point is denied. We, therefore, reiterate that it is excessive to require that an Interconnection Customer maintain security equal to the maximum theoretical tax liability calculated at the outset of the agreement.

96. Although Southern Company's argument is untimely and should have been presented in response to Order No. 2003, we will address the argument to provide clarification. Article 5.17.3 allows the Transmission Provider to require the Interconnection Customer to provide security for Interconnection Facilities ''in an amount equal to the cost consequences of any current tax liability under'' article 5.17. We believe it is unnecessary to specify that such security be ''maintained'' because this requirement is implicit in the provision's reference to ''current tax liability.''

97. Order No. 2003–A explained that the security for tax liability in LGIA article 5.17.3 protects the Transmission Provider against the possibility that the IRS will change its policy or that there will be a subsequent taxable event.[38] A private letter ruling from the IRS does not address these risks. While the ruling may show that the IRS does not currently consider these payments taxable, the risk remains that the IRS may change its policy or there will be a subsequent taxable event. Thus, we reject EPSA's request for rehearing.

b. Elimination of the Interconnection Customer's Right To Contest or Appeal Taxes

98. Order No. 2003 gave the Interconnection Customer the right to appeal, protest, seek abatement of, or otherwise protest a Government Authority's determination that payments made to the Transmission Provider are income subject to taxation. Order No. 2003–A gave to the Transmission Provider in LGIA articles 5.17.7 and 5.17.9 the sole discretion to protest such a determination.

Rehearing Requests

99. EPSA argues that the Commission should not have eliminated the Interconnection Customer's right to contest or appeal taxes for which the Interconnection Customer is ultimately liable. A Transmission Provider with multiple controversial tax matters might be able to trade off a concession on one matter for relief on another. In such a case, the Transmission Provider would have a fiduciary responsibility to its shareholders to concede to the IRS a tax issue for which it is fully indemnified.

[33] Order No. 2003–A at P 343–344.

[34] A ''subsequent taxable event'' is an occurrence that makes taxable payments a Transmission Provider had concluded were not taxable; it creates a current tax liability for the Transmission Provider.

[35] Citing *pro forma* OATT section 11, Southern Company OATT section 11(b).

[36] A tax gross-up for income taxes is a dollar amount calculated to determine the Interconnection Customer's payment needed to indemnify the Transmission Provider for any current tax liability associated with payments the Interconnection Customer makes for the Transmission Provider's Interconnection Facilities and Network Upgrades.

[37] Order No. 2003–A at P 343.

[38] *Id.* at P 344.

Also, the Interconnection Customer's obligation to pay for any tax controversies pursued on its behalf should ensure that it will not force the Transmission Provider to undertake frivolous contests and appeals.

100. Southern Company notes that although the Commission agreed that the Interconnection Customer's settlement obligation in LGIA article 5.17.7 should be subject to a tax gross-up to fully compensate the Transmission Provider for income taxes, it did not amend the article to confirm this intention.

Commission Conclusion

101. Order No. 2003–A allowed the Transmission Provider to determine whether and how to contest a Governmental Authority's tax determination.[39] This is reasonable because otherwise the Interconnection Customer could force the Transmission Provider to pursue a claim that the Transmission Provider does not believe is valid. Allowing the Interconnection Customer to participate in the appeal process,[40] however, should help to counteract the Transmission Provider's ability to negotiate with the IRS in a manner detrimental to the Interconnection Customer's interest.

102. We are amending LGIA article 5.17.7 in response to Southern Company's comment.

c. Transmission Credits for Tax Payments

103. Order No. 2003 provided that, if the Transmission Provider requires the Interconnection Customer to pay a tax gross-up, it will refund all tax gross-up amounts as transmission credits. Order No. 2003–A amended article 11.4.1 to clarify that the Transmission Provider need refund only the tax gross-up amounts associated with Network Upgrades.[41]

Rehearing Request

104. Southern Company repeats the argument it made in response to Order No. 2003 that requiring the Transmission Provider to provide transmission credits for tax gross-up or other related tax payments in connection with Network Upgrades forces retail customers to subsidize the Interconnection Customer.

Commission Conclusion

105. Order No. 2003–A excepted from the total dollars refundable as transmission credits any amount related to the tax gross-up for Interconnection Facilities.[42] Order No. 2003–A distinguished tax payments related to Network Upgrades from tax payments related to Interconnection Facilities.[43] Because the tax payments related to Interconnection Facilities are not ultimately recoverable in transmission rates, the Interconnection Customer must reimburse the Transmission Provider for these payments to make the Transmission Provider whole. For this reason, *pro forma* LGIA article 11.4.1 excludes from the refundable total any costs related to tax payments for Interconnection Facilities. And because all costs associated with Network Upgrades are recoverable through transmission rates, including the cost of funding any related current tax liability, the Transmission Provider should refund to the Interconnection Customer as transmission credits those tax gross-up or other related tax payments initially funded by the Interconnection Customer.[44]

4. Applicable Reliability Council Operating Requirements

106. LGIA article 9.1 requires the Interconnection Customer and the Transmission Provider to comply with the Applicable Reliability Council operating requirements. The Transmission Provider may impose supplemental interconnection requirements not specifically required by the Applicable Reliability Council, particularly those related to system protection and safety, if the Applicable Reliability Council requirements specifically allow such requirements. The Transmission Provider must also impose such requirements on itself and all other Interconnection Customers, including its Affiliates.

Rehearing Request

107. NRECA complains that the Transmission Provider's inability to impose supplemental interconnection requirements if they are not referenced in the Applicable Reliability Council documents creates significant risks to the safety and reliability of the Transmission Provider's Transmission System.

Commission Conclusion

108. We deny NRECA's request for rehearing. Order No. 2003–A stated that most operational requirements are already contained in or referenced in the Applicable Reliability Council's standards. Where such operational requirements are not specifically contained in or referenced in those standards, we strongly encourage the Transmission Provider to seek to have such requirements codified. As provided in Order No. 2003–A, the Transmission Provider is free to propose variations, provided that it can demonstrate that they are consistent with or superior to the *pro forma* LGIP.

5. Power Factor Design Criteria

109. LGIA article 9.6.1 requires the Interconnection Customer to design the Generating Facility to maintain a power factor at the Point of Interconnection within the range of 0.95 leading to 0.95 lagging, unless the Transmission Provider establishes different requirements that apply to all generators in its Control Area on a comparable basis. This provision does not apply to wind generators.

Rehearing Request

110. SoCal Edison argues that wind generators should not be exempted from the power factor requirement. Such an exemption may lead to uncontrolled voltage problems. It also contends that one commenter misled the Commission when it asserted that wind generators are unable to meet the power factor requirement; wind generating facilities have been able to meet this requirement for many years.

Commission Conclusion

111. Order No. 2003–A adopted Appendix G of the LGIA (Requirements of Generators Relying on Newer Technologies) as a placeholder for future interconnection requirements specific to wind and other alternative technologies.[45] The Commission included Appendix G in the LGIA because (1) a particular LGIA or LGIP requirement might not be suitable for those technologies and (2) those technologies might call for a slightly different approach to interconnection. This includes the power factor design criteria requirement in LGIA article 9.6.1.

112. On September 24, 2004, Commission staff held a conference to discuss the technical requirements for

[39] *Id.* at P 372.

[40] LGIA article 5.17.7 requires the Transmission Provider to keep the Interconnection Customer informed of the contest's progress, to consider in good faith the Interconnection Customer's suggestions about conducting the contest, and to reasonably permit the Interconnection Customer or its representative to attend contest proceedings. The Transmission Provider may also agree to settle only after obtaining either the Interconnection Customer's consent or written advice from a nationally recognized tax counsel who is reasonably acceptable to the Interconnection Customer.

[41] Order No. 2003–A at P 351.

[42] LGIA article 11.4.1.

[43] Order No. 2003–A at P 338–341.

[44] *See id.* at P. 341.

[45] Order No. 2003–A at fn 85.

the interconnection of wind generators and other alternative technologies, the needs of transmission operators for voltage support from large wind farms, and the need for creating specific requirements in Appendix G to accommodate their interconnection.[46] Among other things, the conferees spoke about whether the power factor design criteria in Order No. 2003–A are reasonable for these technologies. The Commission is still evaluating the transcript of the conference and comments filed afterwards. Until the Commission decides how to proceed based upon the record in that proceeding, it will continue to exempt wind generators from the power factor design criteria in LGIA article 9.6.1.

6. Payment for Reactive Power

113. LGIA article 9.6.3 requires the Transmission Provider to pay the Interconnection Customer for reactive power the Interconnection Customer provides or absorbs when the Transmission Provider asks the Interconnection Customer to operate its Generating Facility outside a specified power factor range, provided that if it pays its own or affiliated generators for reactive power service within the specified range, it must also pay the Interconnection Customer. Payments are to be under the Interconnection Customer's rate on file with the Commission, unless service is under a Commission-approved RTO or ISO tariff. Order 2003–A clarified that there is nothing in LGIA article 9.6.3 that requires the Interconnection Customer to run its Generating Facility solely to provide reactive power to the Transmission Provider simply because it has an interconnection agreement with the Transmission Provider.

Rehearing Requests

114. The Commission stated in Order No. 2003–A that there is nothing in LGIA article 9.6.3 that requires the Interconnection Customer to run its Generating Facility solely to provide reactive power to the Transmission Provider simply because it has an interconnection agreement with the Transmission Provider. AEP notes that in Order No. 2003, the Commission agreed with Calpine ''* * * that if the Transmission Provider pays its own or its affiliated generators for reactive power within the established range it must also pay the Interconnection Customer.'' These two statements are inconsistent, claims AEP. The Transmission Provider is required to offer ''Reactive Power and Voltage Control from Generation Resources Service'' (Schedule 2 Service) under Order No. 888. The Transmission Provider thus has a responsibility to keep its own generators on line and be able to provide reactive power to allow delivery service on demand anywhere on its electric system. AEP notes that the Transmission Provider is generally paid for providing this service to retail customers through a bundled rate. The cost of providing this service to wholesale customers is recovered through transmission rates—not through a payment to the Transmission Provider's generators, as Calpine had suggested. In contrast, the Interconnection Customer has no such obligation. AEP asks the Commission to clarify that a Transmission Provider that is required to provide Schedule 2 Service, and that charges for it accordingly, is not ''paying its own generators'' for reactive power within the established range and thus triggering a responsibility to pay the Interconnection Customer in the same manner.

115. AEP also seeks clarification that Order No. 2003–A does not prejudge the manner in which the Interconnection Customer should be paid for providing reactive power service.

116. Calpine, EPSA, and PSEG argue that the Interconnection Customer's right to be paid for providing reactive power should not hinge on whether the Transmission Provider pays its own or its Affiliate's generators. They contend that their generators provide reactive power service that is similar to Schedule 2 Service and, therefore, they should receive comparable compensation. They argue that they should be paid for reactive power provided, whether within or outside of the established power factor range. They also argue that the Interconnection Customer incurs an opportunity cost when its Generating Facility must provide reactive power when it reduces real power output. Finally, they state that some regions have mechanisms to compensate for providing reactive power[47] and seek clarification that LGIA article 9.6.3 will not disturb those arrangements.

117. Reliant states that Order No. 2003–A was an improvement over Order No. 2003. However, it contends that the Commission should reinstate the Advance Notice of Proposed Rulemaking (ANOPR) language, which provided that an Interconnection Customer could file a tariff with the Commission to secure compensation for reactive power service. Reliant states that the ANOPR language is balanced and negotiated.

Commission Conclusion

118. We disagree with AEP's assertion that there is a contradiction in the Commission's clarifications in Order No. 2003–A. The intent of the first clarification was to ensure that the Transmission Provider could not demand that the Interconnection Customer operate its Generating Facility solely to provide reactive power. The Interconnection Customer, however, may be required by the Transmission Provider to provide reactive power from time to time when its Generating Facility is in operation.

119. As to the second clarification, we further clarify that while the Transmission Provider is not ''paying'' its own or affiliated generators directly for providing reactive power within the specified range, the owner of the generator is nonetheless being compensated for that service when the Transmission Provider includes reactive power related costs in its transmission revenue requirement. Therefore, the ''trigger'' to compensate the Interconnection Customer for providing this service is not eliminated, as AEP argues. We require that an Interconnection Customer be treated comparably with the Transmission Provider and its Affiliates. Accordingly, we are requiring the Transmission Provider to pay the Interconnection Customer for providing reactive power within the specified range if the Transmission Provider so pays its own generators or those of its Affiliates.

120. We also clarify that Order No. 2003–A does not prejudge how the Interconnection Customer is to be compensated for providing reactive power. LGIP article 9.6.3, as revised in Order No. 2003–A, states that such payments are to be provided under a filed rate schedule unless service is provided under a Commission-approved RTO or ISO tariff.

121. We also clarify that there is nothing in LGIA article 9.6.3 that disturbs any present arrangements for reactive power compensation.

122. In response to Reliant, we decline to substitute the referenced ANOPR language because the ANOPR language was, at best, vague.

7. Security

123. LGIA article 11.5 requires the Interconnection Customer, among other

[46] Interconnection for Wind Energy and Other Alternative Technologies, Docket No. PL04–15–000; Standardization of Small Generator Interconnection Agreements and Procedures, Docket No. RM02–12–000; and Standardizing Generator Interconnection Agreements and Procedures, Docket Nos. RM02–1–001, RM002–1–005.

[47] *E.g.,* PJM, NYISO, and ISO New England.

things, to provide a form of security ''reasonably acceptable to Transmission Provider'' and ''consistent with the Uniform Commercial Code.'' The security shall be ''in an amount sufficient to cover the costs for constructing, procuring and installing the applicable portion of Transmission Provider's Interconnection Facilities, Network Upgrades, or Distribution Upgrades and shall be reduced on a dollar-for-dollar basis for payments made to Transmission Provider for these purposes.''

Rehearing Request

124. Southern Company argues that LGIA article 11.5 should include an obligation to maintain security. Requiring the amount of security to be automatically and immediately reduced on a dollar-for-dollar basis for payments made to the Transmission Provider under the interconnection agreement is arbitrary and discriminatory, as it ignores the risk this imposes on the Transmission Provider under bankruptcy law. Specifically, section 547 of the U.S. Bankruptcy Code provides that a Debtor in Possession or a Bankruptcy Trustee may avoid preferential transfers made by the bankrupt entity on or within 90 days before the filing of the relevant bankruptcy petition. If payments to the Transmission Provider could be deemed ''preferential,'' the Transmission Provider needs the protection given by the security required under article 11.5 to be maintained and not reduced until such payment is not subject to being avoided, set aside, or returned under section 547. Language to this effect should be added to article 11.5; otherwise the Transmission Provider would have no reasonable prospect of being repaid for any payments required to be returned or set aside under bankruptcy law, and the Transmission Provider would also incur legal expenses associated with the defense of such claims.

Commission Conclusion

125. We reject Southern Company's requests for rehearing. Although Southern Company's argument regarding the maintenance of security is untimely and should have been raised in response to Order No. 2003, we will address the argument here to provide clarification. The change Southern Company proposes is unnecessary. Article 11.5 already requires the security provided by the Interconnection Customer to be ''sufficient to cover'' the relevant costs and that a letter of credit or surety bond specify ''a reasonable expiration date.'' [48] Therefore, Southern Company's concern that an Interconnection Customer would not be required to maintain the security is misplaced, as the article requires that ''sufficient'' security be maintained for a ''reasonable'' period of time.

126. Southern Company's arguments regarding bankruptcy were presented and rejected in Order No. 2003–A,[49] and Southern Company offers no new arguments.

8. Assignment

127. LGIA article 19.1 provides that the written consent of the non-assigning party is ordinarily required to assign the interconnection agreement. However, the Interconnection Customer may assign the agreement, without the consent of the Transmission Provider, for collateral security purposes to aid in financing the Generating Facility (*i.e.,* collateral assignment).

Rehearing Request

128. Southern Company argues that several revisions to LGIA article 19.1 are needed to conform to the Uniform Commercial Code and to the OATT. It seeks clarification that a party is not relieved of its obligations if another party assigns the agreement. It adds that the Interconnection Customer only has the right to assign the interconnection agreement to another eligible customer. Southern Company proposes that the Commission revise article 19.1 to subject the collateral assignment of the agreement to the prior written consent of the Transmission Provider if the collateral assignee is not an eligible customer. Such consent is a suitable way for the Transmission Provider to (1) obtain the collateral assignee's agreement and (2) transfer the interconnection agreement in a foreclosure sale only to an eligible customer.

129. Southern Company also argues that the Commission should revise LGIA article 19.1 to address risks associated with adverse claims and multiple assignments of the Interconnection Customer's rights. It states that the exercise of assignment rights by an assignee should be made subject to the Transmission Provider not having received a contrary court order or notice of an unresolved contrary claim. Otherwise, the Transmission Provider could be in violation of a court order or have to resolve which claimant is legally entitled to exercise assignment rights. Southern Company further claims that this requirement is superior to the *pro forma* LGIA in that it helps assure that the proper assignee receives the benefits of the LGIA and that a Transmission Provider does not incorrectly recognize an improper or subordinate assignee as being entitled to the Interconnection Customer's rights under the LGIA.

130. Southern Company also proposes that the Transmission Provider have the right to require the collateral assignee or its purchaser in foreclosure to assume the interconnection agreement and also cure any existing defaults before receiving the benefits of an assignee. It states that if a defaulting Interconnection Customer had not assigned its rights, the Transmission Provider would be free to require the Interconnection Customer to either cure its defaults or terminate the agreement. This ''perform'' or ''get out of the queue'' policy benefits competing Interconnection Customers and potential competitors. The Transmission Provider should not have to provide service to a collateral assignee or purchaser in foreclosure if uncured defaults exist or amounts are owed in arrears after the application of any security provided to the Transmission Provider by the assignor. Southern Company argues that to rule otherwise could result in discrimination against the Transmission Provider and other Interconnection Customers in the queue or desiring to join the queue if the Transmission Provider continues to provide service, despite not being made whole.

Commission Conclusion

131. LGIA article 19.1 already states that an assignment does not relieve a Party of its obligations under the interconnection agreement. As to Southern Company's concern about the assignee being an eligible customer, article 19.1 already requires that the assignee have the ''legal authority and operational ability to satisfy the obligations of the assigning Party.'' This ensures that the assignee is able to meet the obligations under the agreement. And if the assignee is unable to meet the obligations, article 19.1 requires the assignor to fulfill the obligations under the agreement. We are not requiring that the assignee be an ''Eligible Customer'' under Southern Company's OATT because Southern Company has not explained why this designation should be required of an assignee of an interconnection agreement. In response to Southern Company's arguments regarding collateral assignment and the assignment of debts, the Commission rejected these arguments in Order No.

[48] *See* LGIA article 11.5, 11.5.2, and 11.5.3.

[49] Order No. 2003–A at P 428, 431.

2003–A,[50] and Southern Company has offered no new information or arguments that prompt us to change that conclusion.

9. Disclosure of Confidential Information

132. LGIA article 22.1.10 provides that a Party must provide any information requested by the Commission or its staff, including Confidential Information. Order No. 2003–A modified article 22 to require a Party to provide requested information to a state regulator conducting a confidential investigation, even if the Party otherwise would be required to maintain this information in confidence.[51]

Rehearing Request

133. EPSA notes that Order No. 2003–A revised LGIA articles 22.1.10 and 22.1.11, deleting the requirement that a Party be notified when another Party receives a request from a state regulator for Confidential Information.[52] EPSA states that it has no objection to state regulators receiving Confidential Information to which they are entitled, but argues that fundamental fairness and due process should preclude the secret release of Confidential Information. The issue of providing state regulators with access to Confidential Information is under discussion in other forums and, EPSA concludes, any policy developed in this proceeding should be consistent with how the issue is addressed elsewhere. As an example of one forum, EPSA notes that the PJM Electricity Markets Committee (EMC) held several stakeholder meetings to develop the principles under which state regulators should be given access to Confidential Information. The principles developed by the EMC with the input of the state commissions, and which the PJM Members Committee approved, address a wide range of issues and require notice of the request to the Party that provided the Confidential Information. The Commission should reverse the conclusion reached in Order No. 2003–A and, consistent with the PJM approach, return to its Order No. 2003 policy of requiring notice to a Party before another Party releases Confidential Information.

Commission Conclusion

134. We deny EPSA's rehearing request, but provide clarification. In Order No. 2003–A, the Commission explained that it was deleting the requirement that a Party be notified when another Party receives a request for Confidential Information from a state regulator because a state regulator should have the same rights to Confidential Information as this Commission. We clarify here that the state regulator has the right to request Confidential Information from one Party (without notification to the other Party) only when the state commission has the legal authority to do so. The *pro forma* LGIA should not be interpreted as granting states access to Confidential Information where the state lacks authority under state law. Nor should the *pro forma* LGIA be interpreted as barring or limiting a state's access to information, or the procedures through which a state may request such information, where such access is permitted under state law. We are modifying article 22.1.10 to clarify this point. As for EPSA's argument regarding PJM, under the ''independent entity variation'' standard, an RTO like PJM has greater flexibility to propose variations from the *pro forma* LGIP and LGIA, including variations to those provisions applicable to the release of Confidential Information to states. As a result, the RTO or ISO may propose to treat Confidential Information differently from the approach taken in Order No. 2003, to better suit regional needs.

E. Issues Related to the Large Generator Interconnection Procedures

1. Scoping Meeting and OASIS Posting

135. LGIP section 3.3.4 requires the Transmission Provider and the Interconnection Customer to hold a Scoping Meeting within 30 Calendar Days from receipt of the Interconnection Request to discuss the proposed interconnection. If the Transmission Provider intends to hold a Scoping Meeting with an Affiliate, it is required to announce the meeting on its OASIS site, transcribe the Scoping Meeting, and make copies of the transcript available to the public upon request. LGIP section 3.4 requires the Transmission Provider to post on its OASIS a list of all Interconnection Requests. It must post information such as the location of the interconnection and the Generating Facility's projected In-Service Date. The list is not to disclose the identity of the Interconnection Customer until the latter executes an interconnection agreement.

Rehearing Request

136. Southern Company claims that the requirement in LGIP section 3.4 to not disclose the identity of the Interconnection Customer on OASIS conflicts with the requirement to give notice of a meeting with an Affiliate. The requirement to disclose the identity of the Affiliate is discriminatory because it does not apply to other competitors. This puts the Affiliate at a competitive disadvantage. Southern Company also claims that the requirement to notice Scoping Meetings with the Affiliate conflicts with LGIP section 3.4, which requires that the identity of the Interconnection Customer not be disclosed until the Interconnection Customer has executed an interconnection agreement. It asks that the notice and transcript requirements be eliminated or that the Commission require all Scoping Meetings to be noticed and transcribed.

Commission Conclusion

137. We deny Southern Company's request for rehearing. An affiliated Interconnection Customer and one that is not an Affiliate of the Transmission Provider are not similarly situated. That is, of course, one of the reasons the Commission created the Code of Conduct[53] and Standards of Conduct[54] for affiliated Interconnection Customers. Order No. 2003–A balanced the need to treat affiliated and nonaffiliated Interconnection Customers alike with the need to adhere to the Code of Conduct and Standards of Conduct requirements. Finally, we agree with Southern Company that there is a conflict between sections 3.3.4 and 3.4 of the *pro forma* LGIP, and are revising the latter to show that the restriction of section 3.4 (not to disclose the identity of the Interconnection Customer) does not apply to an affiliated Interconnection Customer.

[50] *Id.* at P 475, 476.

[51] *Id.* at P 486.

[52] *Id.*

[53] The Code of Conduct is imposed on a case-by-case basis when the Commission grants market-based rate authorization. Generally, the Code of Conduct contains a provision that all market information shared between the publicly utility (*i.e.,* Transmission Provider) and the Affiliate is to be disclosed simultaneously to the public. *See, e.g.,* Northeast Utilities Service Company, 87 FERC ¶ 61,063 at 61,276 (1999).

[54] Standards of Conduct for Transmission Providers, Order No. 2004, 68 FR 69134 (Dec. 11, 2003), FERC Stats. & Regs., Regulations Preambles ¶ 31,155 (2003), order on reh'g, Order No. 2004–A, 69 FR 23562 (Apr. 29, 2004), III FERC Stats. & Regs. ¶ 31,161 (2004), 107 FERC ¶ 61,032 (2004), order on reh'g, Order No. 2004–B, 69 FR 48371 (Aug. 10, 2004), III FERC Stats & Regs. ¶ 31,166 (2004), 108 FERC ¶ 61,118 (2004).

F. Ministerial Changes to the Pro Forma LGIP and LGIA

138. Since Order No. 2003–A was issued, we have identified certain sections of the LGIP and articles of the LGIA that require modification. Because of the ministerial nature of these changes, no further discussion is needed. The changes are included in Appendix B, which also reports changes to the *pro forma* LGIP and LGIA that reflect conclusions in this order.

G. Compliance

139. This order takes effect 30 days after issuance by the Commission. As with the Order No. 2003 compliance process, the Commission will deem the OATT of each non-independent Transmission Provider to be amended to adopt the revisions to the *pro forma* LGIP and LGIA contained herein on the effective date of this order. The Order No. 2003 compliance process also required each non-independent Transmission Provider to make a ministerial filing to include its *pro forma* LGIP and LGIA in its next filing with the Commission. But because it has taken longer than anticipated for all non-independent Transmission Providers to make the necessary changes to their OATTs, here we adopt different compliance procedure. We are requiring all public utilities that own, control, or operate interstate transmission facilities to adopt the revisions to the *pro forma* LGIP and *pro forma* LGIA that appear in this order within 60 days after the issuance of this order by the Commission. A non-independent Transmission Provider that already has amended its OATT to add the *pro forma* LGIP and *pro forma* LGIA should submit revised tariff sheets incorporating the changes contained in this order. A non-independent Transmission Provider that has not yet made the ministerial filing to reflect the fact that its OATT now follows Order No. 2003, or that has not yet filed the revisions to the *pro forma* LGIP or LGIA that appeared in Order No. 2003-A, must take the necessary steps to ensure that its OATT contains the *pro forma* LGIP and *pro forma* LGIA including the revisions in this order within 60 days after issuance of this order by the Commission. Within the same time frame, each RTO or ISO also must submit either revised tariff sheets incorporating changes contained in this order, or an explanation under the independent entity variation standard as to why it is not adopting each change.

140. Also, in Order No. 2003 the Commission required that for any non-conforming LGIAs submitted for approval, the Transmission Provider ''should clearly indicate where the agreement does not conform to its standard Interconnection Agreement, preferably through red-lining and strikeout.'' [55] We clarify here that each Transmission Provider submitting a non-conforming agreement for Commission approval must explain its justification for each nonconforming provision and provide a redline document comparing the nonconforming agreement to the effective *pro forma* LGIA.

IV. Information Collection Statement

141. Order No. 2003–B contains information collection requirements for which the Commission obtained approval from the Office of Management and Budget (OMB).[56] Given that this order makes only minor changes to Order Nos. 2003 and 2003–A, OMB approval for this order is not necessary. However, the Commission will send a copy of this order to OMB for informational purposes.

V. Regulatory Flexibility Act Certification

142. The Regulatory Flexibility Act (RFA) [57] requires rulemakings to contain either (1) a description and analysis of the effect that the proposed or Final Rule will have on small entities or (2) a certification that the rule will not have a significant economic effect on a substantial number of small entities. In Order Nos. 2003 and 2003–A, the Commission certified that the Final Rule would not have a significant economic effect on a substantial number of small entities.[58]

Rehearing Request

143. NRECA repeats the argument made previously that the Commission has underestimated the number of utilities affected by Order No. 2003. It asks the Commission to clarify that a cooperative with an existing Order No. 888 waiver will not lose that waiver as soon as it receives an Interconnection Request. It also requests clarification that if an Interconnection Customer seeks Interconnection Service from a small utility that believes that it would be overly burdened by the requirements of Order Nos. 2003 and 2003–A, the small utility may seek waiver of those requirements from the Commission.

Commission Conclusion

144. The Commission stated in Order No. 2003 that it is sympathetic to the needs of small entities.[59] However, NRECA raises no new arguments that it did not raise in its rehearing request to Order No. 2003. We therefore reject its assertion that the Commission's RFA analysis was unrealistic.[60]

145. As to its request for clarification, NRECA is correct that an entity may at any time request waiver of the Commission's regulations. However, as the Commission stated in Order No. 2003, waivers must be made on a case-by-case basis.[61] Absent the granting of such a waiver request, however, NRECA is correct that a request for jurisdictional service (including Interconnection Service) would mean that a utility with a conditional waiver of Order No. 888 would lose that waiver.

VI. Document Availability

146. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to obtain this document from the Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern Time) at 888 First Street, NE., Room 2A, Washington, DC The full text of this document is also available electronically from the Commission's eLibrary system (formerly called FERRIS) in PDF and Microsoft Word format for viewing, printing, and downloading. eLibrary may be accessed through the Commission's Home Page (*http://www.ferc.gov*). To access this document in eLibrary, type ''RM02–1–'' in the docket number field and specify a date range that includes this document's issuance date.

147. User assistance is available for eLibrary and the Commission's Web site during normal business hours from our Help line at 202–502–8222 or the Public Reference Room at 202–502–8371 Press 0, TTY 202–502–8659. E-Mail the Public Reference Room at *public.referenceroom@ferc.gov*

VII. Effective Date

148. Changes to Order Nos. 2003 and 2003–A made in this order on rehearing will become effective on January 19, 2005.

Regulatory Text

List of Subjects 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

[55] Order No. 2003 at P 915.

[56] The OMB Control Number for this collection of information is 1902–0096.

[57] 5 U.S.C. 601–612

[58] Order No. 2003 at P 924; Order No. 2003–A at P 792.

[59] *See* Order No. 2003 at P 830.

[60] *See, e.g.,* Order No. 2003–A at P 789 *et seq.*

[61] Order No. 2003 at P 830–831.

By the Commission. Commissioner Brownell dissenting in part with a separate statement attached.

Linda Mitry,

Deputy Secretary.

The Appendices will not be published in the Code of Federal Regulations.

Appendix A

Petitioner Acronyms

AEP—American Electric Power Service Corp.

Calpine—Calpine Corporation

Cinergy—Cinergy Services, Inc.

EPSA—Electric Power Supply Association

Intergen—Intergen Services, Inc. and Tenaska, Inc.

NRECA—National Rural Electric Cooperative Association

NYISO—New York Independent System Operator, Inc. and the New York Transmission Owners

PSEG—PSEG Companies and GWF Energy LLC

Reliant—Reliant Resources, Inc.

SoCal Edison—Southern California Edison Company

Southern Company—Southern Company Services, Inc.

SWTransco—Southwest Transmission Cooperative, Inc.

TAPS—Transmission Access Policy Study Group

Appendix B

CHANGES TO THE PRO FORMA LGIP AND LGIA

Large Generator Interconnection Procedures (LGIP)	
Section 1—Definition of ''Force Majeure''.	Change ''caused'' to ''cause''.
Section 1—Definition of Network Resource Interconnection Service.	Change ''in the same manner as all other Network Resources'' to ''in the same manner as Network Resources''.
Section 3.2.2.1	Remove two instances of ''all other'' in this section: ''Transmission Provider must conduct the necessary studies and construct the Network Upgrades needed to integrate the Large Generating Facility (1) in a manner comparable to that in which Transmission Provider integrates its generating facilities to serve native load customers; or (2) in an ISO or RTO with market based congestion management, in the same manner as Network Resources. Network Resource Interconnection Service allows Interconnection Customer 's Large Generating Facility to be designated as a Network Resource, up to the Large Generating Facility's full output, on the same basis as existing Network Resources interconnected to Transmission Provider's Transmission System, and to be studied as a Network Resource on the assumption that such a designation will occur.''
Section 3.2.2.2	At the end of this section, add the following text: ''The Transmission Provider may also study the Transmission System under non-peak load conditions. However, upon request by the Interconnection Customer, the Transmission Provider must explain in writing to the Interconnection Customer why the study of non-peak load conditions is required for reliability purposes.''
Section 3.4	In the third sentence, change ''The list will not * * *'' to ''Except in the case of an Affiliate, the list will not * * *''
Section 5.2	In the second sentence, change text to read: ''* * * to the Interconnection Customer, as appropriate.''
Section 7.2	In the third paragraph, second sentence, change text to read: ''For the purpose of this section 7.2, * * *
Section 7.6	Change the first sentence to read: ''If Re-Study of the Interconnection System Impact Study is required due to a higher queued project dropping out of the queue, or a modification of a higher queued project subject to Section 4.4, or redesignation of the Point of Interconnection pursuant to section 7.2 Transmission Provider shall notify Interconnection Customer in writing.''
Section 9	In the second paragraph, second sentence, change ''party'' to ''Party.''
Section 11.1	In the second sentence, change '''' Interconnection Customer shall tender a draft LGIA, together with draft appendices completed to the extent practicable'' to '''' Transmission Provider shall tender a draft LGIA, together with draft appendices.''
Section 11.2	In the third sentence, change ''* * * tender of the LGIA pursuant to section 11.1 * * *'' to ''* * * tender of the draft LGIA pursuant to section 11.1 * * *'' In the fifth sentence, change ''* * * section 13.5 within sixty days of tender of completed draft of the LGIA appendices'' to ''* * * section 13.5 within sixty (60) Calendar Days of tender of draft LGIA.''
Section 13.4	In the second paragraph, change the reference to ''OATT'' to ''Tariff.''
Section 13.6.2	In the first sentence, change the text to read: ''* * * within thirty (30) Calendar Days of receipt. * * *'' In the second sentence, change ''OATT'' to ''Tariff.''

Large Generator Interconnection Agreement (LGIA)	
Article 1—Definition of ''Force Majeure''.	Change ''caused'' to ''cause''.
Article 1—Definition of Network Resource Interconnection Service.	Change ''in the same manner as all other Network Resources'' to ''in the same manner as Network Resources''.
Recitals	Change the last word from ''(OATT)'' to ''(Tariff).''
Article 4.1.2.2	Remove ''other'' from the following sentence in the first paragraph: ''Although Network Resource Interconnection Service does not convey a reservation of transmission service, any Network Customer under the Tariff can utilize its network service under the Tariff to obtain delivery of energy from the interconnected Interconnection Customer's Large Generating Facility in the same manner as it accesses Network Resources.'' Remove ''all other'' from the following sentence in the second paragraph: ''In the event of transmission constraints on Transmission Provider's Transmission System, Interconnection Customer's Large Generating Facility shall be subject to the applicable congestion management procedures in Transmission Provider's Transmission System in the same manner as Network Resources.''

CHANGES TO THE PRO FORMA LGIP AND LGIA—Continued

Article 5.14	Delete the first two sentences of this article and replace them with the following sentence: ''Transmission Provider or Transmission Owner and Interconnection Customer shall cooperate with each other in good faith in obtaining all permits, licenses, and authorizations that are necessary to accomplish the interconnection in compliance with Applicable Laws and Regulations.''
Article 5.17.7	In the second paragraph, before the last sentence, add this new sentence: ''The settlement amount shall be calculated on a fully grossed-up basis to cover any related cost consequences of the current tax liability.''
Article 5.17.8(ii)	Add the word ''interest'' to the beginning of this subsection, revising it to read: ''(ii) interest on any amount paid * * * Reference to 18 CFR 35.19a(a)(2)(ii) should be changed to 18 CFR 35.19a(a)(2)(iii).
Article 11.4.1	In the second paragraph of this article, replace ''(2) declare in writing that Transmission Provider or Affected System Operator will continue to provide payments to Interconnection Customer pursuant to this subparagraph until all amounts advanced for Network Upgrades have been repaid.'' with ''(2) declare in writing that Transmission Provider or Affected System Operator will continue to provide payments to Interconnection Customer on a dollar-for-dollar basis for the non-usage sensitive portion of transmission charges, or develop an alternative schedule that is mutually agreeable and provides for the return of all amounts advanced for Network Upgrades not previously repaid; however, full reimbursement shall not extend beyond twenty (20) years from the Commercial Operation Date.'' Add the following sentence to the last paragraph of this article: ''Before any such reimbursement can occur, the Interconnection Customer, or the entity that ultimately constructs the Generating Facility, if different, is responsible for identifying the entity to which reimbursement must be made.'' Reference to 18 CFR 35.19a(a)(2)(ii) should be changed to 18 CFR 35.19a(a)(2)(iii).
Article 18.1	Capitalize each reference to ''Indemnifying Party.''
Article 18.3.5	Revise the second sentence to read ''* * * thirty (30) Calendar Days advance written notice * * *''
Article 18.3.6	In the first sentence, change ''polices'' to ''policies.''
Article 19.1	In the second sentence, change ''party's'' to ''Party's.''
Article 22.1.10	Revise the last sentence to read: ''Requests from a state regulatory body conducting a confidential investigation shall be treated in a similar manner if consistent with the applicable state rules and regulations.''
Article 28.1.2	In the first sentence, change ''party'' to ''Party.''

Nora Mead BROWNELL, Commissioner dissenting in part:

On rehearing of Order No. 2003, the Commission made three critical revisions to the procedures by which Interconnection Customers obtain cost recovery for their up-front funding of Network Upgrades. Specifically, the Commission eliminated the following key protections afforded to Interconnection Customers: (1) The ability to apply credits to transmission service taken from sources other than the specific interconnecting generating facility; (2) the ability to obtain full reimbursement within five years; and (3) the ability to obtain reimbursement for upgrades made to adjacent transmission systems (so-called ''Affected Systems'') on which the Interconnection Customer does not take transmission service. I am now convinced that the Commission erred in making these revisions, and that today's order, by making the minor modification of requiring full reimbursement after twenty years, does not go far enough to correct that error.

In Order No. 2003–A, the Commission's primary justification for modifying the cost recovery provisions was that the changes were necessary to ensure that Interconnection Customers make efficient decisions on where to site their generating facilities. Rehearing petitioners make a convincing argument that there is no reason to believe that these modifications will have any appreciable effect on siting decisions, which are driven by state and local siting regulations and fuel accessibility needs. Instead of attempting to rebut this argument or develop a substitute rationale, the majority simply treats petitioners' argument as an admission that Network Upgrade costs are small and, therefore, concludes that Interconnection Customers have no basis to complain about bearing those costs. However, the relative size of Network Upgrade costs compared to other siting costs is irrelevant to whether it is fair to put Interconnection Customers at substantial risk of never obtaining full reimbursement for upgrades that benefit all customers.

The Commission has been quite explicit that up-front payment of Network Upgrades costs by an Interconnection Customer is simply a ''financing mechanism that is designed to facilitate the efficient construction of Network Upgrades,'' and is ''not a rate for interconnection or transmission service.'' [1] As the Commission explained in Order No. 2003–A, ''the Transmission Provider's right to charge for transmission service at the higher of an embedded cost rate, or an incremental rate designed to recover the cost of the Network Upgrades, provides the Transmission Provider with a cost recovery mechanism that ensures that native load and other transmission customers will not subsidize service to the Interconnection Customer.'' [2] The primary purpose of having the Interconnection Customer finance the Network Upgrades was to alleviate any delay that might result if the Transmission Provider were forced to secure funding.[3]

The issue, then, is whether we have exposed the Interconnection Customer to undue risk in its role as financier of Network Upgrades that benefit the system as a whole. I believe that we have. Therefore, I would grant rehearing and return to the cost recovery policies we announced in Order No. 2003.

Nora Mead Brownell

[FR Doc. 05–15 Filed 1–3–05; 8:45 am]

BILLING CODE 6717–01–P

[1] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003–A, Order on Rehearing, 69 FR 15932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 at P 612 (2004).

[2] *Id.* at P 613.

[3] *See, e.g., id.*

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 358

[Docket Number RM01–10–003; Order No. 2004–C]

Standards of Conduct for Transmission Providers

Issued December 21, 2004.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; order on rehearing of order no. 2004–B.

SUMMARY: The Federal Energy Regulatory Commission (Commission) generally reaffirms its determinations in Order Nos. 2004, 2004–A and 2004–B and grants rehearing and clarifies certain provisions. Order Nos. 2004 *et seq.* require all natural gas and public utility Transmission Providers to comply with Standards of Conduct that govern the relationship between the natural gas and public utility Transmission Providers and all of their Energy Affiliates.

In this order, the Commission addresses the requests for rehearing and/or clarification of Order No. 2004–B. The Commission grants rehearing, in part, denies rehearing, in part, and provides clarification of Order No. 2004–B.

EFFECTIVE DATE: Revisions in this order on rehearing will be effective February 3, 2005.

FOR FURTHER INFORMATION CONTACT: Demetra Anas, Office of Market Oversight and Investigations, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8178.

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly.

Order on Rehearing and Clarification

1. On November 25, 2003, the Federal Energy Regulatory Commission issued a Final Rule adopting Standards of Conduct for Transmission Providers (Order No. 2004 or Final Rule) [1] which added part 358 and revised parts 37 and 161 of the Commission's regulations. The Commission adopted Standards of Conduct that apply uniformly to interstate natural gas pipelines and public utilities (jointly referred to as Transmission Providers) that were subject to the former gas Standards of Conduct in part 161 of the Commission's regulations or the former electric Standards of Conduct in part 37 of the Commission's regulations.[2] Under Order No. 2004, the Standards of Conduct govern the relationships between Transmission Providers and all of their Marketing and Energy Affiliates. On April 16, 2004, the Commission affirmed the legal and policy conclusions on which Order No. 2004 was based, granted and denied rehearing and offered clarification in Order No. 2004–A.[3] On August 2, 2004, the Commission issued Order No. 2004–B, in which it addressed the requests for rehearing and/or clarification of Order No. 2004–A.[4]

2. Seventeen petitioners requested rehearing or clarification of Order No. 2004–B. As discussed below, the Commission grants rehearing, in part, denies rehearing, in part, and provides additional clarification. Chief among the resolutions are: (1) Granting rehearing by allowing local distribution companies (LDCs) to participate in hedging related to on-system sales and still qualify for exemption from Energy Affiliate status; (2) denying rehearing regarding exemptions for electric local distribution companies; (3) clarifying the duties of Transmission Function Employees; (4) providing additional clarification and granting partial rehearing regarding information to be posted on the Internet or OASIS; (5) denying rehearing regarding the timing of the applicability of the Standards of Conduct to newly formed Transmission Providers; (6) and making miscellaneous corrections to the regulatory text.

A. Definition of an Energy Affiliate

Order No. 2004, et seq.

3. The Standards of Conduct, as revised in Order Nos. 2004–A and 2004–B, defines Energy Affiliate in § 358.3(d) as an affiliate that:

(1) Engages in or is involved in transmission transactions in U.S. energy or transmission markets; or

(2) Manages or controls transmission capacity of a Transmission Provider in U.S. energy or transmission markets; or

(3) Buys, sells, trades or administers natural gas or electric energy in U.S. energy or transmission markets; or

(4) Engages in financial transactions relating to the sale or transmission of natural gas or electric energy in U.S. energy or transmission markets.

(5) An LDC division of an electric public utility Transmission Provider shall be considered the functional equivalent of an Energy Affiliate, unless it qualifies for the exemption in § 358.3(d)(6)(v).

(6) An Energy Affiliate does not include:

(i) A foreign affiliate that does not participate in U.S. energy markets;

(ii) An affiliated Transmission Provider or an interconnected foreign affiliated natural gas pipeline that is engaged in natural gas transmission activities which are regulated by the state, provincial or national regulatory boards of the foreign country in which such facilities are located.

(iii) A holding, parent or service company that does not engage in energy or natural gas commodity markets or is not involved in transmission transactions in U.S. energy markets;

(iv) An affiliate that purchases natural gas or energy solely for its own consumption. ''Solely for its own consumption'' does not include the purchase of natural gas or energy for the subsequent generation of electricity.

(v) A State-regulated local distribution company that acquires interstate transmission capacity to purchase and resell gas only for on-system customers, and otherwise does not engage in the activities described in section 358.3(d)(1), (2), (3) or (4), except to the limited extent necessary to support on-system customer sales and to engage in de minimis sales necessary to remaining in balance under applicable pipeline tariff requirements.

(vi) A producer, gatherer, Hinshaw pipeline or an intrastate pipeline that makes incidental purchases or sales of de minimis volumes of natural gas to remain in balance under applicable pipeline tariff requirements and otherwise does not engage in the activities described in §§ 358.3(d)(1), (2), (3) or (4).

i. Scope of the LDC Exemption

Order No. 2004–B

4. In Order No. 2004–B, the Commission stated that an LDC would not be able to engage in financial or futures transactions or hedging without becoming an Energy Affiliate. The Commission expressed concern that the LDC's access to transmission information could be unduly preferential for the LDC when participating in such financial transactions. The Commission also stated that it is virtually impossible to distinguish between financial or futures transactions in a speculative market from those needed to support on-system sales.[5]

Requests for Rehearing and/or Clarification and Commission Conclusions

5. AGA seeks clarification that an LDC that does not make off-system sales except for purposes of balancing may engage in any of the activities described in §§ 358.3(d)(1), (2), (3), or (4), including hedging activities undertaken in conjunction with gas-acquisition activities to support its retail sales, without becoming an Energy Affiliate. Specifically, AGA seeks clarification that an LDC that engages in off-system sales only for balancing can engage in certain types of specific ''hedging'' transactions such as gas storage, contracts for the future delivery of natural gas, futures contracts for natural gas, and financial instruments to stabilize or mitigate the volatility of gas prices, without becoming an energy affiliate.

6. The Duke Pipelines, OkTex, National Fuel, the New York PSC, Southwest Gas, and the Utah PSC and the Wyoming PSC also request rehearing of the Commission's decision to exempt from Energy Affiliate status only those LDCs that do not participate in wholesale market transactions such as hedging, even when such wholesale market transactions are entered into by the LDC only for the purposes of supporting on-system sales.

7. National Fuel, AGA and PSC New York argue that excluding LDCs that engage in hedging from the exemption

[1] Standards of Conduct for Transmission Providers, 68 FR 69134 (Dec. 11, 2003), III FERC Stats. & Regs. ¶ 31,155 (Nov. 25, 2003).

[2] The gas standards of conduct were codified at part 161 of the Commission's regulations, 18 CFR part 161 (2003), and the electric standards of conduct were codified at 18 CFR 37.4 (2003).

[3] 69 FR 23562 (Apr. 29, 2004), III FERC Stats. & Regs. ¶ 31,161 (Apr. 16, 2004).

[4] 69 FR 48371 (Aug. 10, 2004), III FERC Stats. & Regs. ¶ 31,166 (Aug. 2, 2004).

[5] *See* Order No. 2004–B at P 18.

from Energy Affiliate status is inconsistent with the text of §§ 358.3(d)(4) and (d)(6)(v).

8. Several petitioners also argue that, contrary to the Commission's statements in Order No. 2004–B, it is possible to distinguish between hedging and speculative financial derivative transactions. National Fuel and AGA argue that the Commission's own accounting regulations currently provide methods for distinguishing between hedging and speculation, and request clarification that exempt LDCs may utilize gas derivatives in support of on-system sales when such transactions are properly classified either as ''normal purchases and sales scope exception'' per part 201, General Instruction 23(A), or as non-speculative derivatives as properly recorded in Balance Sheet Accounts 176 or 245 per part 201, General Instructions 23(D) and (E). National Fuel goes on to say that it and other New York LDCs are required by the New York PSC to comply with the Commission's Uniform System of Accounts and, as publicly traded companies, are also subject to the Financial Accounting Standards Board (FASB) Standard Nos. 133 and 138 which impose accounting standards for the accounting of derivatives. National Fuel states that an LDC entering into a financial transaction to hedge price risk related to physical purchases for on-system sales is required to concurrently designate and document the hedge, the hedged item and the specific risk being hedged, in order to take advantage of ''fair value'' or ''cash flow'' accounting. National Fuel argues that these requirements would provide an adequate accounting basis to allow hedging to be distinguished from speculation.

9. Petitioners point out that the limitations on hedging for exempt LDCs are inconsistent with various existing and proposed local regulations or policies that require or encourage LDCs to reduce price volatility for their on-system customers by various methods including hedging. OkTex argues that the existence of locally approved and monitored gas cost stabilization programs demonstrates the lack of reasoned basis for the conclusion that it is impossible to distinguish between speculative and nonspeculative transactions.

10. National Fuel argues that affiliated pipelines relying on the LDC exemption would have to limit their purchases to the spot market which might result in increased costs to ratepayers. It also argues that the Commission's concerns regarding improper access to transmission information by LDCs is misplaced in the context of transactions that support on-system sales. National Fuel argues that an LDC with information that could potentially be of benefit would have greater profit potential if it entered a speculative transaction, rather than if it entered into a hedge transaction to limit price risk for on-system sales customers. It also argues that the authorities having jurisdiction over LDCs retail sales require that any benefit derived from entering into such transactions must accrue to the retail ratepayer, with no benefits to the company's shareholders.

11. Duke Pipelines and OkTex request clarification that hedging programs would not jeopardize an LDC's exemption so long as the programs are reviewed on a case-by-case basis by regulators and found to be non-speculative. Utah PSC and Wyoming PSC similarly argue that exempt LDCs should be allowed to implement price stabilization programs which utilize hedging so long as such programs are approved and monitored by state commissions and are for the exclusive benefit of retail customers.

12. The Commission clarifies, as requested by National Fuel and others, that ''normal purchases and sales,'' as those terms are generally used for accounting purposes, are not considered to be financial, futures, or hedging transactions under the Standards of Conduct. Furthermore, the Commission grants rehearing and will allow exempt LDCs to participate in financial transactions necessary for price risk management solely for the benefit of on-system retail customers. Petitioners have raised persuasive arguments that hedging is an important and generally used tool needed to provide economical retail sales service under state regulatory mandates. Further, petitioners have convinced us that current accounting standards make clear distinctions between hedging and speculation so as to create an audit trail should the need arise to investigate allegations of affiliate abuse in this area.[6] However, we wish to be clear that we intend to allow exempt LDCs to use hedging only to manage price risks attributable to serving their on-system, state-regulated bundled retail load. If an LDC engages in financial transactions on a speculative basis for stockholder profit rather than financial transactions to protect bundled retail ratepayers, the LDC will no longer be an exempt Energy Affiliate.

13. Southwest Gas seeks clarification that an LDC exempt from Energy Affiliate status may engage in wholesale sales transactions so long as the transmission capacity acquired by the LDC occurs on unaffiliated interstate pipelines or on affiliated ''conduit'' pipelines that transport under part 157 certificates.

14. The Commission is denying Southwest Gas's request for clarification. If an affiliated LDC participates in any wholesale transactions, the affiliated LDC does not qualify for the Energy Affiliate exemption under § 358.3(d)(6)(v).[7] As the Commission stated in Order No. 2004–A, the purpose is to place all wholesale market participants, affiliated and non-affiliated, on an equal footing. LDC affiliates engaging in wholesale sales transactions compete with non-affiliates for transmission.

ii. Treatment of Gas LDCs

Order No. 2004, et seq.

15. Under § 358.3(d)(6)(v), a Local Distribution Company must be regulated by a state to qualify for exemption from status as an Energy Affiliate.

Requests for Rehearing and/or Clarification and Commission Conclusions

16. Duke Pipelines request clarification that Canadian LDCs regulated at the provincial level and not engaged in off-system sales may also qualify for exemption under § 358.3(d)(6)(v), consistent with the Commission's treatment of other foreign entities and state-regulated LDCs.[8] The Commission is granting the Duke Pipelines' request for clarification. The Commission will treat LDCs that are regulated by Canadian provincial authorities as if they are state-regulated. As a result, if provincially-regulated Canadian LDCs meet the requirements of § 358.3(d)(6)(v) they will not be treated as Energy Affiliates if they do not participate in U.S. commodity and transmission markets. However, as the

[6] Should the Commission need to examine the books and records of a Transmission Provider's LDC to ensure compliance with the Standards of Conduct, those records should be made available upon the Commission's request. To the extent that records are found to be deficient, or not readily available, the affiliated Transmission Provider shall treat the subject LDC as an Energy Affiliate that is ineligible for exemption pursuant to § 358.3(d)(6)(v).

[7] The Commission notes that on September 20, 2004, in Docket No. TS04–222–000, the Commission granted Southwest Gas a partial waiver of the Standards of Conduct vis-à-vis its affiliated LDC. *See Alcoa Power Generating Inc.,* 108 FERC ¶ 61,243 at P 202–203 (Alcoa).

[8] In Order No. 2004–A, the Commission determined that a foreign affiliated Transmission Provider, that is regulated by the state, province or national regulatory board of the foreign country in which its facilities are located will not be treated as an Energy Affiliate. *See* Order No. 2004–A at P 97.

Commission stated in Order No. 2004–A, a Canadian Energy Affiliate that does business in the U.S. commodity and transmission markets should not be afforded undue preferences or services. *See* Order No. 2004–A at P 97.

17. Entergy seeks clarification that LDCs regulated by local governmental bodies which regulate the rates, terms and conditions for retail electric and natural gas service, may also qualify for the LDC exemption. Entergy states that an LDC regulated by the City of New Orleans, which regulates the rates, terms and conditions for retail electric and natural gas service in New Orleans, should also be exempt from status as an Energy Affiliate as if it were a state-regulated LDC. The Commission is denying Entergy's request for clarification. Entergy's request reflects a very limited, if not unique, circumstance. Entergy has not shown that other entities are subject to local rather than state regulation or that its regulatory situation warrants a generic exemption. The Commission will not create a generic exemption for LDCs subject to local regulation. Entergy, however, may file a request for an individual waiver based on its individual circumstances.

iii. Treatment of Electric LDCs or LDC Divisions

Order No. 2004–B

18. In Order No. 2004–B, the Commission rejected requests to clarify that electric LDCs may qualify for the exemption from the definition of Energy Affiliate in § 358.3(d)(6)(v). *See* Order No. 2004–B at P 26.

Requests for Rehearing and/or Clarification and Commission Conclusions

19. Entergy, National Grid, and EEI repeat their request for clarification that the LDC exemption from Energy Affiliate status apply to electric LDCs as well as gas LDCs, arguing that the Commission's previous denial of such clarification in Order 2004–B was based on an inaccurate understanding of the concerns raised. They argue that the Commission in Order No. 2004–B addressed the question of whether exempt electric LDCs could make de minimis off-system sales, while the petitioners were concerned with the broader question of whether electric LDCs were included in the LDC exemption from Energy Affiliate status. Petitioners argue that the first clause of the LDC exemption in § 358.3(d)(6)(v) assumes that an LDC buys or sells gas, and thus could be inferred to mean that the exemption applies only to gas LDCs. Petitioners recommend establishing a separate exemption statement for electric and gas LDCs, and endorse EEI's proposed language. Under EEI's proposal, § 358.3(d)(6)(v) would be clarified to refer only to gas, and a new section would be added to create an exemption from the Energy affiliate status as follows: ''A state-regulated electric local distribution company or division that does not engage in the activities described in §§ 358.3(d)(1), (2), (3) or (4), except to the limited extent necessary to support on-system sales.'' National Grid argues that adoption of EEI's proposed regulatory language clarifying the exemptions for gas and electric LDCs in § 358.3(d)(6) would ensure that employees who do not engage in Energy Affiliate activities, such as employees serving distribution functions, are not required to be treated as Energy Affiliate employees or separated from transmission system information.

20. EEI states that the Commission may want to explain that the new regulatory language it has proposed for § 358.3(d)(6) does not alter the treatment of bundled or unbundled retail sales as expressed in prior orders.

21. National Grid also argues that the since Commission does not require the independent functioning of distribution division employees from transmission function employees when they are all part of the same company, it would be illogical to require independent functioning of an electric distribution division when the distribution function is contained in a corporate entity separated from the affiliated Transmission Provider.

22. Calpine submitted an answer to Entergy and EEI's request for new regulatory language in § 358.3(d)(6). Calpine argues that Entergy and EEI are repeating a request for a stand-alone exemption from the definition of Energy Affiliate for LDCs that the Commission already rejected as unnecessary in Order No. 2004–B. Calpine also argues that EEI's proposed text is too broad, and could be interpreted to permit retail sales function employees of an LDC to purchase capacity and power in wholesale energy markets, in competition with non-affiliates, without regard to the Standards of Conduct, so long as such transactions were deemed ''necessary to support on-system sales.''

23. Entergy and EEI submitted an answer to Calpine's answer, in which they argue that Calpine has seriously misinterpreted what Entergy and EEI intended in their requests for clarification. The regulatory text EEI proposes, they argue, simply makes explicit the fact that electric LDCs that do not make off-system sales can qualify for the LDC exemption from Energy Affiliate status.

Commission Disposition

24. We will deny petitioners' requests for rehearing and grant in part the requests for clarification of the exemption from the definition of Energy Affiliate. The Commission will not adopt petitioners' proposed language for an exemption for electric LDCs. The Commission clarifies that an electric distribution division or company that performs only distribution wires functions may be shared with the transmission function of a Transmission Provider (wires-to-wires services). But, if the distribution function includes retail sales functions, a retail sales function employee cannot engage in any wholesale sales, such as selling excess generation to a non-retail customer without triggering Energy Affiliate status. It is not appropriate for an entity that participates in the wholesale market to obtain an undue preference when competing with non-affiliates for transmission capacity. See Order No. 2004 at P 78.[9]

25. The effect of this ruling is not overly broad. Many electric distribution divisions or companies are not Energy Affiliates because they do not engage in nor are involved with the following activities in U.S. energy or transmission markets: transmission transactions; manage or control transmission capacity; buy, sell, trade, or administer electric energy; or engage in financial transactions relating to the sale or transmission of electric energy. As we have stated, electric distribution divisions or companies (unlike gas LDCs) do not make purchases or sales of electricity to remain in balance. Therefore, a separate electric distribution division or company exemption is unnecessary. However, the

[9] *See also,* Order No. 889–A, 81 FERC ¶ 61,253 at 62,174 (1997) (A * * * public utility has no choice pursuant to Order Nos. 888 and 888–A but to separate its wholesale power marketing function (including power purchase transactions made by the marketing function on behalf of wholesale native load) from the transmission operations function. This means that those persons in the company that are involved in wholesale power purchases as well as wholesale sales cannot interact with the transmission personnel other than through the OASIS. Thus, to the extent they are making purchases on behalf of wholesale as well as bundled retail native load as part of a single purchase, they will have to abide by the separation of function requirement * * * [S]uch a purchase is not divisible. Additionally, it is conceivable that there could be a separate retail marketing function for native load and a separate wholesale marketing function for native load * * * [I]n such cases, it would clearly be inappropriate for the retail staff to share transmission information with the wholesale marketing staff.).

Commission will consider case-specific requests for exemption.[10]

B. Definition of a Transmission Function Employee

Order No. 2004, *et seq.*

26. Section 358.3(j) defines a Transmission Function Employee as an employee, contractor, consultant or agent of a Transmission Provider who conducts transmission system operations or reliability functions, including, but not limited to, those who are engaged in day-to-day duties and responsibilities for planning, directing, organizing or carrying out transmission-related operations. Order No. 2004–A clarified, and Order No. 2004–B reiterated, that the Commission looks at the actual duties and responsibilities of employees in determining whether individuals are Transmission Function Employees.[11]

Requests for Rehearing and/or Clarification and Commission Conclusions

27. EEI and AGA seek additional clarification of the term Transmission Function Employee following the Commission's issuance of Alcoa Power Generating, Inc., 108 FERC ¶ 61,243 (2004).[12] Petitioners are concerned that Commission's wording of *Alcoa* could be read to suggest that all transmission rate design and transmission tariff administration duties are deemed transmission functions. EEI and AGA seek clarification with regard to the applicability of the designation of Transmission Function Employee to rate design and transmission tariff administration employees. With regard to rate design employees, EEI and AGA request clarification that, to the extent that employees who do not engage in other Transmission Functions, may engage in traditional accounting and regulatory cost-of-service support activities for designing transmission rates without becoming Transmission Function Employees. EEI and AGA claim that for many of their members, rate design duties are not assigned to a dedicated staff, but rather spread over a large number of employees with other shared roles.

28. With regard to tariff administration employees, EEI and AGA request clarification that the Commission did not intend to make a blanket determination that all such employees were Transmission Function Employees, but rather that the status of each such employee should be determined by his or her job description. EEI and AGA urge the Commission to clarify that an employee who performs billing or administrative support should not be deemed a Transmission Function Employee even if the employee is located in the ''tariff administration'' department. EEI and AGA claim that these employees are ''back-office support employees'' and do not offer transmission service, execute service agreements, negotiate terms or service or approve service, and should qualify for the support exemption under § 358.4(a)(4).[13]

29. With respect to rate-design employees, petitioners offer few details about the specific duties of employees who engage in accounting and regulatory cost-of-service support roles. Rate design is an integral element of the transmission function. As discussed in the *Alcoa* order, activities such as designing rates, administering tariffs (which establish rates for services as well as the terms and conditions of service for the transmission of electricity or transportation of natural gas, including operating conditions), and calculating gas cost adjustment charges are transmission functions that involve the planning and carrying-out of transmission-related operations. See *Alcoa* at P 169. Petitioners urge the Commission to consider Ameren Services Co., in which the Commission permitted the sharing of rate design functions and found that none of the rate design individuals described by a particular company directed, organized or executed transmission/reliability or wholesale merchant functions.[14] Petitioners urge the Commission to continue to review these issues on a case-by-case basis rather than make a blanket determination that all rate design employees are Transmission Function Employees.

30. The Commission grants the requested clarification, and reiterates our prior commitment to consider the actual duties and responsibilities of employees in determining whether they are Transmission Function Employees. However, to provide additional guidance to Transmission Providers, we also clarify that there are certain rate design functions that will be considered Transmission Functions because rates are an integral part of transmission service.

31. With regard to tariff administration employees, the Commission clarifies that it did not make a blanket determination that all tariff administration employees are automatically deemed Transmission Function Employees. As previously stated, the Commission will look at the actual duties and responsibilities of employees in determining whether they are Transmission Function Employees. However, an employee that is involved in certain tariff-related activities, such as determining whether discretion may be granted under the tariff or applying tariff provisions, is a Transmission Function Employee.

C. Independent Functioning—Treatment of Electricity Provider of Last Resort Service (POLR)

Order No. 2004–B

32. Order 2004–A explained, in response to a request for clarification from Cinergy, that the Commission was not prepared to adopt a proposed rule change and amendment to the definition of ''marketing, sales or brokering'' to accord POLR service the same treatment, on a generic basis, as the Commission had accorded bundled retail sales, but that it would entertain case-by-case requests for exemption of a POLR service based on the relevant facts and circumstances.[15]

Requests for Rehearing and/or Clarification and Commission Conclusions

33. Cinergy is concerned that Order Nos. 2000, 2000–A and 2000–B could be interpreted to classify the retail account representatives of its affiliates, Cincinnati Gas & Electric Company (CG&E) and Union Light, Heat & Power Company (ULH&P), as sales and marketing employees or Energy Affiliate employees subject to the independent functioning and information sharing restrictions, even though CG&E provides only POLR gas and electric services in Ohio, and ULH&P provides only bundled gas and electric services in greater Cincinnati's Northern Kentucky communities (where competitive retail gas and electric markets have not been adopted).

34. Cinergy requests that the Commission find that the activities of the account representatives do not fall within the definition of sales and marketing employees at § 358.3(e). But, if they should be classified as sales and

[10] We note that National Grid has requested a case-specific exemption in Docket No. TS04–46–000, which will be addressed separately by the Commission.

[11] *See* Order No. 2004–A at P 131 and Order No. 2004–B at P 53.

[12] In *Alcoa,* the Commission addressed several requests for exemption from the Standards of Conduct.

[13] Under 18 CFR 358.4(a)(4), Transmission Providers are permitted to share support employees and field and maintenance employees with their Marketing and Energy Affiliates.

[14] 87 FERC ¶ 61,145 at 61,598 (1999).

[15] Order No. 2004–A at P 127.

marketing employees or Energy Affiliate employees, Cinergy requests an exemption from the independent functioning and information sharing restrictions for their account representatives because, Cinergy argues, in their limited roles, they cannot cause any harmful effects to the retail or wholesale competitive marketplace.

35. As the Commission explained in Order No. 2004–A, the question of the status of shared employees in the context of a state retail access program or as a provider of last resort is best decided on a case-specific basis. To the extent Cinergy seeks clarification of that policy, Cinergy's request is denied. Further, we are not prepared to grant any of Cinergy's requests at this time. While Cinergy has committed to ensuring that the account representatives will not act as conduits for passing transmission system information to its sales and marketing personnel or to any Energy Affiliate, Cinergy also seeks an exemption for these employees from the information sharing and independent functioning requirements. This request for exemption appears to be inconsistent with its no-conduit commitment. We need more explanation as to how the no-conduit commitment will work in practice in combination with the apparent need for an information sharing and independent functioning exemption if the Commission were to classify the retail account representatives as sales and marketing employees or Energy Affiliate employees.

36. Accordingly, we direct the Secretary to redocket Cinergy's request in the next available TS Docket, and we direct Cinergy to explain its implementation of the no-conduit rule in the context of its account representatives. The Commission will process this filing subsequently as a request for waiver or exemption specific to Cinergy's unique circumstances.

D. Information To Be Posted on the Internet or OASIS

i. Discretionary Waivers

Order No. 2004, et seq.

37. In Order No. 2004, the Commission stated that a Transmission Provider must maintain a written log, available for Commission audit, detailing the circumstances and manner in which it exercised its discretion under any terms of its tariff. The Commission further required that the Transmission Provider post the information in this log on the OASIS or Internet Web site within 24 hours of when the Transmission Provider exercises its discretion under any terms of the tariff. See § 358.5(c)(4) of the Commission's regulations.

Requests for Rehearing and/or Clarification and Commission Conclusions

38. INGAA seeks clarification that when discretion is exercised under a Transmission Provider's tariff, the details contained in the written log must be posted online on the following business day, as opposed to within 24 hours, consistent with § 385.2007. INGAA argues, for example, that if the act of discretion occurs on a Friday afternoon, the Transmission Provider could post the information on Monday. INGAA submits that requiring the posting within 24 hours would require Transmission Providers to hire additional staff to be available on non-business days to review and post discretionary waivers that is not justified since shippers and potential shippers would not likely be reviewing the postings on non-business days.

39. The Commission denies INGAA's request. Under INGAA's scenario, the Transmission Provider could wait until 5 p.m. on Monday to post the information concerning its act of discretion that took place on Friday. This is insufficient notice. If a Transmission Provider exercises discretion by waiving a nomination/scheduling deadline or gas quality provision, and the Transmission Provider posts the information on the next business day rather than within 24 hours, the shipper or potential shipper may not learn of the discretionary act until it is too late to benefit from the posting. Gas control centers operate 24 hours a day, seven days a week and daily changes occur, even on the weekends and holidays. The goal of the requirement is to ensure that if a Transmission Provider exercises discretion, all shippers or potential shippers have timely access to information concerning that discretion so that, if appropriate, they can, on a non-discriminatory basis, obtain comparable service.

ii. Discounts

Order No. 2004, et seq.

40. Under § 358.5(d), any offer of a discount for any transmission service made by the Transmission Provider must be posted on the OASIS or Internet Web site contemporaneously with the time that the offer is contractually binding. One of the elements of the discount posting includes the requirement to identify the quantity of power or gas scheduled to be moved.[16] Following Order No. 2004–A, INGAA requested clarification and urges the Commission to require the posting of the firm maximum daily contract quantity or, for interruptible transportation, the quantity of gas to which the shipper is entitled, instead of requiring the quantity ''scheduled.'' INGAA explained that while the parties agree on the quantity of the shipper's entitlement at the time they enter into the contract, they typically do not know what quantities will actually be nominated and scheduled until later when service begins under the contract. The Commission denied INGAA's request in Order No. 2004–B. See Order No. 2004–B at P 131.

Requests for Rehearing and/or Clarification and Commission Conclusions

41. INGAA repeats its request for clarification that Internet postings of transmission service provided at a discount should refer to the quantity of gas that the shipper is entitled to take under the contract, rather than the quantity of gas that is actually scheduled. INGAA argues that the Commission, in denying its previous request for clarification of Order No. 2004–A, misunderstood the problem INGAA was identifying, which is that the quantities that the contracts reference are the maximum quantities that the contracts permit to be scheduled, and that the actual amounts scheduled may be less than the contract amount. INGAA argues that the requested clarification that Transmission Providers must post the contract quantities on the Internet instead of the scheduled quantities will ''provide other shippers with timely, pertinent discount contract quantity information to determine whether they are entitled to ''comparable discount'' as similarly situated shippers.''

42. The Commission recognizes that the Transmission Provider may not know, at the time the offer is contractually binding, the actual quantity that will later be ''scheduled.'' However, the Commission disagrees with INGAA's claim that the discount contract applies to the maximum quantity that the shipper is entitled to nominate and have scheduled at that discounted rate. Discount procedures vary significantly among pipelines and for different types of service on the same pipeline. Contrary to INGAA's assertion,

[16] Using the quantity of gas scheduled to be moved as an element of the discount posting requirement is consistent with the former gas standards of conduct at former 18 CFR 161.3(h)(2).

the maximum daily contract amount does not always reflect the volume on which the discount was based. For example, under umbrella-type interruptible transportation agreements, short-term discounts are often negotiated for less than the MDQ identified in the IT transportation agreement, and posting the MDQ would provide misleading information about the discount.

43. The goal of the discount requirement is to post pertinent information so a similarly situated shipper can determine if it is entitled to a comparable discount. There may be instances in which the MDQ is the appropriate information to post vis-à-vis volume, but there are also instances in which the amount scheduled more accurately reflects the information used by the Transmission Provider as a basis for granting a discount. With that in mind, the Commission clarifies that the volume reported for the discount postings should be the volume identified in the discount request or relied upon as part of the consideration upon which a specific discount is granted. A Transmission Provider must identify whether it is posting the volumetric information based on the MDQ or scheduled volume. The Commission will modify the following portion of the regulatory text at § 358.5(d) by deleting the phrase ''the quantity of power or gas scheduled to be moved,'' and replacing it with the phrase ''the quantity of power or gas upon which the discount is based.''

E. Applicability of the Standards of Conduct to Newly Formed Transmission Providers

Order No. 2004–B

44. In Order No. 2004–B, the Commission established that a new pipeline will have a reasonable time (30 days) after it accepts its certificate of public convenience or otherwise becomes subject to the Commission's jurisdiction (whichever comes first) to come into compliance with the Standards of Conduct.[17]

Requests for Rehearing and/or Clarification and Commission Conclusions

45. Tractebel and AES seek clarification that companies which have obtained certificates allowing them to construct pipelines, but which have not yet begun transporting natural gas for others, are not yet natural gas companies, and therefore the Standards of Conduct do not apply to them. Tractebel points to section 2(6) of the Natural Gas Act and the Commission's interpretation of that section in Millennium Pipeline Co., 100 FERC ¶ 61,277 at P 121 and 124, where the Commission found that Millennium Pipeline Co. had not completed construction of its pipeline and therefore was not yet a natural gas company. Tractebel further argues that a pre-operational pipeline is not a Transmission Provider as that term is defined in § 358.3(2) because it has not yet begun providing transportation service. Similarly, AES requests clarification that it need not comply with the separation of functions requirement until it has ''transmission function employees,'' as defined in § 358.3(j), and until it commences ''transmission,'' as defined in § 358.3(f). AES also requests clarification that in the pre-service stage of development, it need not comply with the posting, training or separation of function requirements contained in Standards of Conduct. Tractebel and AES both point to the Commission's statement in Order No. 2004–A at P 237 that ''some aspects of the Standards of Conduct may have no meaningful applicability until the company has been staffed and begins to perform transmission functions, such as soliciting business, or negotiating contracts.''

46. As noted by Petitioners, the Commission previously stated that some of the Standards of Conduct requirements may not apply until the Transmission Provider has been staffed and begins to perform transmission functions. However, when a Transmission Provider begins soliciting business or negotiating, it is engaging in transmission functions and is subject to the Standards of Conduct requirements. The Commission's goal is to ensure that the newly formed pipeline will provide non-discriminatory treatment and limit its ability to unduly favor its Marketing or Energy Affiliates. If the Commission defers applying the Standards of Conduct, a newly formed pipeline might share employees or information with its Marketing or Energy Affiliates giving those affiliates the ability to obtain preferential service or treatment.

F. Exemptions

Order No. 2004, *et seq.*

47. In Order No. 2004, the Commission established that Transmission Providers that did not previously obtain an exemption may request an exemption under § 358.1(d) from all or some of the requirements of Part 358.[18]

Requests for Rehearing and/or Clarification and Commission Conclusions

48. NGSA seeks clarification that §§ 358.5(c) and (d) generally should not be waived absent extraordinary circumstances justifying such a waiver.[19] NGSA argues that these provisions are generally applicable standards of conduct that prevent unduly discriminatory behavior, and that waiver of such provisions for gas Transmission Providers that do not have Energy Affiliates inadvertently eliminates important protections that should apply to all pipeline operations regardless of whether any Energy Affiliate relationships exist. Specifically, NGSA argues that the complete exemption from the Standards of Conduct granted to Texas Gas Transmission Company (Texas Gas) may lead to the unduly discriminatory treatment of shippers on Texas Gas's system, and that Texas Gas should only be granted a waiver from those Standards of Conduct that apply specifically to affiliate relationships.[20]

49. In response, Texas Gas argues that the Commission's finding is consistent with the Commission's policy under the former Part 161 Standards of Conduct in which a Transmission Provider was not subject to the Standards of Conduct if it had no Marketing Affiliates.[21] Moreover, Texas Gas argues that it is still bound to provide service that is not unduly discriminatory under the requirements of sections 4 and 5 of the Natural Gas Act (NGA). The Commission denies NGSA's request. As Texas Gas states, the Commission's determination was limited to a single Transmission Provider with unique circumstances. If Texas Gas obtains a Marketing or Energy Affiliate, it must comply with the Standards of Conduct requirements of Order No. 2004 within 30 days of obtaining or creating a Marketing or Energy Affiliate. Finally, as noted above, Texas Gas is bound by the provisions of sections 4 and 5 of the

[17] Order No. 2004–B at P 137.

[18] *See* Order No. 2004 at P 28.

[19] Sections 358.5(c) and (d) contain provisions requiring the Transmission Provider to implement tariffs on a non-discriminatory manner and to post discounts.

[20] On September 20, 2004, in Docket No. TS04–253–000, the Commission determined that Texas Gas Transmission Company (Texas Gas) was not subject to Order No. 2004 because Texas Gas does not have any Marketing or Energy Affiliates. See Alcoa at P 108. NGSA's petition was filed in the instant docket, as well as in the TS04–253 docket, with a request for an untimely intervention, which Texas Gas opposed.

[21] See Discovery Gas Transmission LLC, 103 FERC ¶ 61,301 at 62,170 (2003).

NGA to provide non-discriminatory service and the non-discriminatory provisions of the Standards of Conduct regarding the implementation of tariffs should serve as a guideline for Texas Gas's behavior in complying with sections 4 and 5 of the NGA.

G. Miscellaneous Corrections

50. The Commission is also making some miscellaneous corrections to typographical errors in the regulatory text. Specifically, Entergy has pointed out that § 358.4(b)(3)(vi) contains a reference to § 37.3 which Entergy believes should be § 37.6. The Commission agrees, and § 358.4(b)(3)(vi) is being corrected to reference § 37.6. Also, § 358.3(d)(6)(vi) is revised to remove ''producer'' and replace it with ''processor'' to reflect the Commission's intent of this provision as described in paragraph 30 of Order No. 2004–B.

By the Commission.

Linda Mitry,

Deputy Secretary.

■ In consideration of the foregoing, the Commission amends part 358, Chapter I, Title 18 of the Code of Federal Regulations, as follows:

PART 358—STANDARDS OF CONDUCT

■ 1. The authority citation for part 358 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

§ 358.3 [Amended]

■ 2. In § 358.3(d)(6)(vi) the word ''producer'' is removed and the word ''processor'' is inserted in its place.

§ 358.4 [Amended]

■ 3. In § 358.4(b)(3)(vi) the word ''§ 37.3'' is removed and the word ''§ 37.6'' is inserted in its place.

§ 358.5 [Amended]

■ 4. In § 358.5(d), the words ''the quantity of power or gas scheduled to be moved'' are removed and the words ''the quantity of power or gas upon which the discount is based,'' are inserted in their place.

Note: This Appendix A will not be published in the Code of Federal Regulations.

Appendix A

List of Petitioners Requesting Rehearing or Clarification or submitting Comments
American Gas Association (AGA)
AES Ocean Express LLC (AES)
Algonquin Gas Transmission, LLC; jointly with East Tennessee Natural Gas, LLC; Egan Hub Storage, LLC; Gulfstream Natural Gas System, L.L.C.; Maritimes & Northeast Pipeline, L.L.C.; and Texas Eastern Transmission, LP (collectively, Duke Pipelines)
Calpine Corporation (Calpine)
Cinergy Services, Inc. (Cinergy)
Edison Electric Institute (EEI)
Entergy Services, Inc. (Entergy)
Interstate Natural Gas Association of America (INGAA)
National Fuel Gas Supply Corporation jointly with National Fuel Gas Distribution Corporation (collectively, National Fuel)
National Grid USA (National Grid)
Natural Gas Supply Association (NGSA)
OkTex Pipeline Company (OkTex)
Public Service Commission of the State of New York (PSC New York)
Southwest Gas Corporation (Southwest Gas)
Tractebel Calypso Pipeline, LLC (Tractebel)
Utah Public Service Commission (Utah PSC)
Wyoming Public Service Commission (Wyoming PSC)

[FR Doc. 05–16 Filed 1–3–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1304, 1306, and 1310

[Docket No. DEA–234F]

RIN 1117–AA71

Recordkeeping and Reporting Requirements for Drug Products Containing Gamma-Hydroxybutyric Acid (GHB)

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Final rule.

SUMMARY: DEA is amending its regulations to require additional recordkeeping and reporting requirements for drug products containing gamma-hydroxybutyric acid (GHB) for which an application has been approved under the Federal Food, Drug, and Cosmetic Act. DEA makes these changes under section 4 of the ''Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000.'' These additional requirements are necessary to protect against the diversion of GHB for illicit purposes.

EFFECTIVE DATE: February 3, 2005.

FOR FURTHER INFORMATION CONTACT: Patricia M. Good, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537. Telephone (202) 307–7297.

SUPPLEMENTARY INFORMATION:

Controlled Substances and Listed Chemicals

Controlled substances are drugs that have a potential for abuse and addiction; these include opiates, stimulants, depressants, hallucinogens, anabolic steroids, and substances that are immediate precursors to these controlled substances. Controlled substances are listed in 21 CFR part 1308. The substances are divided into five schedules. Schedule I substances are drugs for which there is a high potential for abuse, no currently accepted medical treatment in use in the United States, and lack accepted safety for use under medical supervision. Schedule II–V substances have accepted medical uses, but have a potential for abuse and may lead to physical and psychological dependence. Such drugs are subject to varying levels of control. Chemicals that can be used to manufacture controlled substances are regulated as either List I chemicals (important to the manufacture) or List II chemicals (used in the manufacture) of controlled substances.

Background

Gamma-Hydroxybutyric acid (GHB) is a central nervous system depressant drug. In recent years, the abuse of GHB has increased substantially. GHB is abused for its euphoric and purported hallucinogenic effects, as well as for its alleged role as an agent to stimulate muscle growth. GHB can produce drowsiness, dizziness, nausea, visual disturbances, unconsciousness, seizures, severe respiratory depression, coma, and death.

GHB can be produced in clandestine laboratories using a relatively simple synthesis with readily available and inexpensive source materials. Gamma-Butyrolactone (GBL), a List I chemical, is an industrial chemical that is used in the illicit manufacture of GHB. GBL and 1,4-butanediol, another industrial chemical, are also abused for their GHB-like effects. Due to their structural and pharmacological similarities to GHB, GBL and 1,4-butanediol are considered controlled substance analogues as defined by 21 U.S.C. 802(32). Manufactured GHB usually results in a clear solution that can be disguised by adding food coloring, flavorings, or storing it in different kinds of bottles and containers.

The listed chemical GBL has many industrial applications, and has not been scheduled at this time to prevent an undue regulatory burden to legitimate commerce in this substance. Because GBL is a controlled substance analogue, individuals who manufacture or distribute or possess with intent to manufacture or distribute this chemical intending it for human consumption may be prosecuted under provisions of the Controlled Substances Act. This is

because a controlled substance analogue which is intended for human consumption is treated as a Schedule I controlled substance. When handled for industrial purposes, with no intent for human consumption, it is not treated as a Schedule I controlled substance and those handling it are not subject to any Schedule I controlled substances penalties under the Controlled Substances Act.

Regulatory History

On February 18, 2000, the ''Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000'' was enacted (Pub. L. 106–172, 114 Stat. 7). Public Law 106–172 declared GHB an imminent hazard to public safety that required immediate regulatory action under the Controlled Substances Act. Public Law 106–172 required the Attorney General to list GHB as a Schedule I controlled substance and designated GBL as a List I chemical. As a result of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act, DEA issued two final rules: Schedules of Controlled Substances: Addition of Gamma-Hydroxybutyric Acid to Schedule I (65 FR 13235, March 13, 2000) (corrected at 65 FR 17440, April 3, 2000) and Placement of Gamma-Butyrolactone in List I of the Controlled Substances Act (21 U.S.C. 802(34)) (65 FR 21645, April 24, 2000).

Under the March 13, 2000 final rule, GHB and its salts, isomers, and salts of isomers were placed in Schedule I, and GHB became subject to the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, dispensing, importing, and exporting of a Schedule I controlled substance. As required by the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act, the March 13, 2000 final rule created an exception for drug products containing GHB, including its salts, isomers, and salts of isomers, for which an application is approved under section 505 of the Federal Food, Drug, and Cosmetic Act (FDCA) (21 U.S.C. 355). The exception placed any such drug products—there were none approved at the time the legislation was passed—in Schedule III. Therefore, registered manufacturers and distributors of FDA-approved drug products containing GHB are subject to Schedule III regulatory requirements. However, criminal penalties for unlawful distributions of these drug products are those for Schedule I controlled substances.

On July 17, 2002, the Food and Drug Administration (FDA) approved Xyrem, a drug product containing gamma-hydroxybutyric acid, as a drug for the treatment of cataplexy associated with narcolepsy.

Notice of Proposed Rulemaking

The March 13, 2000 final rule did not address the recordkeeping and reporting requirements recommended by the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act for drug products containing GHB for which an application is approved under section 505 of the FDCA. On November 25, 2003 DEA issued a notice of proposed rulemaking (68 FR 66048) to establish requirements to prevent the diversion of Schedule III GHB drug products for illicit purposes as was intended by Congress as part of the regulatory scheme for these products. DEA received no comments in response to the November 25, 2003 notice of proposed rulemaking and is adopting the rule language as proposed.

In response to section 4 of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act, this rule establishes recordkeeping requirements for practitioners dispensing Schedule III GHB drug products and reporting requirements for manufacturers and distributors of Schedule III GHB drug products. Under existing 21 CFR 1304.22(c), dispensers of any controlled substance, including GHB, are required to maintain the name and address of the person to whom the controlled substance was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or typewritten name or initials of the individual who dispensed or administered the substance on behalf of the dispenser. This final rule adds 21 CFR 1304.26, which requires pharmacies and practitioners dispensing GHB to maintain and make available for inspection the name of the prescribing practitioner, the prescribing practitioner's Federal and State registration numbers with expiration dates, verification that the prescribing practitioner possesses appropriate registration, and the patient's insurance provider, if available. Section 4 of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act also recommended that DEA establish a recordkeeping requirement for ''documentation by a medical practitioner licensed and registered to prescribe the drug of the patient's medical need for the drug.'' Part of this recommendation is satisfied by existing DEA requirements in 21 CFR 1306.04 which state that prescriptions ''must be issued for a legitimate medical purpose.'' To further satisfy this statutory requirement, DEA has amended 21 CFR 1306.05 to require that the medical need be written on the prescription.

This final rule also amends 21 CFR 1304.33 to include Schedule III GHB drug products as controlled substances that must be reported under the Automation of Reports and Consolidated Orders System (ARCOS). ARCOS is an automated, comprehensive drug reporting system that monitors the flow of DEA controlled substances from their point of manufacture through commercial distribution channels to point of sale or distribution at the dispensing/retail level, *e.g.*, hospitals, retail pharmacies, practitioners, mid-level practitioners, and teaching institutions. Included in the list of controlled substance transactions tracked by ARCOS are the following: All Schedules I and II materials (manufacturers and distributors); Schedule III narcotic materials (manufacturers and distributors); and selected Schedules III and IV psychotropic controlled substances (manufacturers only). This final rule adds Schedule III GHB drug products to this list for both manufacturers and distributors.

In addition, section 4 of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act recommended that DEA apply the mail order reporting requirements of 21 U.S.C. 830(b)(3) to ''gamma hydroxybutyric acid to the same extent and in the same manner as such section applies with respect to the chemicals and drug products specified in subparagraph (B)(i) of such section.'' DEA has complied with these recommendations in this final rule by amending 21 CFR 1310.03(c), which makes GHB subject to mail order requirements established under the Methamphetamine Anti-Proliferation Act of 2000 (MAPA) (Title XXXVI of the ''Children's Health Act of 2000'' (Pub. L. 106–310, 114 Stat. 1101)). The Methamphetamine Anti-Proliferation Act of 2000 imposed mail order reporting requirements for export transactions involving ephedrine, pseudoephedrine, or phenylpropanolamine. These reporting requirements do not apply to distributions of drug products, including GHB, under a valid prescription, which were excluded under MAPA (21 U.S.C. 830(b)(3)(D)). Regulations implementing MAPA were published October 7, 2003 (68 FR 57799). The net effect is that all export transactions involving GHB must be reported to DEA. Transactions involving prescriptions of GHB are not required to be reported to DEA.

Regulatory Certifications

Regulatory Flexibility Act

The Deputy Assistant Administrator certifies that this rulemaking has been drafted in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)). The Deputy Assistant Administrator has reviewed this regulation, and by approving it certifies that it will not have a significant economic impact upon a substantial number of small entities. This rulemaking creates new recordkeeping and reporting requirements which will have an extremely limited impact on a small number of registrants due to the restricted use of GHB for legitimate medical purposes. As a condition of Xyrem's (the FDA-approved product containing GHB) approval, a risk management program was designed to limit its distribution. Under this program, Xyrem will only be available to physicians and patients through a single centralized pharmacy. As a result of this program, at this time, controlled substance distributors and retail pharmacies will not be handling Xyrem and, thus, will not be affected by these requirements. For those few persons affected by these regulations, the information requested by these added records is readily and commonly available, and due to the limited distribution of GHB, the impact on reporting requirements should be minimal.

Executive Order 12866

The Deputy Assistant Administrator further certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, Section 1(b). This action has been determined to be a ''significant regulatory action'' under Executive Order 12866, and accordingly this rule has been reviewed by the Office of Management and Budget.

Executive Order 12988

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

Executive Order 13132

This rulemaking does not preempt or modify any provision of State law; nor does it impose enforcement responsibilities on any State; nor does it diminish the power of any State to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $114.5 million or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act

While, technically, this rule requires new, minimal recordkeeping and reporting requirements for drug products containing GHB, DEA does not believe that these recordkeeping and reporting requirements create any greater hour or cost burden for respondents than what already exists. Records required to be maintained by dispensing practitioners under 21 CFR 1304.26, including the prescribing practitioner's name, address, state license and federal registration numbers, and the patient's insurance provider (if available) are all records which are maintained as a usual course of professional practice by a dispensing practitioner. The reporting requirements in 21 CFR 1304.33 are part of an already-approved collection of information (OMB 1117–0003: ARCOS Transaction Reporting—DEA Form 333). DEA believes that the additional reporting requirements will have no impact on the hour or cost burden for respondents as reports are generated and submitted electronically. As has been stated previously, due to the risk management plan established for Xyrem (the FDA-approved drug product containing GHB) this product has an extremely limited distribution potential. Because of the nature of this product's distribution, DEA anticipates that fewer than five persons will be impacted by the requirement to report handling Schedule III GHB products to ARCOS, and those persons are already filing reports with DEA for other controlled substances handled. The system modifications necessary to generate this report will occur as a normal part of a registrant's handling of this product. Therefore, DEA is not submitting any changes or amendments to its active information collections under the Paperwork Reduction Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

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

List of Subjects

21 CFR Part 1304

Drug traffic control, Reporting and recordkeeping requirements.

21 CFR Part 1306

Drug traffic control, Prescription drugs.

21 CFR Part 1310

Drug traffic control, List I and List II chemicals, Reporting and recordkeeping requirements.

■ For the reasons set out above, 21 CFR parts 1304, 1306, and 1310 are amended as follows:

PART 1304—RECORDS AND REPORTS OF REGISTRANTS

■ 1. The authority citation for 21 CFR part 1304 continues to read as follows:

Authority: 21 U.S.C. 821, 827, 871(b), 958, 965, unless otherwise noted.

■ 2. Section 1304.22 is amended by revising paragraph (c) to read as follows:

§ 1304.22 Records for manufacturers, distributors, dispensers, researchers, importers and exporters.

* * * * *

(c) *Records for dispensers and researchers.* Each person registered or authorized to dispense or conduct research with controlled substances shall maintain records with the same information required of manufacturers pursuant to paragraph (a)(2)(i), (ii), (iv), (vii), and (ix) of this section. In addition, records shall be maintained of the number of units or volume of such finished form dispensed, including the name and address of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or typewritten name or initials of the individual who dispensed or administered the substance on behalf of the dispenser. In addition to the requirements of this paragraph, practitioners dispensing gamma-hydroxybutyric acid under a prescription must also comply with § 1304.26.

* * * * *

■ 3. Section 1304.26 is added to read as follows:

§ 1304.26 Additional recordkeeping requirements applicable to drug products containing gamma-hydroxybutyric acid.

In addition to the recordkeeping requirements for dispensers and researchers provided in § 1304.22, practitioners dispensing gamma-hydroxybutyric acid that is manufactured or distributed in accordance with an application under section 505 of the Federal Food, Drug, and Cosmetic Act must maintain and make available for inspection and copying by the Attorney General, all of the following information for each prescription:

(a) Name of the prescribing practitioner.

(b) Prescribing practitioner's Federal and State registration numbers, with the expiration dates of these registrations.

(c) Verification that the prescribing practitioner possesses the appropriate registration to prescribe this controlled substance.

(d) Patient's name and address.

(e) Patient's insurance provider, if available.

■ 4. Section 1304.33 is amended by revising paragraph (c) and the introductory text of paragraph (d)(1) to read as follows:

§ 1304.33 Reports to ARCOS.

* * * * *

(c) *Persons reporting.* For controlled substances in Schedules I, II, narcotic controlled substances in Schedule III, and gamma-hydroxybutyric acid drug product controlled substances in Schedule III, each person who is registered to manufacture in bulk or dosage form, or to package, repackage, label or relabel, and each person who is registered to distribute, including each person who is registered to reverse distribute, shall report acquisition/distribution transactions. In addition to reporting acquisition/distribution transactions, each person who is registered to manufacture controlled substances in bulk or dosage form shall report manufacturing transactions on controlled substances in Schedules I and II, each narcotic controlled substance listed in Schedules III, IV, and V, gamma-hydroxybutyric acid drug product controlled substances in Schedule III, and on each psychotropic controlled substance listed in Schedules III and IV as identified in paragraph (d) of this section.

(d) *Substances covered.* (1) Manufacturing and acquisition/distribution transaction reports shall include data on each controlled substance listed in Schedules I and II, on each narcotic controlled substance listed in Schedule III (but not on any material, compound, mixture or preparation containing a quantity of a substance having a stimulant effect on the central nervous system, which material, compound, mixture or preparation is listed in Schedule III or on any narcotic controlled substance listed in Schedule V), and on gamma-hydroxybutyric acid drug products listed in Schedule III. Additionally, reports on manufacturing transactions shall include the following psychotropic controlled substances listed in Schedules III and IV:

* * * * *

PART 1306—PRESCRIPTIONS

■ 5. The authority citation for part 1306 continues to read as follows:

Authority: 21 U.S.C. 821, 829, 871(b) unless otherwise noted.

■ 6. Section 1306.05 is amended by revising paragraph (a) to read as follows:

§ 1306.05 Manner of issuance of prescriptions.

(a) All prescriptions for controlled substances shall be dated as of, and signed on, the day when issued and shall bear the full name and address of the patient, the drug name, strength, dosage form, quantity prescribed, directions for use and the name, address and registration number of the practitioner. Where a prescription is for gamma-hydroxybutyric acid, the practitioner shall note on the face of the prescription the medical need of the patient for the prescription. A practitioner may sign a prescription in the same manner as he would sign a check or legal document (*e.g.*, J.H. Smith or John H. Smith). Where an oral order is not permitted, prescriptions shall be written with ink or indelible pencil or typewriter and shall be manually signed by the practitioner. The prescriptions may be prepared by the secretary or agent for the signature of a practitioner, but the prescribing practitioner is responsible in case the prescription does not conform in all essential respects to the law and regulations. A corresponding liability rests upon the pharmacist, including a pharmacist employed by a central fill pharmacy, who fills a prescription not prepared in the form prescribed by DEA regulations.

* * * * *

PART 1310—RECORDS AND REPORTS OF LISTED CHEMICALS AND CERTAIN MACHINES

■ 7. The authority citation for part 1310 is revised to read as follows:

Authority: 21 U.S.C. 802, 827(h), 830, 871(b) 890.

■ 8. Section 1310.03 is amended by revising paragraph (c) to read as follows:

§ 1310.03 Persons required to keep records and file reports.

* * * * *

(c) Each regulated person who engages in a transaction with a nonregulated person or who engages in an export transaction that involves ephedrine, pseudoephedrine, phenylpropanolamine, or gamma-hydroxybutyric acid, including drug products containing these chemicals, and uses or attempts to use the Postal Service or any private or commercial carrier must file monthly reports of each such transaction as specified in § 1310.05 of this part.

Dated: December 22, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. 05–56 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1310

[Docket No. DEA–137f2]

RIN 1117–AA31

Exemption of Chemical Mixtures; Correction

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Final rule with request for comment; correction.

SUMMARY: This document corrects the Final Rule with request for comment ''Exemption of Chemical Mixtures'' [Docket No. DEA–137f2, RIN 1117–AA31] which DEA published in the **Federal Register** on Wednesday, December 15, 2004 (69 FR 74957). The Final Rule concerned the exemption of certain chemical mixtures containing listed chemicals from the provisions of the Controlled Substances Act.

DATES: This correction is effective January 14, 2005.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, Ph.D., Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Telephone (202) 307–7183

SUPPLEMENTARY INFORMATION:

Background

On Wednesday, December 15, 2004, DEA published a Final Rule with request for comment entitled ''Exemption of Chemical Mixtures'' in the **Federal Register** (69 FR 74957). The aspect of the Final Rule subject to this correction concerns the amendatory instructions for 21 CFR 1310.04 in which DEA indicated that ''Section 1310.04 is to be amended by revising paragraph (h) and adding new paragraphs (i) and (j)''. However, it was not DEA's intent to add new paragraphs (i) and (j). DEA only intended to revise paragraph (h). Therefore, to alleviate any confusion which might arise regarding these amendatory instructions, DEA is correcting the amendatory instructions for 21 CFR 1310.04. No substantive changes to 21 CFR 1310.04 are occurring in this correction.

■ Accordingly, the publication on Wednesday, December 15, 2004 of the Final Rule with request for comment [Docket No. DEA–137f2, RIN 1117–AA31], which was the subject of FR Doc. 04–27449, is corrected as follows:

PART 1310—[CORRECTED]

■ 1. On page 74970, amendatory instruction 2 is corrected to read as follows: ''2. Section 1310.04 is amended by revising paragraph (h) to read as follows:''

Dated: December 27, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. 05–57 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 20 and 301

[TD 9172]

RIN 1545–BB12

Gross Estate; Election to Value on Alternate Valuation Date

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that amend § 20.2032–1(b) to reflect the change made to section 2032 of the Internal Revenue Code by the Deficit Reduction Act of 1984 and the technical change to that section made by the Tax Reform Act of 1986. In addition, the final regulations remove temporary regulation § 301.9100–6T(b) of the Procedure and Administration Regulations so that estates that fail to make the alternate valuation election on the last estate tax return filed before the due date of the return, or on the first estate tax return filed after the due date of the return may request an extension of time to make the election under the provisions of §§ 301.9100–1 and 301.9100–3. The final regulations affect estates that are required to file Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.

DATES: *Effective Date:* These regulations are effective January 4, 2005.

Applicability Date: For dates of applicability, *see* § 20.2032–1(h).

FOR FURTHER INFORMATION CONTACT: Theresa M. Melchiorre at (202) 622–7830 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On December 24, 2003, proposed regulations (REG–139845–02) were published in the **Federal Register** (68 FR 74534). The proposed regulations contained proposed amendments to the Estate Tax Regulations (26 CFR part 20) and the Procedure and Administration Regulations (26 CFR part 301) relating to the election under section 2032 to value a decedent's gross estate on the alternate valuation date. The proposed regulations reflected changes that were made to section 2032 by the Deficit Reduction Act of 1984, Public Law 98–369 (98 Stat. 494). Written comments were received on the proposed regulations, and a public hearing was held on June 3, 2004. The proposed regulations, with certain changes in response to the written and oral comments, are adopted as final regulations.

Summary of Comments and Explanation of Provisions

Determination of Eligibility To Make the Alternate Valuation Election

The proposed regulations provided that the alternate valuation election may be made only if the election results in a decrease both in the value of the gross estate and in the sum of the estate tax and generation-skipping transfer tax liability (reduced by credits allowable against these taxes). One commentator noted that it may not be possible to determine whether the election will reduce the sum of estate tax and generation-skipping transfer tax if the generation-skipping transfer tax will not be imposed until a later time, as in the case of a later taxable termination or taxable distribution. In response to this comment, the final regulations provide that the determination of whether there has been a decrease in the sum of the estate tax and generation-skipping transfer tax liability (reduced by credits allowable against these taxes) is made with reference to the estate tax and generation-skipping transfer tax payable by reason of the decedent's death.

Availability of Relief Under §§ 301.9100–1 and 301.9100–3

In view of the 1-year limitation imposed under section 2032(d)(2), the proposed regulations provided that no request for an extension of time to make the alternate valuation election under the provisions of §§ 301.9100–1 and 301.9100–3 will be granted if the request is submitted to the IRS more than 1 year after the due date of the return of tax imposed by section 2001 (including extensions of time actually granted). One commentator argued that the 1-year limitation in section 2032(d)(2) applies only to late-filed returns, and therefore should not limit the availability of relief under §§ 301.9100–1 and 301.9100–3 to make a late alternate valuation election if the taxpayer timely filed its return, but failed to make the election on the return. After considering the language and intent of section 2032 and §§ 301.9100–1 and 301.9100–3, the IRS and Treasury Department have determined that taxpayers may request relief under §§ 301.9100–1 and 301.9100–3, even after the expiration of the 1-year period, and that such relief may be granted (subject to the requirements of §§ 301.9100–1 and 301.9100–3) provided that the return of tax is filed no later than 1 year after the due date of the return (including extensions of time actually granted). This rule also will apply to requests under §§ 301.9100–1 and 301.9100–3 for an extension of time to make a protective election under section 2032.

The IRS and Treasury Department also have determined that taxpayers should be permitted to apply for relief under §§ 301.9100–1 and 301.9100–3 to make a late election under section 2056A to be treated as a Qualified Domestic Trust (QDOT). Like the alternate valuation election of section 2032, no election under section 2056A to be treated as a QDOT may be made on a return that is filed more than 1 year after the due date of the return (including extensions of time actually granted). Section 2056A(d). Thus, taxpayers will be permitted to apply for an extension of time under the provisions of §§ 301.9100–1 and 301.9100–3 to make an election under section 2056A(d), provided that the

return of tax is filed no later than 1 year after the due date of the return (including extensions of time actually granted).

Any taxpayer eligible for relief under §§ 301.9100–1 and 301.9100–3 to make the section 2032 election or the 2056A(d) election is encouraged to file promptly an application for relief and a claim for refund before the statute of limitations under section 6511 expires in the event the requested relief is granted.

Special Analyses

It has been determined that this final Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Theresa Melchiorre of the Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

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

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR parts 20 and 301 are amended as follows:

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

■ **Paragraph 1.** The authority citation for part 20 continues to read in part as follows:

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

■ **Par. 2.** Section 20.2032–1(b) is revised and paragraph (h) is added to read as follows:

§ 20.2032–1 Alternate valuation.

* * * * *

(b) *Method and effect of election*—(1) *In general.* The election to use the alternate valuation method is made on the return of tax imposed by section 2001. For purposes of this paragraph (b), the term *return of tax imposed by section 2001* means the last estate tax return filed by the executor on or before the due date of the return (including extensions of time to file actually granted) or, if a timely return is not filed, the first estate tax return filed by the executor after the due date, provided the return is filed no later than 1 year after the due date (including extensions of time to file actually granted). Once the election is made, it is irrevocable, provided that an election may be revoked on a subsequent return filed on or before the due date of the return (including extensions of time to file actually granted). The election may be made only if it will decrease both the value of the gross estate and the sum (reduced by allowable credits) of the estate tax and the generation-skipping transfer tax payable by reason of the decedent's death with respect to the property includible in the decedent's gross estate. If the election is made, the alternate valuation method applies to all property included in the gross estate and cannot be applied to only a portion of the property.

(2) *Protective election.* If, based on the return of tax as filed, use of the alternate valuation method would not result in a decrease in both the value of the gross estate and the sum (reduced by allowable credits) of the estate tax and the generation-skipping transfer tax liability payable by reason of the decedent's death with respect to the property includible in the decedent's gross estate, a protective election may be made to use the alternate valuation method if it is subsequently determined that such a decrease would occur. A protective election is made on the return of tax imposed by section 2001. The protective election is irrevocable as of the due date of the return (including extensions of time actually granted). The protective election becomes effective on the date on which it is determined that use of the alternate valuation method would result in a decrease in both the value of the gross estate and in the sum (reduced by allowable credits) of the estate tax and generation-skipping transfer tax liability payable by reason of the decedent's death with respect to the property includible in the decedent's gross estate.

(3) *Requests for extension of time to make the election.* A request for an extension of time to make the election or protective election pursuant to §§ 301.9100–1 and 301.9100–3 of this chapter will not be granted unless the return of tax imposed by section 2001 is filed no later than 1 year after the due date of the return (including extensions of time actually granted).

* * * * *

(h) *Effective date.* Paragraph (b) of this section is applicable to decedents dying on or after January 4, 2005. However, pursuant to section 7805(b)(7), taxpayers may elect to apply paragraph (b) of this section retroactively if the period of limitations for filing a claim for a credit or refund of Federal estate or generation-skipping transfer tax under section 6511 has not expired.

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 3.** The authority citation for part 301 continues to read in part as follows:

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

§ 301.9100–6T [Amended]

■ **Par. 4.** Section 301.9100–6T is amended by:

■ 1. Removing the language ''paragraph (b)(2)'' from paragraph (a)(2) introductory text, and adding the language ''paragraph (a)(2)'' in its place.

■ 2. Removing paragraph (b).

■ 3. Redesignating paragraphs (c) through (s) as paragraphs (b) through (r), respectively.

■ 4. Removing the language ''paragraph (c)(2)'' from the last sentence in newly designated paragraph (b)(2) and adding the language ''paragraph (b)(2)'' in its place.

■ 5. Removing the language ''paragraph (l)'' from the second, fourth and last sentences in newly designated paragraph (k) and adding the language ''paragraph (k)'' in its place.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: December 28, 2004.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 05–95 Filed 1–3–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF EDUCATION

34 CFR Part 36

Adjustment of Civil Monetary Penalties for Inflation

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Department of Education (Department) issues these final regulations to adjust the Department's civil monetary penalties (CMPs) for inflation.

DATES: These regulations are effective January 4, 2005.

FOR FURTHER INFORMATION CONTACT: Lisa Kanter, Office of the General Counsel, U.S. Department of Education, 400 Maryland Avenue, SW., room 6E205, Washington, DC 20202–2241. Telephone: (202) 401–8300.

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Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

SUPPLEMENTARY INFORMATION: The Federal Civil Penalties Adjustment Act of 1990 (Inflation Adjustment Act) (28 U.S.C. 2461 note), as amended by the Debt Collection Improvement Act of 1996 (DCIA) (31 U.S.C. 3701 note), provides for the regular evaluation of CMPs to ensure that they continue to maintain their deterrent value. As amended by the DCIA, the Inflation Adjustment Act requires that each agency issue regulations to adjust its CMPs beginning in 1996 and at least every 4 years thereafter. The Department's initial adjustment to each CMP was published in the **Federal Register** on November 18, 2002 (67 FR 69654) and became effective on the date of publication. Although it has not been 4 years since the Department's last adjustments, had the Department published adjustments in 1996 and 2000, it would now be time to adjust its CMPs. Accordingly, the Department is now making any necessary adjustments.

A CMP is defined in the statute as any penalty, fine, or other sanction that is (1) for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law; (2) assessed or enforced by an agency pursuant to Federal law; and (3) assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

The formula for the amount of a CMP inflation adjustment is prescribed by law and is not subject to the exercise of discretion by the Secretary of the Department of Education (Secretary). The adjustment reflects the percentage increase in the Consumer Price Index for all urban consumers (CPI–U) published by the Department of Labor from June of the calendar year in which the amount was last set or adjusted pursuant to law, to June of the calendar year preceding the adjustment.

Four of the Department's CMP were adjusted in 2002. These CMPs are (1) 20 U.S.C. 1082(g), which provides for a fine of up to $27,500 for violations by lenders and guaranty agencies of Title IV–B of the Higher Education Act of 1965, as amended (HEA), which authorizes the Federal Family Education Loan Program; (2) 20 U.S.C. 1094(c)(3)(B), which provides for a fine of up to $27,500 for an institution of higher education's violation of Title IV of the HEA, which authorizes various programs of student financial assistance; (3) 31 U.S.C. 1352(c)(1) and (c)(2)(A), which provide for a fine of $11,000 to $110,000 for recipients of Government grants, contracts, etc. that lobby Congress or the Executive Branch with respect to the award of Government grants and contracts; and (4) 31 U.S.C. 3802(a)(1) and (a)(2), which provide for a fine of up to $5,500 for false claims and statements made to the Government. For these four CMPs, not enough inflation has occurred since 2002 to require an adjustment under the Inflation Adjustment Act.

Two of the Department's CMPs were enacted as part of the Higher Education Amendments of 1998 (Pub. L. 105–244). These CMPs are 20 U.S.C. 1015(c)(5), which provides for a fine of up to $25,000 for failure by an institution of higher education (IHE) to provide information on the cost of higher education to the Commissioner of Education Statistics, and 20 U.S.C. 1027(f)(3), which provides for a fine of up to $25,000 for failure by an IHE to provide information to the State and the public regarding its teacher preparation programs. In 2002, when the Department last adjusted its CMPs, not enough inflation had occurred to require an adjustment to these CMPs under the Inflation Adjustment Act. At this time, however, there has been more than 10 percent inflation, warranting an adjustment for each of these CMPs. By statute, the Department's first adjustment of a CMP may not exceed 10 percent of such a penalty, and, therefore, we are adjusting these CMPs by 10 percent.

Two additional points regarding the Department's adjustments are worth noting. First, the Department is using the following CPI–U figures as measures of inflation: 163 for June 1998; 179.9 for June 2002; and 183.7 for June 2003. Second, the increases to the Department's CMPs due to these inflation adjustments apply only to violations that occur after the effective date of the adjustments.

Waiver of Proposed Rulemaking

Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. However, these regulations merely implement the statutory mandate to adjust CMPs for inflation. The regulations reflect administrative computations performed by the Department as prescribed by the statute and do not establish or affect substantive policy. Therefore, under 5 U.S.C. 553(b)(B), the Secretary has determined that public notice and comment are impracticable, unnecessary, and contrary to the public interest.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities. The formula for the amount of the inflation adjustments is prescribed by statute and is not subject to the exercise of discretion by the Secretary. These CMPs are infrequently imposed by the Secretary, and the regulations do not involve any special considerations that might affect the imposition of CMPs on small entities.

Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

Assessment of Educational Impact

Based on our own review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Number does not apply)

List of Subjects in 34 CFR Part 36

Claims, Fraud, Penalties.

Dated: December 28, 2004.

Eugene W. Hickok,

Deputy Secretary of Education.

■ For the reasons discussed in the preamble, the Secretary amends part 36 in title 34 of the Code of Federal Regulations as follows:

PART 36—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

■ 1. The authority citation for part 36 continues to read as follows:

Authority: 28 U.S.C. 2461 note and 31 U.S.C. 3701 note, unless otherwise noted.

■ 2. Section 36.2 is amended by revising Table I to read as follows:

§ 36.2 Penalty adjustment.

* * * * *

TABLE I, SECTION 36.2.—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

Statute	Description	New maximum (and minimum, if applicable) penalty amount
20 U.S.C. 1015(c)(5)	Provides for a fine of up to $25,000 for failure by an institution of higher education (IHE) to provide information on the cost of higher education to the Commissioner of Education Statistics.	$27,500.
20 U.S.C. 1027(f)(3)	Provides for a fine of up to $25,000 for failure by an IHE to provide information to the State and the public regarding its teacher-preparation programs.	$27,500.
20 U.S.C. 1082(g)	Provides for a civil penalty of up to $25,000 for violations by lenders and guaranty agencies of Title IV–B of the Higher Education Act of 1965, as amended (HEA), which authorizes the Federal Family Education Loan Program.	$27,500.
20 U.S.C. 1094(c)(3)(B)	Provides for a civil penalty of up to $25,000. for an institution of higher education's violation of Title IV of the Higher Education Act of 1965, as amended, which authorizes various programs of student financial assistance.	$27,500.
31 U.S.C. 1352(c)(1) and (c)(2)(A).	Provides for a civil penalty of $10,000 to $100,000 for recipients of Government grants, contracts, etc. that lobby Congress or the Executive Branch with respect to the award of Government grants and contracts.	$11,000 to $110,000.
31 U.S.C. 3802(a)(1) and (a)(2)	Provides for a civil penalty of up to $5,000. for false claims and statements made to the Government.	$5,500.

* * * * *

[FR Doc. 05–100 Filed 1–3–05; 8:45 am]

BILLING CODE 4000–01–P

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 533 and 552

GSAR Amendment 2004–05; GSAR Case 2004–G501 (Change 13)

RIN 3090–AH98

General Services Administration Acquisition Regulation; Disputes and Appeals

AGENCIES: General Services Administration (GSA), Office of the Chief Acquisition Officer.

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) to add a clause that supplements the Disputes clause in the Federal Acquisition Regulation (see 48 CFR Chapter 1).

DATES: Effective Date: January 4, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Laurieann Duarte, Regulatory Secretariat (VIR), Room 4035, GS Building, Washington, DC, 20405, (202) 501–4225, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775. Please cite Amendment 2004–05, GSAR case 2004–G501 (Change 13).

SUPPLEMENTARY INFORMATION:

A. Background

Federal Acquisition Regulation (FAR) Subpart 33.2 (48 CFR subpart 33.2) implements the requirements of the Contract Disputes Act of 1978, as amended (41 U.S.C. 601–613) (the Act), which establishes procedures and requirements for asserting and resolving claims subject to the Act. It is the Government's policy to resolve all contractual issues in controversy by mutual agreement at the contracting officer level. The Act provides for Agencies Boards of Contract Appeals (Boards) and the United States Court of Federal Claims (Court) to resolve appeals of a contracting officer's decision. However, the Boards and Court do not have authority to interpret tariffs or tariff-related matters established through public hearings in each jurisdiction for regulated utilities. The authority pertaining to these matters lie with state public utility commissions.

A proposed rule was published in the **Federal Register** at 69 FR 40730, July 6, 2004. No comments were received from the public.

FAR section 33.215 requires that the clause 52.233–1, Disputes, be inserted in all solicitations and contracts, except those with a foreign government or agency of that government, or an international organization or subsidiary body of that organization, if the agency head determines that the application of the Act to the contract would not be in the public interest. GSA's Public Buildings Service awards contracts for public utility services. From time-to-time, disputes may arise from those contracts that involve tariffs and tariff-related matters. This rule provides for a supplement to FAR 52.233–1, Disputes, allowing for such disputes to be subject to the jurisdiction and regulation of the utility rate commission having jurisdiction. This rule also provides GSA contracting officers and contractors, acting under a utility service contract, with specific guidance regarding the resolution of disputes

involving tariffs and tariff-related matters.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The General Services Administration certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the majority of small entities that are in the industry were established as a result of deregulation and are not subject to the utility rate commissions. Also, this is intended to be a clarification of existing law, not a substantive change. A Final Regulatory Flexibility Act Analysis was, therefore, not performed.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the GSAR do not impose recordkeeping or information collection requirements, or otherwise collect information from offerors, contractors, or members of the public that require approval of the Office of Management and Budget under 44 U.S.C.3501, *et seq.*

List of Subjects in 48 CFR Parts 533 and 552

Government procurement.

Dated: December 27, 2004.

David A. Drabkin,

Senior Procurement Executive, Office of the Chief Acquisition Officer.

■ Therefore, GSA amends 48 CFR parts 533 and 552 as set forth below:

■ 1. The authority citation for 48 CFR parts 533 and 552 continues to read as follows:

Authority: 40 U.S.C. 121(c).

PART 533—PROTESTS, DISPUTES, AND APPEALS

■ 2. Add section 533.215 to read as follows:

533.215 Contract clause.

Insert the clause at 552.233–71, Disputes (Utility Contracts), in solicitations and contracts for utility services subject to the jurisdiction and regulation of a utility rate commission.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Add section 552.233–71 to read as follows:

552.233–71 Disputes (Utility Contracts).

As prescribed in 533.215, insert the following clause:

DISPUTES (UTILITY CONTRACTS) (JAN 2005)

The requirements of the Disputes clause at FAR 52.233–1 are supplemented to provide that matters involving the interpretation of tariffed retail rates, tariff rate schedules, and tariffed terms provided under this contract are subject to the jurisdiction and regulation of the utility rate commission having jurisdiction.

(End of clause)

[FR Doc. 05–82 Filed 1–3–05; 8:45 am]

BILLING CODE 6820–61–S

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2004–19939]

RIN 2127–AI54

Tire Safety Information; Technical Amendment

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Final rule; technical amendment.

SUMMARY: This document contains a technical amendment to the Federal motor vehicle safety standard (FMVSS) No. 119, *New pneumatic tires for vehicles other than passenger cars*. Specifically, the amendment changes the metric value of tire speed restriction threshold from 88 km/h (55 mph) to 90 km/h (55 mph). The amendment will make FMVSS No. 119 more consistent with established tire industry protocol and labeling technology, without making any substantive changes to the standard.

DATES: This rule is effective February 3, 2005.

FOR FURTHER INFORMATION CONTACT: For legal issues: Mr. George Feygin, Office of Chief Counsel (telephone: (202) 366–2992) (Fax: (202) 366–3820); NHTSA, 400 7th Street, SW., Washington, DC 20590. For technical issues: Mr. Joseph Scott, Office of Crash Avoidance Standards, (telephone: (202) 366–2720) (Fax: (202) 366–7002); NHTSA, 400 7th Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION: FMVSS No. 119 specifies performance requirements for tires used on motor vehicles other than passenger cars, and requires certain markings on tires to facilitate proper selection and use. S6.5(e) requires that a tire be marked with a speed restriction information if the maximum speed is below 88 km/h (55 mph). Further, Table III contains a reference to speed-restricted tires with the maximum speed of 88 km/h (55 mph).

Within the tire industry, the metric value of the tire speed restriction threshold is 90 km/h instead of 88 km/h. Also, the English value of the tire speed restriction threshold is sometimes listed at 56 mph, instead of 55 mph. The industry uses speed rating symbols to differentiate among the tires with various maximum speed capabilities. The speed symbol of ''G'' is associated with tires with a maximum speed of 90 km/h. The discrepancy between 88 km/h and 90 km/h, as well as 55 mph and 56 mph is the result of using different methods of converting the English speed measurements to the metric system and vice versa.

The Tire and Rim Association Inc., has petitioned NHTSA to change the speed restriction threshold from 88 km/h to 90 km/h and from 55 mph to 56 mph. They argued that this change would make FMVSS No. 119 more consistent with established tire industry protocol and labeling technology, and would facilitate international harmonization.

The agency decided to amend only the metric value of tire speed restriction threshold from 88 km/h to 90 km/h. The English value will remain at 55 mph because we found that majority of tire industry literature lists the speed restriction threshold at 55 mph (90 km/h) instead of 56 mph (90 km/h).[1] Thus, 55 mph appears to be generally accepted within the industry.

We believe that the discrepancy between the metric values of the speed restriction threshold currently used by the agency and the one used by the majority of industry publications result from different methods of converting 55 mph to km/h. We note that the change from 88 km/h to 90 km/h will have no substantive practical effect on FMVSS No. 119 because the difference between the two values is so insignificant.

[1] *See* 2004 Year Book; The Tire and Rim Association, Inc., at page 3–06. The Japan Automobile Tyre Manufacturers Association, Inc. (JATMA), the European Tyre and Rim Technical Organization (ETRTO), and the Scandinavian Tire & Rim Organization (STRO) also rely on 90 km/h as the speed restriction threshold.

In consideration of the foregoing, this document amends the CFR by changing the metric value of tire speed restriction threshold in S6.5(e) and Table III from 88 km/h to 90 km/h.

This technical amendment will not impose or relax any substantive requirements or burdens on manufacturers. Therefore, NHTSA finds for good cause that any notice and opportunity for comment on these correcting amendments are not necessary.

List of Subjects in 49 CFR Part 571

Motor vehicle safety, Reporting and recordkeeping requirements, Tires.

■ 49 CFR part 571 is amended by making the following technical amendment:

PART 571—[CORRECTED]

■ 1. The authority citation continues to read as follows:

Authority: 49 U.S.C. 322, 2011, 30115, 30166 and 30177; delegation of authority at 49 CFR 1.50.

■ 2. Section 571.119 is amended by revising paragraph S6.5(e) to read as follows; and amending Table III, under the column ''Description'', by revising ''88 km/h'' to read ''90 km/h''.

§ 571.119 New pneumatic tires for vehicles other than passenger cars.

* * * * *

(e) The speed restriction of the tire, if 90 km/h (55 mph) or less, shown as follows:

Max speed __ km/h (__mph).

* * * * *

Issued: December 20, 2004.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. 05–41 Filed 1–3–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 041104307–4356–02; I.D. 102904B]

RIN 0648–AS56

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of Puerto Rico and the U.S. Virgin Islands; Seasonal Closure of Grammanik Bank

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

ACTION: Temporary final rule.

SUMMARY: NMFS issues this temporary final rule to implement interim measures recommended by the Caribbean Fishery Management Council (Council). This rule prohibits fishing for or possessing any species of fish, except highly migratory species, within the Grammanik Bank closed area on a temporary basis (see **DATES**). The intended effect of this rule is to protect a yellowfin grouper spawning aggregation and to reduce overfishing.

DATES: This temporary final rule is effective February 1, 2005, through April 30, 2005.

ADDRESSES: Copies of documents supporting this action may be obtained from NMFS, Southeast Regional Office, 9721 Executive Center Drive N., St. Petersburg, FL 33702.

FOR FURTHER INFORMATION CONTACT: Joe Kimmel, 727–570–5752.

SUPPLEMENTARY INFORMATION: The reef fish fishery of Puerto Rico and of the U.S. Virgin Islands is managed under the Fishery Management Plan for the Reef Fish Fishery of Puerto Rico and of the U.S. Virgin Islands (FMP). The FMP was prepared by the Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

On November 16, 2004, NMFS published a proposed rule (69 FR 67104) to implement the interim measures specified in this temporary final rule as requested by the Caribbean Fishery Management Council for Grammanik Bank and to request comments on the proposed actions. The rationale for the interim measures is provided in the preamble to the proposed rule and is not repeated here. No public comments were received during the comment period on the proposed rule. Therefore, the proposed rule is adopted as final.

Classification

The Administrator, Southeast Region, NMFS, determined that the interim measures that this temporary final rule implements are necessary for the conservation and management of the yellowfin grouper fishery in the Caribbean and that they are consistent with the Magnuson-Stevens Act and other applicable laws.

This temporary final rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared a final regulatory flexibility analysis (FRFA). The FRFA incorporates the initial regulatory flexibility analysis (IRFA) and a summary of the analyses completed to support the action. No public comments were received on the economic impacts of this rule. A summary of the analysis follows.

The rule is intended to protect an important spawning aggregation of yellowfin grouper, to help arrest the decline in the resource, and to support its recovery. The Magnuson-Stevens Act, as amended, provides the statutory basis for the rule.

The rule is intended to implement, on an interim basis, an action currently included in the draft Sustainable Fisheries Act (SFA) Amendment. The SFA Amendment is expected to be implemented prior to the 2006 fishing year. This rule will be an interim action providing protection to an important yellowfin grouper spawning aggregation during the 2005 spawning season and will expire prior to the implementation of the SFA Amendment. No duplicate, overlapping, or conflicting rules have been identified.

No issues were raised by public comments in response to the IRFA. Therefore, no changes were made in the FRFA.

There are two general classes of small business entities that will be directly affected by the rule: commercial fishing vessels and for-hire fishing vessels. The Small Business Administration defines a small business that engages in commercial fishing as a firm that is independently owned and operated, that is not dominant in its field of operation, and that has annual receipts up to $3.5 million per year. The revenue benchmark for a small business that engages in charter fishing is a firm with receipts up to $6.0 million.

There are an estimated 342 registered commercial fishing vessels in the U.S. Virgin Islands. The majority of participants are part-time fishermen. Total annual average dockside revenues from commercial fishing activity are estimated at $1.72 million, or an average of $5,000 per registered vessel. Given the average revenue estimates of the fleet, all commercial entities are determined to be small business entities. It cannot be precisely determined how many of the commercial vessels that operate in the U.S. Virgin Islands would be affected by the rule, though the rule will apply to all commercial fishing vessels. NMFS assumes that indirect impacts would be incurred industry-wide, and that all the commercial fishing entities that will be affected by the rule are small entities.

An estimated 27 year-round charter fishing operations operate in the U.S. Virgin Islands, with an unknown

number of seasonal operations. No information exists on the business profile of this fleet. However, the average gross revenue for charter vessels operating in Florida is estimated at $68,000, and ranges from $26,000 (South Carolina) to $82,000 (Alabama) for other areas in the southeastern United States. No information exists to suggest the revenue profile of charter vessels operating in the U.S. Virgin Islands is substantially different from these estimates, so NMFS concludes that all charter vessels operating in the U.S. Virgin Islands are small business entities. It cannot be determined how many of the charter vessels that operate in the U.S. Virgin Islands will be affected by the rule, though the rule will apply to all charter vessels. NMFS assumes that indirect effects will be incurred industry-wide, and that all the charter fishing entities that will be affected by the rule are small entities.

The rule does not impose any reporting or recordkeeping requirements.

No precise estimates of the profits of either the commercial fishing vessels or the charter vessels that are expected to be affected by the rule are available. However, even though not all water habitat is equally productive, the rule will affect only approximately 3 percent of the available water area in the less than 100–fathom (183–m) depth range and close the area to fishing for only 25 percent of the year. Thus, less than 1 percent of available fishing area and time will be affected. Although harvests from this area during this time period will likely exceed 1 percent because it is a spawning site, the restriction is expected to be sufficiently small so as to not significantly affect the profits of a substantial number of small entities.

Including the no-action alternative (Alternative 1), five alternatives were considered in addition to the rule (that is, the preferred Alternative 2). The no-action alternative and Alternatives 3 through 6 provided insufficient spawning protection or failed to minimize the significant economic impacts on small entities. The no-action alternative would not impose any closure in the target area, thereby allowing all current fishing practices. This would eliminate all short-term adverse impacts expected to result from the closure. However, spawning protection of yellowfin grouper would not be provided, thereby forgoing the benefits of rebuilding the stock, and the action would, therefore, not be consistent with the Council's intent. The remaining four alternatives differ in the geographic size and time duration of the closure. Alternative 3 would establish closure over a larger geographic area than the rule, 17.5 nm^2 (60 km^2) vs. 6.88 nm^2 (28.60 km^2), but would not encompass the entire period during which yellowfin grouper are known to spawn, thereby potentially negating the purpose and effectiveness of the closure. Alternatives 4 and 6 would only establish closure in a 1 nm^2 (3.4 km^2) area, an area insufficient to afford the necessary protection. Alternative 4 would additionally not encompass the full spawning period and may allow fishing pressure to significantly impact an aggregation that is still present in the latter half of April. Alternative 6 would encompass the entire spawning period, but would continue the closure longer than is believed necessary. Alternative 5 would encompass 5 nm^2 (17.2 km^2), an area smaller than that in Alternative 2 but possibly affording sufficient geographic scope. However, Alternative 5 would also extend the closure for an additional month, which is longer than necessary and would, therefore, impose unnecessary adverse impacts.

Among the alternatives, only the preferred action (i.e., this rule) meets the geographic and temporal scope necessary to meet the management objectives. The fishing restriction described in the preferred action will affect less than 1 percent of available fishing area and time and therefore is expected to be sufficiently small so as to not significantly affect the profits of a substantial number of small entities. A copy of this analysis is available from NMFS (see **ADDRESSES**).

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the Southeast Regional Office (see **ADDRESSES**), and the guide, i.e., permit holder letter, will be sent to all holders of permits for the reef fish fishery. The guide and this final rule will be available upon request.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: December 28, 2004.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 622.33, paragraph (a)(4) is added to read as follows:

§ 622.33 Caribbean EEZ seasonal and/or area closures.

(a) * * *

(4) Grammanik Bank closed area. (i) The Grammanik Bank closed area is bounded by rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	18°12.40′	64°59.00′
B	18°10.00′	64°59.00′
C	18°10.00′	64°56.10′
D	18°12.40′	64°56.10′
A	18°12.40′	64°59.00′

(ii) From February 1, 2005, through April 30, 2005, no person may fish for or possess any species of fish, except highly migratory species, within the Grammanik Bank closed area. For the purpose of paragraph (a)(4) of this section, ''fish'' means finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals and birds. ''Highly migratory species'' means bluefin, bigeye, yellowfin, albacore, and skipjack tunas; swordfish; sharks (listed in appendix A to 50 CFR part 635); white marlin, blue marlin, sailfish, and longbill spearfish.

* * * * *

[FR Doc. 04–28749 Filed 12–29–04; 2:49 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[I.D. 122704C]

Atlantic Highly Migratory Species; Bluefin Tuna Fisheries

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

ACTION: Fishery reopening; quota transfer.

SUMMARY: NMFS has determined that a reopening of the coastwide General category Atlantic bluefin tuna (BFT) fishery is warranted. In addition, NMFS has determined that a BFT quota transfer from the Atlantic tunas Purse seine category to the Reserve category is warranted. These actions are being taken to ensure that U.S. BFT harvest is consistent with recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT), pursuant to the Atlantic Tunas Convention Act (ATCA), and to meet domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Fishery Management Plan for Atlantic Tunas, Swordfish and Sharks (HMS FMP).

DATES: The effective date for the General category reopening, as specified in this rule, is 12:30 a.m. on January 2, 2005, through 11:30 p.m. on January 4, 2005, inclusive. The effective date of the BFT quota transfer is December 29, 2004 through May 31, 2005.

FOR FURTHER INFORMATION CONTACT: Brad McHale at (978) 281–9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the ATCA (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by ICCAT among the various domestic fishing categories, and together with General category effort controls are specified annually under procedures specified at 50 CFR 635.23(a) and 635.27(a). The proposed initial 2004 BFT Quota and General category effort controls published in the **Federal Register** on December 10, 2004 (69 FR 71771).

General Category Reopening

The coastwide General category BFT fishery reopened on December 8, 2004, and closed on December 20, 2004 (69 FR 71732, December 10, 2004). The intent of this 13-day reopening was to provide commercial fishing opportunities to both Atlantic tunas General and HMS Charter/Headboat category fishery participants to harvest the remainder of the available General category quota. Catch rates were lower than anticipated, primarily due to inclement weather and approximately 70 metric tons (mt) of the available 107 mt was landed during this time period. Therefore, 37 mt remains available, which is nearly the same amount as landings attributed to southern area fishermen during the winter commercial BFT fishery in January 2004.

Recent information indicates that commercial sized BFT are off the coast of North Carolina and are available to General and Charter/Headboat category fishery participants. In consideration of historical General category catch rates in January, the unpredictable nature of the weather, the availability of BFT on the fishing grounds, and the amount of available quota, NMFS has determined that a coastwide General category reopening period of three days should allow harvest of the remaining quota without risking overharvest. Therefore, the coastwide General category is scheduled to reopen at 12:30 a.m. on January 2, 2005, and close at 11:30 p.m. on January 4, 2005.

General Category Limits

The General category daily retention limit during this reopening is one large medium or giant BFT, measuring 73 inches or greater (185 cm or greater) curved fork length (CFL) per vessel/day/trip. This limit applies in all fishing areas, for all vessels fishing under the General category quota (i.e., permitted Atlantic tunas General and HMS Charter/Headboat vessels). Fishing for, retaining, possessing, or landing large medium or giant BFT by persons fishing under the General category quota must cease at 11:30 p.m. local time January 4, 2005.

BFT Quota Transfer

The ATCA and the Magnuson-Stevens Act both address the issue of setting quotas for the U.S. domestic fishery when a species is subject to an allocation negotiated through an international agreement. Specifically, NMFS is charged to enable harvest of the full amount of these agreed quotas. To balance the collective legislative requirements to prevent overharvest of the overall U.S. quota, to allocate available quota consistent with traditional fishing practices, and to provide a reasonable opportunity to harvest the quota, some flexibility is needed to adapt to seasonal variations in the migratory patterns of bluefin tuna. Current regulations provide this flexibility in the following three ways:(1) placement of a portion of the total quota in a Reserve category (50 CFR 635.27(a)(7)); (2) inseason transfers of unharvested quota between fishing categories or to the Reserve category (50 CFR 635.27(a)(8)); and (3) carryover of overharvested or unharvested amounts to the subsequent fishing year (50 CFR 635.27(a)(9)).

While NMFS exercises discretion in adapting to prevailing fishery conditions by balancing reserves, transfers, and carryover there are certain criteria which guide the decision making process for transfers. Those criteria include: (1) the usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock; (2) the catches of the particular category quota to date and the likelihood of closure of that segment of the fishery if no allocation is made; (3) the projected ability of the vessels fishing under the particular category quota to harvest the additional amount of BFT before the end of the fishing year; (4) the estimated amounts by which quotas established for other gear segments of the fishery might be exceeded; (5) the effects of the transfer on BFT rebuilding and overfishing; and (6) the effects of the transfer on accomplishing the objectives of the HMS FMP. If it is determined, based on the indicated factors and the likelihood of exceeding the total quota, that vessels fishing under any category or subcategory quota are not likely to take the initial quota, NMFS may transfer inseason any portion of the remaining quota of that fishing category to any other fishing category or to the Reserve quota.

In considering these criteria, NMFS also recognizes the unique nature of the Purse seine category which is managed by an individual vessel quota system. As such, the Purse seine vessels are vested with a greater degree of autonomy for managing their allocations, including: fishing days, transfers between vessels, and planning for carryover. Consequently, NOAA Fisheries has elected to exclude Purse seine allocations from past inseason transfers between fishing categories on the premise that the vessels are always able to harvest their remaining allocations or to elect to carry them

over, after considering: current market conditions, the need to avoid discards in setting the gear when only small amounts of allocation remain, and the possibilities for transfers between vessels to consolidate residual allocations. While this approach has worked reasonably well in past years, anomalous fishery conditions since 2002 have resulted in the carryover of unprecedented amounts of unharvested Purse seine quota. Given this atypical situation, NMFS has reconsidered how the inseason transfer provisions should be applied to the Purse seine category in 2004.

The 2004 fishing year proposed initial BFT quota specifications were prepared in accordance with: the 2002 ICCAT quota recommendation, the ICCAT recommendation regarding the dead discard allowance, the HMS FMP percentage shares for each of the domestic categories including restrictions on landings of school BFT, and the addition or subtraction of any underharvest or overharvest from the previous fishing year (69 FR 71771, December 10, 2004). NMFS proposed initial quota specifications for the 2004 fishing year as follows: General category – 659.0 mt; Harpoon category – 81.4 mt; Purse Seine category – 389.4 mt; Angling category – 65.5 mt; Longline category – 171.2 mt; Trap category – 2.3 mt; and the Reserve category – 36.6 mt. Subsequently, NMFS transferred 300 mt from the General category, 45 mt from the Longline category, and 40 mt from the Harpoon category (69 FR 71732, December 10, 2004). These transfers resulted in additions of 223.1 mt to the Angling category and 161.9 mt to the Reserve.

NMFS has determined that a transfer of 100 mt from the Purse Seine category to the Reserve is warranted, based on the 2004 proposed BFT specifications, the subsequent transfers, an assessment of the commercial and recreational landings data to date, carryover of unharvested amounts from prior years, and considering the factors governing quota transfers between categories. The Reserve category was established, in part, for the purpose of compensating overharvest in any category and to ensure overall U.S. landings do not exceed ICCAT recommended quotas. Given the suspension of Purse seine fishing activity for the remainder of the 2004 fishing year and continued fishing activity in several other categories through May 31, 2005, it is likely that allowing for full utilization of the U.S. quota may require additional transfers from the Reserve.

The effects on rebuilding and overfishing as a result of this transfer are predicted to be neutral. The prime effect is to transfer quota among categories and no additional harvest above the level authorized in the BFT rebuilding plan is anticipated. The transfer is consistent with the objectives of the HMS FMP as it would provide for fair and reasonable fishing opportunities and allow for maximum utilization of the 2004 U.S. BFT allocation while preventing an overharvest of that allocation.

Monitoring and Reporting

NMFS selected the duration of the reopening and the daily retention limit based on a review of available quota, dealer reports, daily landing trends, the availability of BFT on the fishing grounds, and previous fishing years effort and landings rates for the month of January. NMFS will continue to monitor the General category BFT fishery closely via the commercial BFT landing reports submitted by authorized BFT dealers. Once the General category BFT fishery has closed, NMFS will assess reported landings and available quota and determine if a subsequent reopening is warranted.

Classification

The Assistant Administrator for Fisheries, NOAA (AA), finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action. The General category BFT fishery closed on December 20, 2004, after a 13 day reopening. Catch rates were slower that anticipated, due primarily to inclement weather and the full 107 mt of quota that was available was not attained. Since the closure, NMFS has compiled all commercial BFT landing reports submitted by permitted dealers and determined that approximately 37 mt is still available for a limited General category BFT fishery in the month of January. Recent information shows BFT in the commercial size classes are now available off southern Atlantic states in nearshore areas and accessible to commercial anglers as well as Charter/Headboat operations. Under ATCA and the HMS FMP, NMFS is required to provide fishing opportunities to catch the available quota.

Delaying this action would be contrary to the public interest as BFT are now available in nearshore waters and will soon migrate out of range of the commercial and charter/headboat fleets. As the General category is currently closed, fishery participants are not currently able to access these BFT while they are available. It is in the public interest to act quickly to open the fisheries while the BFT are accessible so that the short window of fishing opportunity is not lost. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons and because this action relieves a restriction (e.g., reopens fisheries), there is good cause under 5 U.S.C. 553(d) to waive the delay in effectiveness of this action.

These actions are being taken under 50 CFR 635.23(a)(4) and 50 CFR 635.27(a)(8) and are exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: December 28, 2004.

Bruce C. Morehead

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–28748 Filed 12–29–04; 2:49 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 041110317–4364–02; I.D. 110404B]

RIN 0648–AR51

50 CFR Part 648

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; 2005 and 2006 Summer Flounder Specifications; 2005 Scup and Black Sea Bass Specifications

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

ACTION: Final rule; final specifications for the 2005 and 2006 summer flounder fisheries and for the 2005 scup and black sea bass fisheries, and preliminary 2005 quota adjustment; notification of 2005 commercial summer flounder quota harvest for Delaware.

SUMMARY: NMFS issues final specifications for the 2005 and 2006 summer flounder fisheries and for the 2005 scup and black sea bass fisheries, and makes preliminary adjustments to the 2005 commercial quotas for these fisheries. This final rule specifies allowed harvest limits for both commercial and recreational fisheries, including scup possession limits. This action prohibits federally permitted commercial vessels from landing summer flounder in Delaware in 2005. Regulations governing the summer

flounder fishery require publication of this notification to advise the State of Delaware, Federal vessel permit holders, and Federal dealer permit holders that no commercial quota is available for landing summer flounder in Delaware in 2005. This action also makes changes to the regulations regarding the commercial scup fishery. The intent of this action is to establish allowed 2005 harvest levels and other measures to attain the target fishing mortality (F) or exploitation rates, as specified for these species in the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP), and to reduce bycatch and improve the efficiency of the commercial scup fishery.

DATES: This rule is effective December 30, 2004.

ADDRESSES: Copies of the specifications document, including the Environmental Assessment (EA), Regulatory Impact Review (RIR), the Initial Regulatory Flexibility Analysis (IRFA), and other supporting documents for the specification are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South Street, Dover, DE 19901–6790. The specifications document is also accessible via the Internet at *http://www.nero.noaa.gov.* The Final Regulatory Flexibility Analysis (FRFA) consists of the IRFA, public comments and responses contained in this final rule, and the summary of impacts and alternatives contained in this final rule. Copies of the small entity compliance guide are available from Patricia A. Kurkul, Regional Administrator, Northeast Region, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930–2298.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin, Fishery Policy Analyst, (978) 281–9279, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

The summer flounder, scup, and black sea bass fisheries are managed cooperatively by the Atlantic States Marine Fisheries Commission (Commission) and the Mid-Atlantic Fishery Management Council (Council), in consultation with the New England and South Atlantic Fishery Management Councils. The management units specified in the FMP include summer flounder (*Paralichthys dentatus*) in U.S. waters of the Atlantic Ocean from the southern border of North Carolina (NC) northward to the U.S./Canada border, and scup (*Stenotomus chrysops*) and black sea bass (*Centropristis striata*) in U.S. waters of the Atlantic Ocean from 35°13.3′ N. lat. (the latitude of Cape Hatteras Lighthouse, Buxton, NC) northward to the U.S./Canada border. Implementing regulations for these fisheries are found at 50 CFR part 648, subparts A, G (summer flounder), H (scup), and I (black sea bass).

The regulations outline the process for specifying annually the catch limits for the summer flounder, scup, and black sea bass commercial and recreational fisheries, as well as other management measures (*e.g.*, mesh requirements, minimum fish sizes, gear restrictions, possession restrictions, and area restrictions) for these fisheries. The measures are intended to achieve the annual targets set forth for each species in the FMP, specified either as an F or an exploitation rate (the proportion of fish available at the beginning of the year that are removed by fishing during the year). Once the catch limits are established, they are divided into quotas based on formulas contained in the FMP. Detailed background information regarding the status of the summer flounder, scup, and black sea bass stocks and the development of the 2005 specifications for these fisheries (and 2006 summer flounder specifications) was provided in the proposed specifications (69 FR 70414, December 6, 2004). That information is not repeated here.

NMFS will establish the 2005 recreational management measures for summer flounder, scup, and black sea bass by publishing a proposed and final rule in the **Federal Register** at a later date, following receipt of the Council's recommendations as specified in the FMP.

Summer Flounder

The FMP specifies a target F of F_{max}, that is, the level of fishing that produces maximum yield per recruit. The best available scientific information indicates that, for 2005 and 2006, F_{max} for summer flounder is 0.26 (equal to an exploitation rate of about 22 percent from fishing). The Total Allowable Landings (TAL) associated with the target F rate is allocated 60 percent to the commercial sector and 40 percent to the recreational sector. The commercial quota is allocated to the coastal states based upon percentage shares specified in the FMP. The recreational harvest limit is specified on a coastwide basis. Recreational measures will be the subject of a separate rulemaking early in 2005.

This final rule implements the specifications contained in the proposed rule, a summer flounder TAL of 30.3 million lb (13,744 mt) for 2005 and 33.0 million lb (14,969 mt) for 2006. The TAL for 2005 is allocated 18.18 million lb (8,246 mt) to the commercial sector and 12.12 million lb (5,498 mt) to the recreational sector, and the TAL for 2006 is allocated 19.8 million lb (8,981 mt) to the commercial sector and 13.2 million lb (5,987 mt) to the recreational sector. This TAL was determined by the Council's Summer Flounder Monitoring Committee to have at least a 75-percent probability of achieving the F_{max} (0.26) that is specified in the FMP, if the 2004 TAL and assumed discard levels are not exceeded. Two research projects that would utilize the full summer flounder research set-aside (RSA) of 353,917 lb (161 mt) have been conditionally approved by NMFS and are currently awaiting notice of award. After deducting this RSA, the TAL is divided into a commercial quota of 17.97 million lb (8,151 mt) and a recreational harvest limit of 11.98 million lb (5,434 mt). If either project is not approved by the NOAA Grants Office, the research quota associated with the disapproved proposal will be restored to the summer flounder TAL through publication of a notice in the **Federal Register** by NMFS.

Consistent with the revised quota setting procedures for the FMP (67 FR 6877, February 14, 2002), summer flounder overages are determined based upon landings for the period January–October 2004, plus any previously unaccounted for landings from January–December 2003. Table 1 summarizes, for each state, the commercial summer flounder percent share, the 2005 commercial quota (both initial and less the RSA), the 2004 quota overages as described above, and the resulting final adjusted 2005 commercial quota less the RSA.

TABLE 1.—FINAL STATE-BY-STATE COMMERCIAL SUMMER FLOUNDER ALLOCATIONS FOR 2005

State	Percent share	2005 initial quota		2005 initial quota less RSA		2004 quota overages (through 10/31/04) [1]		Adjusted 2005 quota, less RSA [2]	
		lb	kg	lb	kg	lb	kg	lb	kg
ME	0.04756	8,646	3,922	8,547	3,877	0	0	8,547	3,877
NH	0.00046	84	38	83	37	0	0	83	37
MA	6.82046	1,239,960	562,442	1,225,637	555,945	48,083	21,810	1,177,554	534,130
RI	15.68298	2,851,166	1,293,280	2,818,232	1,278,341	0	0	2,818,232	1,278,341
CT	2.25708	410,337	186,128	405,597	183,978	0	0	405,597	183,978
NY	7.64699	1,390,223	630,601	1,374,164	623,317	0	0	1,374,164	623,317
NJ	16.72499	3,040,603	1,379,209	3,005,481	1,363,277	0	0	3,005,481	1,363,277
DE	0.01779	3,234	1,467	3,197	1,450	54,536	24,737	(51,339)	(23,287)
MD	2.03910	370,708	168,152	366,426	166,210	19,028	8,631	347,398	157,577
VA	21.31676	3,875,387	1,757,864	3,830,622	1,737,559	0	0	3,830,622	1,737,559
NC	27.44584	4,989,654	2,263,292	4,932,017	2,237,148	0	0	4,932,017	2,237,148
Total [3]	100.00	18,180,002	8,246,395	17,970,002	8,151,139	121,647	55,178	17,899,695	8,119,165

[1] 2004 Quota overage is determined through comparison of landings for January through October 2004, plus any landings in 2003 in excess of the 2003 quota (that were not previously addressed in the 2004 specifications), with the final 2004 quota (as revised) for each state (69 FR 10937, March 9, 2004). For Delaware, includes continued repayment of overharvest from 2003.
[2] Parentheses indicate a negative number.
[3] Total quota is the sum of all states having allocation. A state with a negative number has an allocation of zero (0). Kilograms are as converted from pounds and may not necessarily add due to rounding.

The Commission has established a system whereby 15 percent of each state's quota may be voluntarily set aside each year to enable vessels to land an incidental catch allowance after the directed fishery in a state has been closed. The intent of the incidental catch set-aside is to reduce discards by allowing fishermen to land summer flounder caught incidentally in other fisheries during the year, while ensuring that the state's overall quota is not exceeded. These Commission set-asides are not included in these 2005 and 2006 final summer flounder specifications because NMFS does not have authority to establish such subcategories.

Delaware Summer Flounder Closure

Table 1 above indicates that, for Delaware, the amount of the 2004 summer flounder quota overage (inclusive of overharvest from 2003) is greater than the amount of commercial quota allocated to Delaware for 2005. As a result, there is no quota available for 2005 in Delaware. The regulations at § 648.4(b) provide that Federal permit holders, as a condition of their permit, must not land summer flounder in any state that the Regional Administrator has determined no longer has commercial quota available for harvest. Therefore, effective December 30, 2004, landings of summer flounder in Delaware by vessels holding commercial Federal fisheries permits are prohibited for the 2005 calendar year, unless additional quota becomes available through a quota transfer and is announced in the **Federal Register**. Federally permitted dealers are advised that they may not purchase summer flounder from federally permitted vessels that land in Delaware for the 2005 calendar year, unless additional quota becomes available through a transfer, as mentioned above.

For 2006, because information pertaining to the potential amount of RSA is unknown, RSA is conservatively estimated as 3 percent of the TAL (the maximum allowed under the FMP), *i.e.*, 990,000 lb (449 mt). After deducting the RSA, the TAL for 2006 will be divided into a commercial quota of 19.21 million lb (8,714 mt) and a recreational harvest limit of 12.80 million lb (5,806 mt). Table 2 shows, for each state, the commercial summer flounder percent share, the 2006 commercial quota (both initial and less the RSA, which is estimated at this point and which will be revised in the proposed specifications for 2006). These state quota allocations are preliminary and are subject to a reduction if there are any overages of a state's quota for the previous fishing year (using the landings information and procedures described earlier). Any commercial quota adjustments to account for 2005 overages will be published in the **Federal Register** in the final rule implementing the 2006 specifications.

TABLE 2.—2006 PROPOSED INITIAL SUMMER FLOUNDER STATE COMMERCIAL QUOTAS

State	Percent share	Initial quota [1]		Initial quota less RSA [1]	
		lb	kg [2]	lb	kg [2]
ME	0.04756	9,417	4,271	9,136	4,144
NH	0.00046	91	41	88	40
MA	6.82046	1,350,451	612,561	1,310,210	594,308
RI	15.68298	3,105,230	1,408,523	3,012,700	1,366,552
CT	2.25708	446,902	202,713	433,585	196,673
NY	7.64699	1,514,104	686,793	1,468,987	666,328
NJ	16.72499	3,311,548	1,502,108	3,212,871	1,457,349
DE	0.01779	3,522	1,598	3,417	1,550
MD	2.03910	403,742	183,136	391,711	177,679
VA	21.31676	4,220,718	1,914,505	4,094,950	1,857,457
NC	27.44584	5,434,276	2,464,972	5,272,346	2,391,520

TABLE 2.—2006 PROPOSED INITIAL SUMMER FLOUNDER STATE COMMERCIAL QUOTAS—Continued

State	Percent share	Initial quota [1]		Initial quota less RSA [1]	
		lb	kg [2]	lb	kg [2]
Total	100.00	19,800,002	8,981,222	19,210,002	8,713,600

[1] State quotas are preliminary and will be adjusted as necessary in the 2006 final quota based on any overage of a state's quota for the previous fishing year.
[2] Kilograms are as converted from pounds and do not add to the converted total due to rounding.

Scup

The target exploitation rate for scup for 2005 is 21 percent. The FMP specifies that the Total Allowable Catch (TAC) associated with a given exploitation rate be allocated 78 percent to the commercial sector and 22 percent to the recreational sector. Scup discard estimates are deducted from both sectors' TACs to establish TALs for each sector (TAC less discards = TAL). The commercial TAL is then allocated on a percentage basis to three quota periods, as specified in the FMP: Winter I (January–April)—45.11 percent; Summer (May–October)—38.95 percent; and Winter II (November–December)—15.94 percent. The recreational harvest limit is allocated on a coastwide basis. Recreational measures will be the subject of a separate rulemaking early in 2005.

This final rule implements the specifications contained in the proposed rule, *i.e.*, an 18.65-million lb (8,460-mt) scup TAC and a 16.5-million lb (7,484-mt) scup TAL. After deducting 303,675 lb (138 mt) of RSA for the three approved research projects, the TAL is divided into a commercial quota of 12.23 million lb (5,547 mt) and a recreational harvest limit of 3.96 million lb (1,796 mt). If any of these projects are not approved by the NOAA Grants Office, the research quota associated with the disapproved proposal(s) will be restored to the scup TAL through publication of a notice in the **Federal Register** by NMFS.

Consistent with the revised quota setting procedures established for the FMP (67 FR 6877, February 14, 2002), scup overages are determined based upon landings for the Winter I and Summer 2004 periods, plus any previously unaccounted for landings from January–December 2003. Table 3 presents the final 2004 commercial scup quota for each period and the reported 2004 landings for the 2004 Winter I and Summer periods; there was no overage of the Winter I or Summer quota. On October 12, 2004 (69 FR 60565), NMFS announced a transfer of quota from Winter I to Winter II 2004. Per the quota counting procedures, after June 30, 2005, NMFS will compile all available landings data for Winter II 2004 and compare the landings to the Winter II 2004 allocation, as adjusted. Any overages will be determined and required deductions will be made to the Winter II 2005 allocation.

TABLE 3.—SCUP PRELIMINARY 2004 COMMERCIAL LANDINGS BY QUOTA PERIOD

Quota period	2004 Quota		Reported 2004 landings through 10/31/04		Preliminary overages as of 10/31/04	
	lb	kg	lb	kg	lb	kg
Winter I	5,568,920	2,526,020	3,592,469	1,629,517	0	0
Summer	4,808,455	2,181,078	3,845,362	1,744,227	0	0
Winter II	1,967,825	892,590	N/A	N/A	N/A	N/A
Total	12,345,200	5,599,689	7,437,831	3,373,744	.....	.....

N/A = Not applicable.

Table 4 presents the commercial scup percent share, 2005 TAC, projected discards, 2005 initial quota (with and without the RSA deduction), and initial possession limits, by quota period. To achieve the commercial quotas, this final rule implements a Winter I period (January–April) per-trip possession limit of 30,000 lb (6.8 mt), and a Winter II period (November–December) initial per-trip possession limit of 1,500 lb (680 kg). The Winter I per-trip possession limit will be reduced to 1,000 lb (454 kg) when 80 percent of the commercial quota allocated to that period is projected to be harvested.

TABLE 4.—INITIAL COMMERCIAL SCUP/QUOTA ALLOCATIONS FOR 2005 BY QUOTA PERIOD

Period	Percent share	Total allowable catch		Discards		2005 initial quota		2005 initial quota less RSA		Possession limits (per trip) [2]	
		lb	kg [1]	lb	kg	lb	kg	lb	kg	lb	kg
Winter I	45.11	6,563,505	2,977,186	938,288	425,605	5,625,217	2,551,582	5,518,367	2,503,089	15,000	6,804
Summer	38.95	5,667,225	2,570,636	810,160	367,486	4,857,065	2,203,150	4,764,806	2,161,280	[3] N/A	[3] N/A
Winter II	15.94	2,319,270	1,052,014	331,552	150,391	1,987,718	901,623	1,949,962	884,487	1,500	680
Total	100.00	14,550,000	6,599,837	2,080,000	943,482	12,470,000	5,656,355	12,233,135	5,548,856	.....	.....

[1] Kilograms are as converted from pounds and may not necessarily add due to rounding.

[2] The Winter I possession limit will drop to 1,000 lb (454 kg) upon attainment of 80 percent of that period's allocation. The Winter II possession limit may be adjusted (in association with a transfer of unused Winter I quota to the Winter II period) via notification in the **Federal Register**.
[3] Not applicable.

As described in the proposed rule, the Council recommended no change in the Winter II possession limits that result from potential rollover of quota from the Winter I period for the 2005 fishing year. Therefore, NMFS maintains the Winter II possession limit-to-rollover amount ratios specified for 2004, as presented in Table 5.

TABLE 5.—POTENTIAL INCREASE IN WINTER II POSSESSION LIMITS BASED ON THE AMOUNT OF SCUP ROLLED OVER FROM WINTER I TO WINTER II PERIOD

Initial winter II possession limit		Rollover from winter I to winter II		Increase in initial winter II possession limit		Final winter II possession limit after rollover from winter I to winter II	
lb	kg	lb	mt	lb	kg	lb	kg
1,500	680	0–499,999	0–227	0	0	1,500	680
1,500	680	500,000–999,999	227–454	500	227	2,000	907
1,500	680	1,000,000–1,499,999	454–680	1,000	454	2,500	1,134
1,500	680	1,500,000–1,999,999	680–907	1,500	680	3,000	1,361
1,500,	680	2,000,000–2,500,000	907–1,134	2,000	907	3,500	1,587

Other Scup Management Measures

This final rule makes two changes to the regulations regarding the directed otter trawl fishery for scup. The purpose of these modifications is to reduce potential scup discards. First, NMFS increases the minimum mesh size to 5 inches (12.7 cm) for the first 75 meshes from the terminus of the net; and for codends constructed with fewer than 75 meshes, requires a minimum mesh size of 5 inches (12.7 cm) throughout the net. Second, this final rule increases the threshold level to trigger the minimum mesh size requirement from 100 lb (45 kg) to 200 lb (90 kg) for the Scup Summer period (May 1 through October 31). The change to the minimum mesh size regulations also apply in the Scup Gear Restricted Areas (GRA's).

Scup GRA's

This final rule shifts the entire Southern GRA by 3 longitudinal minutes to the west. The recommendation to move the Southern GRA follows an industry request and subsequent analysis by the Northeast Fisheries Science Center (NEFSC), which indicates that the shift would expose an additional 3 percent of the scup stock to small-mesh gear during the effective period, while allowing access to an additional 8 percent of the *Loligo* squid stock. NMFS also terminates the existing GRA Exemption Program, in which no vessels have participated to date. The intent of these actions is to allow greater opportunity for trawl vessels to harvest *Loligo* squid while maintaining the protective aspects of the Southern GRA for scup.

Black Sea Bass

For 2005, the target exploitation rate for black sea bass is 25 percent. The FMP specifies that the TAL associated with a given exploitation rate be allocated 49 percent to the commercial sector and 51 percent to the recreational sector. The recreational harvest limit is allocated on a coastwide basis. Recreational measures will be the subject of a separate rulemaking early in 2005.

This final rule implements the specifications contained in the proposed rule, *i.e.*, an 8.2-million lb (3,719-mt) black sea bass TAL. After deducting 109,500 lb (50 mt) of RSA for the three approved research projects, the TAL is divided into a commercial quota of 3.97 million lb (1,796 mt) and a recreational harvest limit of 4.13 million lb (1,873 mt). If any of these projects are not approved by the NOAA Grants Office, the research quota associated with the disapproved proposal(s) will be restored to the black sea bass TAL through publication of a notice in the **Federal Register** by NMFS.

Consistent with the revised quota setting procedures for the FMP, black sea bass overages are determined based upon landings for the period January–September 2004, plus any previously unaccounted for landings from January–December 2003. No adjustment to the 2005 commercial quota is necessary. Table 6 presents the initial 2005 commercial quota and the final 2005 commercial quota (less the RSA).

TABLE 6.—FINAL BLACK SEA BASS COMMERCIAL QUOTA ALLOCATIONS FOR 2005

2005 initial quota (lb)	2005 quota less research Set-aside (lb)	Quota overages (through 09/30/04) (lb)	Final (adjusted) 2005 quota (lb)
4,020,000	3,966,345	0	3,966,345

Other Changes to the Regulations

In addition to the changes recommended by the Council and the Commission's Summer Flounder, Scup, and Black Sea Bass Management Board (Board), this final rule removes references to a specific date by which the Summer Flounder, Scup, and Black Sea Bass Monitoring Committees shall meet for the purposes of recommending annual or multi-year TALs. This action is intended to provide flexibility for the Council in scheduling Monitoring Committee meetings and to remove an unnecessary restriction. NMFS previously modified the text regarding Monitoring Committee meetings in §§ 648.100, 648.120, and 648.140 to reflect that annual review of updated information on the fisheries by the Monitoring Committees would not be required during the period of multi-year specifications. These regulatory changes

were effective November 29, 2004 (69 FR 62818, October 28, 2004).

Changes From the Proposed Rule

In the proposed rule, the longitude coordinate for the Southern GRA point SGA1 was inadvertently listed as 72°50′ W. long. In the second mention of SGA1. NMFS corrects the longitude coordinate of point SGA1 to 72°53′ W. long to reflect the shift of the entire Southern GRA by 3 longitudinal minutes to the west.

Comments and Responses

One comment letter was received regarding the proposed measures.

Comment 1: The commenter, representing a commercial seafood association, wrote in support of the proposed TALs, RSA amounts, commercial scup possession limits, scup minimum mesh size, and westward shift of the Southern GRA.

Response: NMFS agrees and this final rule implements these proposed measures.

Comment 2: The same commenter noted the error in the Southern GRA point 1 as described in Changes from the Proposed Rule in this preamble.

Response: NMFS has corrected the Southern GRA point 1 coordinate in this final rule.

Classification

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA, finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delayed effectiveness period for this rule. This action establishes annual quotas for the summer flounder, scup, and black sea bass fisheries and possession limits for the commercial scup fishery. Preparation of the proposed rule was dependent on the submission by the Council of the final EA/RIR/IRFA, which occurred in early November 2004, and appended in early December 2004. NMFS published the proposed rule on December 6, 2004, with an abbreviated, 15-day comment period, in order to allow for finalization of the proposed regulatory changes by January 1, 2005. NMFS was unable to obtain the necessary data from the Council before November 2004 to finalize the specifications. Therefore, in order to implement the 2005 specifications before the beginning of the finishing season beginning January 1, 2005, NMFS waives the 30-day delay in effectiveness.

If implementation of the specifications is delayed, NMFS will be prevented from carrying out its legal obligation to prevent overfishing of these three species. The fisheries covered by this action will begin making landings on January 1, 2005. If a delay in effectiveness were to be required, and a quota were to be harvested during a delayed effectiveness period, the lack of effective quota specifications would prevent NMFS from closing the fishery. The scup and black sea bass fisheries are expected to be active at the start of the fishing season in 2005. In addition, the Delaware summer flounder fishery would be open for fishing but in a negative quota situation. This likely would result in overages that may require deduction from the associated state quota or coastwide quota period in the future, and might have a negative economic impact for some gear sectors.

Additionally, pursuant to 5 U.S.C. 553(d)(1), the measure regarding the commercial scup possession limit relieves a restriction and is therefore not subject to a delay in effective date. The current commercial scup possession limit (15,000 lb (6.8 mt) per trip) is more restrictive than the measure recommended by the Council and implemented by NMFS in this rule (30,000 lb (13.6 mt) per trip).

Under the current GRA Exemption Program requirements, vessels that are subject to the provisions of the GRA's must carry on board a Scup GRA Exemption Program Authorization (which requires application to the Regional Administrator) and a NMFS-certified observer in order to fish for, or possess, non-exempt species (black sea bass, *Loligo* squid, or silver hake (whiting)) using trawl nets having a minimum mesh size less than that required at § 648.123. A minimum of 5 business days in advance of a trip is required to obtain an observer. NMFS terminates the GRA Exemption Program in this rule at the recommendation of the Council and because no vessels have participated in the program to date. Further, NMFS shifts the entire Southern GRA by 3 longitudinal minutes to the west in response to an industry request and subsequent analysis by the NEFSC, which indicates that the shift would expose an additional 3 percent of the scup stock to small-mesh gear during the effective period, while allowing access to an additional 8 percent of the *Loligo* squid stock. NMFS implements this measure in order to allow greater opportunity for trawl vessels to harvest *Loligo* squid while maintaining the protective aspects of the Southern GRA for scup. The commercial scup fishery is active at the beginning of January. If a delay in effectiveness were to be required, it would affect trawl vessel owners' ability to plan fishing trips until the rule is in effect, specifically due to the current Scup GRA Exemption Program requirements.

Included in this final rule is the Final Regulatory Flexibility Analysis (FRFA) prepared pursuant to 5 U.S.C. 604(a). The FRFA incorporates the IRFA, the comments and responses to the proposed rule (69 FR 70414, December 6, 2004), and the analyses completed in support of this action. A copy of the EA/RIR/IRFA is available from the Council (*see* **ADDRESSES**).

The preamble to the proposed rule included a detailed summary of the analyses contained in the IRFA, and that discussion is not repeated here.

Final Regulatory Flexibility Analysis

Statement of Objective and Need

A description of the reasons why this action is being taken, and the objectives of and legal basis for this final rule are explained in the preambles to the proposed rule and this final rule and are not repeated here.

Summary of Significant Issues Raised in Public Comments

The one comment letter received on the proposed rule did not specifically address the potential economic impact of the rule. Other than the correction described in Changes to the Proposed Rule, no changes to the proposed rule were required to be made as a result of public comments. For a summary of the comments received, and the responses thereto refer to the ''Comments and Responses'' section of this preamble.

Description and Estimate of Number of Small Entities to Which the Rule Will Apply

The categories of small entities likely to be affected by this action include commercial and charter/party vessel owners holding an active Federal permit for summer flounder, scup, or black sea bass, as well as owners of vessels that fish for any of these species in state waters. The Council estimates that the 2005 quotas (and 2006 summer flounder quota) could affect 2,114 vessels that held a Federal summer flounder, scup, and/or black sea bass permit in 2003. However, the more immediate impact of this final rule will likely be felt by the 1,040 vessels that actively participated (*i.e.,* landed these species) in these fisheries in 2003.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

No additional reporting, recordkeeping, or other compliance

requirements are included in this final rule.

Description of the Steps Taken To Minimize Economic Impact on Small Entities

Economic impacts are being minimized to the extent practicable with the quota specifications being implemented in this final rule, while being consistent with the target fishing mortality rates or target exploitation rates specified in the FMP. Specification of commercial quotas and possession limits is constrained by the conservation objectives of the FMP, and implemented at 50 CFR part 648 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

The economic analysis assessed the impacts of the various management alternatives. In the EA, the no action alternative is defined as follows: (1) No proposed specifications for the 2005 and 2006 summer flounder fishery and for the 2005 scup and black sea bass fisheries would be published; (2) the indefinite management measures (minimum sizes, possession limits, minimum mesh size, threshold limits to trigger mesh requirements, permit and reporting requirements, etc.) would remain unchanged; (3) there would be no quota set-aside allocated to research in 2005 and 2006; (4) the existing GRA's and GRA regulations would remain in place for 2005; and (5) there would be no specific cap on the allowable annual landings in these fisheries (*i.e.*, there would be no quota). Implementation of the no action alternative would be inconsistent with the goals and objectives of the FMP, its implementing regulations, and the Magnuson-Stevens Act. In addition, the no action alternative would substantially complicate the approved management program for these fisheries, and would very likely result in overfishing of the resources. Therefore, the no action alternative is not considered to be a reasonable alternative to the preferred action and is not analyzed in the EA/RIR/IRFA/FRFA.

Alternative 1 (preferred) consists of the harvest limits proposed by the Council and the Board for summer flounder, scup, and black sea bass. Alternative 2 consists of the most restrictive quotas (*i.e.*, lowest landings) considered by the Council and the Board for all of the species. Alternative 3 consists of the least restrictive quotas (*i.e.*, highest landings) considered by the Council and Board for all three species. Although Alternative 3 would result in higher landings for 2005 (and for the summer flounder fishery in 2006), it would also likely exceed the biological targets specified in the FMP and could, therefore, not be implemented without violating the requirements of the Magnuson-Stevens Act.

Table 7 evaluates three alternative combinations of summer flounder, scup, and black sea bass landings (commercial and recreational).

TABLE 7.—COMPARISON IN LB (MT) OF THE ALTERNATIVES OF QUOTA COMBINATIONS REVIEWED

	Initial TAL	RSA	2004 commercial quota overage	Preliminary adjusted commercial quota	Preliminary recreational harvest limit
Quota Alternative 1 (Preferred)					
Summer Flounder Preferred Alternative—2005.	30.3 million (13,744)	353,917 (161)	121,647 (55)	17.87 million (8,108)	11.98 million (5,434)
Summer Flounder Preferred Alternative—2006.	33.0 million (14,969)	990,000 (449)	N/A	19.21 million (8,714)	12.80 million (5,806)
Scup Preferred Alternative (Status quo).	16.5 million (7,484)	303,675 (138)	0.00	12.23 million (5,547)	3.96 million (1,796)
Black Sea Bass Preferred Alternative.	8.2 million (3,719)	109,500 (50)	0.00	3.97 million (1,796)	4.13 million (1,873)
Quota Alternative 2 (Most Restrictive)					
Summer Flounder Alternative 2 (Status Quo)—2005.	28.2 million (12,791)	353,917 (161)	121,647 (55)	16.59 million (7,523)	11.14 million (5,053)
Summer Flounder Alternative 2 (Status Quo)—2006.	28.2 million (12,791)	846,000 (384)	N/A	16.41 million (7,443)	10.94 million (4,962)
Scup Alternative 2.	11.0 million (4,990)	303,675 (138)	0.00	7.95 million (3,606)	2.74 million (1,242)
Black Sea Bass Alternative 2 (Status Quo).	8.0 million (3,629)	109,500 (50)	0.00	3.87 million (1,755)	4.02 million (1,823)
Quota Alternative 3 (Least Restrictive)					
Summer Flounder Alternative 3—2005.	32.6 million (14,787)	353,917 (161)	121,647 (55)	19.23 million (8,721)	12.90 million (5,851)

TABLE 7.—COMPARISON IN LB (MT) OF THE ALTERNATIVES OF QUOTA COMBINATIONS REVIEWED—Continued

	Initial TAL	RSA	2004 commercial quota overage	Preliminary adjusted commercial quota	Preliminary recreational harvest limit
Summer Flounder Alternative 3—2006.	35.5 million (16,103)	1.07 (485)	N/A	20.66 million (9,371)	13.77 million (6,246)
Scup Alternative 3.	22.0 million (9,979)	303,675 (138)	0.00	16.53 million (7,498)	5.17 million (2,345)
Black Sea Bass Alternative 3.	8.7 million (3,946)	109,500 (50)	0.00	4.21 million (1,910)	4.38 million (1,987)

N/A=Not applicable. Any commercial quota adjustments to account for 2005 overages will be published in the **Federal Register** in the final rule implementing the 2006 specifications.

In summary, relative to 2004, the 2005 commercial quotas and recreational harvest limits contained in the Preferred Alternative would result in an 11-percent and a 7-percent increase in summer flounder landings for the commercial and recreational sectors, respectively, a less than 1-percent decrease in scup landings for both sectors, and a 5-percent and 3-percent increase in black sea bass landings for the commercial and recreational sectors, respectively; percentage changes associated with each alternative are discussed in the proposed rule. The measures contained in the Preferred Alternative were chosen because they provide for the maximum level of landings that still achieve the fishing mortality and exploitation targets specified in the FMP. While the commercial quotas and recreational harvest limits specified in Alternative 3 would provide for even larger increases in landings and revenues, they would not achieve the fishing mortality and exploitation targets specified in the FMP.

The commercial possession limits for scup were chosen in part because they are intended to provide for economically viable fishing trips that will be equitably distributed over the entire quota period. The minimum mesh size and threshold increases were chosen in part because they would effect reduction in the discard of undersized fish, thus increasing the efficiency of the commercial scup fishery. Through the proposed rule, NMFS specifically sought comment on the likely effectiveness of and/or costs associated with the proposed change in minimum mesh size for scup. The change to the minimum mesh size regulations also would apply in the Scup GRA's.

The decision to eliminate the GRA Exemption Program was made because no vessels have participated in the program since its implementation in 2003, and because there would be no change to the economic aspects of the fishery. Revised Southern GRA coordinates were selected in order to allow greater opportunity for trawl vessels to harvest *Loligo* squid while maintaining the protective aspects of the Southern GRA for scup.

Finally, the revenue decreases associated with the RSA program are expected to be minimal, and are expected to yield important long-term benefits associated with improved fisheries data. It should also be noted that fish harvested under the RSAs would be sold, and the profits would be used to offset the costs of research. As such, total gross revenue to the industry would not decrease substantially if the RSAs are utilized.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 28, 2004.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons stated 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 § 648.14, paragraph (a)(127) is removed and reserved, and paragraph(a)(122) is revised to read as follows:

§ 648.14 Prohibitions.

(a) * * *

(122) Fish for, catch, possess, retain or land *Loligo* squid, silver hake, or black sea bass in or from the areas and during the time periods described in § 648.122(a) or (b) while in possession of any trawl nets or netting that do not meet the minimum mesh restrictions or that are obstructed or constricted as specified in §§ 648.122 and 648.123(a), unless the nets or netting are stowed in accordance with § 648.123(b).

* * * * *

(127) [Reserved]

* * * * *

■ 3. In § 648.100, paragraph (a) is revised to read as follows:

§ 648.100 Catch quotas and other restrictions.

(a) *Review.* The Summer Flounder Monitoring Committee shall review each year the following data, subject to availability, unless a TAL has already been established for the upcoming calendar year as part of a multiple-year specification process, provided that new information does not require a modification to the multiple-year quotas, to determine the annual allowable levels of fishing and other restrictions necessary to achieve, with at least a 50-percent probability of success, a fishing mortality rate (F) that produces the maximum yield per recruit (F_{max}): Commercial, recreational, and research catch 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; sea sampling and winter trawl survey data or, if sea sampling data are unavailable, length frequency information from the winter trawl survey and mesh selectivity analyses; impact of gear other than otter trawls on the mortality of summer flounder; and any other relevant information.

* * * * *

■ 4. In § 648.120, paragraph (a) is revised to read as follows:

§ 648.120 Catch quotas and other restrictions.

(a) *Review.* The Scup Monitoring Committee shall review each year the following data, subject to availability, unless a TAL already has been established for the upcoming calendar

year as part of a multiple-year specification process, provided that new information does not require a modification to the multiple-year quotas: 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}).

* * * * *

■ 5. In § 648.122, paragraph (d) is removed and reserved, and the section heading, paragraph (a)(1), and the first two sentences of paragraph (b)(1) are revised to read as follows:

§ 648.122 Season and area restrictions.

(a) * * *

(1) *Restrictions.* From January 1 through March 15, all trawl vessels in the Southern Gear Restricted Area that fish for or possess non-exempt species as specified in paragraph (a)(2) of this section must fish with nets that have a minimum mesh size of 5.0-inch (12.7-cm) diamond mesh, applied throughout the codend for at least 75 continuous meshes forward of the terminus of the net. For trawl nets with codends (including an extension) of fewer than 75 meshes, the entire trawl net must have a minimum mesh size of 5.0 inches (12.7 cm) throughout the net. The Southern Gear Restricted Area is an area bounded by straight lines connecting the following points in the order stated (copies of a chart depicting the area are available from the Regional Administrator upon request):

SOUTHERN GEAR RESTRICTED AREA

Point	N. lat.	W. long.
SGA1	39°20′	72°53′
SGA2	39°20′	72°28′
SGA3	38°00′	73°58′
SGA4	37°00′	74°43′
SGA5	36°30′	74°43′
SGA6	36°30′	75°03′
SGA7	37°00′	75°03′
SGA8	38°00′	74°23′
SGA1	39°20′	72°53′

* * * * *

(b) * * *

(1) * * * From November 1 through December 31, all trawl vessels in the Northern Gear Restricted Area I that fish for or possess non-exempt species as specified in paragraph (b)(2) of this section, 5.0-inch (12.7 cm) diamond mesh, applied throughout the codend for at least 75 continuous meshes forward of the terminus of the net. For trawl nets with codends (including an extension) of fewer than 75 meshes, the entire trawl net must have a minimum mesh size of 5.0 inches (12.7 cm) throughout the net. * * *

* * * * *

(d) [Reserved]

* * * * *

■ 6. In § 648.123, paragraph (a)(1) is revised to read as follows:

§ 648.123 Gear restrictions.

(a) * * *

(1) *Minimum mesh size.* No owner or operator of an otter trawl vessel that is issued a scup moratorium permit may possess 500 lb (226.8 kg) or more of scup from November 1 through April 30, or 200 lb (90.7 kg) or more of scup from May 1 through October 31, unless fishing with nets that have a minimum mesh size of 5.0-inch (12.7-cm) diamond mesh, applied throughout the codend for at least 75 continuous meshes forward of the terminus of the net, and all other nets are stowed in accordance with § 648.23(b)(1). For trawl nets with codends (including an extension) of fewer than 75 meshes, the entire trawl net must have a minimum mesh size of 5.0 inches (12.7 cm) throughout the net. Scup on board these vessels must be stowed separately and kept readily available for inspection. Measurement of nets will be in conformity with § 648.80(f)(2)(ii).

* * * * *

■ 7. In § 648.140, paragraph (a) is revised to read as follows:

§ 648.140 Catch quotas and other restrictions.

(a) *Review.* The Black Sea Bass Monitoring Committee shall review each year the following data, subject to availability, unless a TAL already has been established for the upcoming calendar year as part of a multiple-year specification process, provided that new information does not require a modification to the multiple-year quotas, to determine the allowable levels of fishing and other restrictions necessary to result in a target exploitation rate of 23 percent (based on F_{max}) in 2003 and subsequent years: Commercial, recreational, and research catch 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; sea sampling and winter trawl survey data, or if sea sampling data are unavailable, length frequency information from the winter trawl survey and mesh selectivity analyses; impact of gear other than otter trawls, pots and traps on the mortality of black sea bass; and any other relevant information.

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[FR Doc. 04–28752 Filed 12–30–04; 9:39 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 70, No. 2
Tuesday, January 4, 2005

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

NUCLEAR REGULATORY COMMISSION

10 CFR Part 71

RIN 3150–AG71

Packaging and Transportation of Radioactive Material; Withdrawal of Subpart I

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule: withdrawal.

SUMMARY: The Nuclear Regulatory Commission (NRC) is withdrawing a portion of a proposed rule (Subpart I, April 30, 2002; 67 FR 21390) that would have allowed certificate holders for dual-purpose (storage and transport) spent fuel casks, designated as Type B(DP) packages, to make certain design changes to the transportation package without prior NRC approval. The NRC is taking this action because it has received significant comments regarding the cost and complexity to implement the proposed change authority rule.

FOR FURTHER INFORMATION CONTACT: Neelam Bhalla, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6843, e-mail *nxb@nrc.gov.*

SUPPLEMENTARY INFORMATION:

On April 30, 2002 (67 FR 21390), the NRC published in the **Federal Register** a proposed rule amending NRC's regulations on packaging and transporting radioactive materials to make the regulations compatible with the International Atomic Energy Agency (IAEA) standards. The proposed final rule also proposed changes in fissile material exemption requirements to address the unintended economic impact of NRC's emergency final rule entitled, ''Fissile Material Shipments and Exemptions'' and addressed a petition for rulemaking (PRM–73–12) submitted by International Energy Consultants, Inc. The Commission also identified eight additional issues for consideration in the 10 CFR Part 71 rulemaking process. One of these NRC-initiated issues was Issue 15, adoption of change authority for dual-purpose package certificate holders. The proposed rule addressing this issue, 10 CFR Subpart I—Application for Type B(DP) Package Approval, would have created a new type of package certification, Type B(DP). The proposed Subpart I would also have authorized holders of Type B(DP) certificates to make changes to the package design and procedures without NRC approval under certain conditions.

NRC received substantial comments on the proposed rule, including numerous comments on the proposed Subpart I. The comments on the proposed Subpart I are presented below, with NRC's responses. On January 26, 2004 (69 FR 3698), the NRC published in the **Federal Register** a final rule amending 10 CFR Part 71. In that final rule, the Commission did not reach a final decision on the issue of change authority for dual-purpose package certificate holders. The NRC determined that implementation of the proposed change authority rule (Issue 15) could result in new regulatory burdens and significant costs, and that certain changes were already authorized under the current 10 CFR Part 71 regulations. The NRC further stated in the **Federal Register** that additional stakeholder input was needed on the values and impacts of the change authority rule before it could decide whether to adopt a final rule providing change authority. Subsequently, the NRC issued a discussion paper on March 15, 2004 (69 FR 12088), to facilitate discussions of the change authority rule and held a public workshop on April 15, 2004, with appropriate stakeholders to discuss the same proposed rule. The workshop transcripts are available on the NRC's public Web site at *http://www.nrc.gov,* under Current Rulemakings, Final Rules and Policy Statements, Compatibility with IAEA Transportation Safety Standards (TS–R–1) and Other Transportation Safety Amendments Rulemaking Text and Other Documents (RIN 3150–AG71).

Information collected from the public workshop, as well as written comments received from the stakeholders, were generally against implementation of the change authority rule. The proposed 10 CFR 71.153 of Subpart I would require the applicant for a Type B(DP) package to include two parts: (1) A current Part 71 application for a Type B(U) package; and (2) the additional information specifically required for the Type B(DP) packages, including, among other things, a safety analysis report (SAR) that provides an analysis of potential accidents, package response to these potential accidents, and consequences to the public.

The major concern raised by the dual-purpose cask vendors and industry representatives is that the second SAR specified in the proposed Subpart I would impose a substantial cost and burden on them. Unlike current Part 71 standards for Type B(U) packages that are fundamentally route and mode independent, transport routes and population distributions might be needed for the second SAR in order to evaluate potential accidents, package response to these accidents, and consequences to the public. In addition, the accident analyses would be more complicated than the engineering examinations under the existing Part 71 hypothetical accident conditions. The dual-purpose cask vendors and industry representatives believe that it could require significant expenditures on the part of the applicant to produce such an SAR. In light of the public comments received, the Commission has reconsidered the need for the change authority provided in proposed Subpart I of the proposed rule and has determined to withdraw Subpart I of the proposed rule for the reasons explained below.

The current Part 71 licensing process provides a framework that allows licensees flexibility to make certain non-safety related changes without prior NRC approval. The licensee can maximize such flexibility by writing Safety Analysis Reports that focus on the design features necessary to meet the regulatory requirements of Part 71. Typically, the NRC Certificate of Compliance (CoC) references design drawings, specification of the authorized contents, operating procedures, and maintenance commitments. These drawings and documents identify the design and operational features that are important for the safe performance of the package under normal and accident conditions. Therefore, the drawings and documents need to be of sufficient detail to identify the package accurately and to provide

an adequate basis for its evaluation. However, when licensees include features that do not contribute to the ability of the package to meet the performance standards in Part 71 in drawings and documents, the licensees limit their flexibility to make changes without prior NRC approval. Furthermore, experience from the stakeholders has indicated that many changes made to a dual-purpose cask under the provisions of § 72.48, may also be made without prior NRC approval in the current regulatory structure of Part 71, without explicit change authority.

Implementation of the change authority in the proposed rule, on the other hand, would result in new regulatory burdens and significant costs for both stakeholders and NRC without a commensurate potential benefit. The proposed rule would require the applicant to: perform an independent analysis of potential transportation accidents specific to that design and plans for use; project package responses to ''real world'' transportation accidents; and determine the consequences to the public from such accidents. It would also require the applicant to perform a documented evaluation to demonstrate that ''changes'' would not result in the increase of frequency and consequences of potential ''real world'' transportation accidents or the likelihood and consequences of a malfunction of structures, systems, and components (SSCs) important to safety; or raise the possibility of an unevaluated accident or malfunction. Consequently, the applicant would need information such as the transport routes and population distributions along the transportation routes on which a specific design is intended to be used. Since such information is not readily available, it could require significant expenditures and efforts on the part of the applicant to produce such information. Furthermore, as part of the implementation of the proposed Subpart I, NRC would have to expend significant resources to develop guidance documents on accident analyses, SSCs important to safety, the change process, and reviews of methodologies used in the design bases. Additionally, the staff resources needed to review an application under the proposed Subpart I would likely increase significantly with the need to perform reviews and document staff findings in the Safety Evaluation Report (SER) for these additional items.

Public Comments on the Change Authority of 10 CFR Part 71

Public Comments on the Proposed Rule, April 30, 2002. (Prior to the April 15, 2004 Meeting/Workshop)

Issue 15. Change Authority for Dual-Purpose Package Certificate Holders

The following comments were submitted before the discussion paper that was issued on March 15, 2004 (69 FR 12088), and the public workshop that was held on April 15, 2004. Therefore, these commenters did not have the benefit of the additional information that was gathered in the discussion paper and the public workshop.

Comment. One commenter opposed NRC's proposal to ''harmonize'' transport and storage of spent nuclear fuel and fissile materials with ''a watered down international standard.'' The commenter said that the Type B(DP) package as proposed does not provide an adequate level of public protection from radiation hazards.

Response. The NRC acknowledges the commenter's opposition to the proposed rule change. The NRC has decided to withdraw proposed Subpart I for the reasons explained above.

Comment. An industry representative voiced support for the change authority that was included in the proposed rule. The commenter added that the quality assurance programs developed under Part 71 were equivalent in effectiveness and caliber to the programs developed under Part 72.

Five commenters expressed their support for the NRC's proposal, but requested that the change authorization process be extended to all packages licensed under Part 71. Two of these commenters suggested reasons why licensees should be allowed to make minor changes independent of the CoC holders.

Another commenter stated that the changes allowed for shipping packages licensed under Part 72 should also be allowed for those under Part 71.

Response. As previously discussed, the proposed change is not being implemented for either dual purpose casks or for other transportation casks.

Comment. Seven commenters expressed disapproval of the proposed change authority for dual purpose casks. One commenter stated that even ''minor'' design changes made by licensees and shippers could impact the safety of casks and that all changes should be subject to full NRC review. One commenter suggested that there would not be sufficient experience based on the part of the CoC holders to implement the responsibility effectively, and another commenter suggested that the rule lacked specificity for adequate implementation and that the rule change would be more effective if each design change were subject to NRC independent inspection. One commenter asserted that the public has a right to know if design changes are being made.

Response. The proposed change process is not being implemented for the reasons previously explained.

Comment. One commenter expressed concern that transporting dual-purpose containers is going to be complicated, especially in instances when there is no available rail access.

Response. The NRC notes that this comment is beyond the scope of this rulemaking.

Comment. Three commenters requested clarifications on various aspects of the proposed change authority. One of these commenters asked for clarification on what is meant by ''minimal changes'' with potential safety consequences. The commenter also asked that NRC include examples as well as seek, and consider, input from State regulatory agencies when amending certificates of compliance.

Another commenter wanted to know if a certificate holder proposing a minor change would still have to check with the NRC to see if the change was permissible under the proposed change authority. The commenter wanted to know if NRC would be notified before the changes are made. The commenter requested clarification of the procedure for changes under the proposed change authority. The commenter also requested a more detailed explanation of what constitutes a minor design change with no safety significance.

The last commenter wanted to know what types of changes could be made to dual-purpose spent nuclear fuel casks intended for domestic transport. This point was echoed by the first commenter who recommended that NRC establish guidance for determining when a design or procedural change that enhances one cask function might compromise the effectiveness of the other. NRC should ensure that the interrelationship between the storage and transportation effects of cask changes are considered during the review of certificate amendment requests. Furthermore, the first commenter stated that NRC should consider issuing a single certificate of compliance instead of two.

Response. The proposed change process is not being implemented for the reasons previously explained.

Comment. One commenter noted that the eight criteria used to determine if changes require NRC prior approval were extracted verbatim from Parts 50 and 72 and placed into Part 71. The commenter suggested that these criteria be customized before inclusion in Part 71.

Response. The eight criteria used to determine if changes require prior NRC approval are effectively the same as those included in Parts 50 and 72. This motivated the staff to reevaluate how the proposed change process could be implemented and led to the determination that the proposed change process should not be added by this rulemaking as previously discussed.

Comment. One commenter noted that a large number of highly radioactive shipments could take place in dual-purpose containers and that these shipments could be destined for a repository. The commenter explained that even minor design changes would affect waste acceptance at the repository.

Response. This comment deals with detailed transportation and storage plans/designs that will need to be developed by the U.S. Department of Energy (DOE) in its effort to design, construct, and operate a proposed high level waste repository site and is beyond the scope of this rulemaking.

Comment. One commenter expressed support for the design change authority being provided to CoC holders but recommended that the ability to make changes to the transportation design aspects of a dual-purpose package be provided to licensees who use the casks as well. The basis for this recommendation is that the change process included in Part 72 for storage facilities or casks allows licensees to make changes to the storage design without prior NRC approval subject to certain codified tests. Another commenter was concerned that the proposed revisions to change authority would hinder the ability of Part 72 general and specific licensees to effectively manage and control their Dry Cask Storage Program and ensure that changes made in accordance with Part 72 do not impact the Part 71 certification of spent fuel casks.

Response. The proposed change process is not being implemented for the reasons previously explained.

Comment. Three commenters expressed support for the proposed change authority. One of these commenters asserted that allowing the change authority would allow for more attention to more significant safety issues.

Response. These three commenters did not provide a basis for their support of the proposed rule. The comments did not have the benefit of the additional information in the discussion paper that clarified NRC's view on the proposed rule and the April 15, 2004 workshop discussions. Although these three comments were in support of the proposed change authority, there were also significant concerns raised as indicated in response to other comments. The NRC staff considered all the comments and for the reasons described above, NRC determined that the proposed change process should not be implemented in this rulemaking. The NRC does not agree that the proposed change authority would have resulted in more attention to significant safety issues because even if this proposal were finalized, the existing standards of Part 71 would still have been required to be demonstrated.

Comment. Two commenters suggested improvements on the procedures of the change authority. One stated that the two-year submittal date for application renewal is too long and instead suggested a 30-day requirement. The other commenter stated that the proposed § 71.175(d) change reporting requirements need to allow for a single report to be filed by dual-purpose CoC holders to comply with the requirements of Parts 71 and 72, to avoid unnecessary duplication of reports. Both stated that the proposed submittal date of two years before expiration for the renewal of a CoC or QA program is burdensome and should have a submittal date of only 30 days before expiration, as is required under Part 72. One commenter suggested that a CoC holder should be permitted to submit [change process implementation summary] report for both Part 71 and Part 72 designs as one package instead of having to provide two separate reports.

Response. The NRC has chosen not to include the proposed change process in the final rule for the reasons previously explained.

Comment. One commenter discussed 71/72 SAR's (Safety Analysis Reports) for the change authority. The commenter stated that a single 71/72 SAR for generally certified dual-purpose systems should also be permitted as an option for CoC holders. The commenter suggested that the rule language should include provisions for submitting updated transportation Final Safety Analysis Reports (FSARs) for casks already certified and having an approved SAR. The commenter suggested that an FSAR Rev. 0 be submitted to replace the last approved transportation SAR within two years of the effective date of the final rule, consistent with the proposed § 71.177(c)(6). The commenter stated that the requirement in proposed § 71.177(c)(7) for an FSAR update to be submitted within 90 days of issuance of an amendment of the CoC is unnecessary and inconsistent with the requirements under Part 72 for the dual-purpose spent fuel storage casks. The commenter stated that this creates an unnecessary administrative burden on CoC holders by requiring extra FSAR updates. The commenter said that this portion of the proposed rule should be deleted.

Response. Regarding the suggestion to permit the submittal of a single SAR for reflecting both the transportation and storage design for a dual-purpose cask, the NRC staff notes that the SAR submittal request is now moot based on the final rule language.

The NRC staff notes that because Subpart I is being eliminated from the final rulemaking, the comment regarding the addition of a provision in the rule language for submittal of SAR updates for those transportation casks already certified is not applicable.

The last comment regarding the requirement for the submittal of an updated FSAR within 90 days of an amendment to the transportation certificate of compliance is not applicable.

Comment. One commenter expressed a number of concerns about the proposed change process for dual purpose casks. The commenter questioned the NRC position that the change process be implemented by the CoC holder while the licensee would be most familiar with details such as site-specific parameters affecting preparation, loading, and shipment of Type B(DP) packages. The commenter also noted that it has been unable to convince NRC that the level of required detail in the FSAR is excessive and would, therefore, require excessive evaluations with procedure changes that could only be addressed by the CoC holder rather than the licensee who is implementing detailed procedures. The commenter added that industry experience with storage procedures clearly demonstrates that the proposed limitation on procedure evaluation against the Part 71 FSAR by the licensee is unworkable.

Response. The proposed change process is not being implemented for the reasons previously explained.

Public Comments from Meeting/ Workshop April 15, 2004

Comment. One commenter noted that changes can be made under the current Part 71, without coming to the NRC for approval if the changes do not affect the drawings and contents listed in the certificate. Consequently, the commenter suggested that making intelligent SAR drawings and operations chapters appears to be a much better path for going forward than the proposed change authority of Part 71. The commenter also noted that the change authority for Type B(DP) packages included in the proposed Subpart I would add a substantial amount of work to a cask designer and license holder without a commensurate potential benefit. The commenter pointed out that many users of Part 72 products wait until the last minute to buy their products and are under the gun to get them loaded. Furthermore, Part 72 amendment is a rulemaking process that takes a long time. Therefore, change authority is essential for Part 72. The commenter suggested that time is not an issue with Part 71 changes at the present time, or in the near future, because of the lack of activities in spent fuel transportation. Thus, there is time to deal with any discrepancies in the transport certificates that the licensees pick up either in the course of design changes or manufacturing.

Response. NRC acknowledges the commenter's opinion about the proposed change authority of Part 71 which provides support for the NRC's decision to withdraw the proposed Subpart I.

Comment. Four commenters voiced their support for the concept of change authority. Two commenters suggested that the change authorization process be extended to all packages licensed under Part 71. One commenter, who is an industry representative, suggested that the change authority should be based on existing Part 71 criteria rather than on a new supplemental set of Part 71 criteria. In a subsequent letter, dated April 30, 2004, the industry representative informed NRC that the industry does not endorse NRC's proposed change process for Part 71 because the limited change ability, and the required additional FSAR, as included in the proposed Subpart I, would add significant cost and very little benefit to the industry. The industry representative encouraged NRC to develop a change process for Part 71 that is based on the existing regulatory safety criteria of Part 71 and offered to work with NRC cooperatively, for such an effort.

Response. NRC acknowledges the commenter's support for the concept of change authority; however, the proposed change process is not being implemented as described above either for dual-purpose casks or for other transportation casks.

Comment. One commenter voiced support for the cask-specific, mode-specific, and route-specific approach to safety analysis included in the proposed Subpart I. The commenter noted that the analysis is presently one-sided, for dual-purpose casks, because licensees are required to consider all potential accidents and their consequences for storage; however, the likelihood and consequences are not considered for transportation. The commenter viewed the proposed Subpart I, § 71.153, which requires a probabilistic risk analysis for transportation, to be the instrument to correct this imbalance. The commenter suggested that this approach would not only be extremely useful for emergency planning purposes, but also would be helpful in avoiding populated areas, tunnels, high bridges, routes with high accident rates, etc., or to demonstrate that dual-purpose casks can withstand potential accidents along these routes. The commenter further suggested that dual-purpose casks certified as a result of this approach would greatly enhance public confidence in the nuclear industry which, in turn, would also benefit the DOE as the owners and/or shippers of these casks to Yucca Mountain.

Response. NRC acknowledges the commenter's support for the proposed change authority of Part 71 and understands that an independent accident analysis specific to designs could have public-confidence benefits. However, NRC disagrees with the commenter that the analysis is one-sided for dual-purpose casks. Dual-purpose casks must also meet performance requirements specified in Part 71 for packaging and transportation of radioactive material. Among the performance requirements, dual-purpose casks must be capable of withstanding the mechanical and thermal loading imposed by normal and accident conditions and still meet specified acceptance criteria. These conditions have been internationally accepted and have been shown to encompass spent fuel casks performance in severe accidents. The safety record associated with Part 71 for the domestic transportation of spent fuel is exemplary—approximately 1,300 shipments of civilian fuel and 920,000 miles without an accidental radioactive release. Nonetheless, NRC continually examines the transportation safety programs. Furthermore, the Type B(DP) package approval in the proposed rule presented only an option for transportation. That is, other Type B packages would still be permitted for spent fuel transportation, and those packages would not require the mode and route specific accident analysis in proposed Subpart I. As for comments regarding emergency planning and avoiding populated areas, tunnels, high bridges, routes with high accident rates, etc., the U.S. Department of Transportation (DOT) regulates routing for hazardous material transportation, including radioactive materials.

Comment. One commenter requested that the decision for the final rule regarding Part 71 change authority for dual-purpose package certificate holders be delayed for a period of six to nine months. The commenter cited the likely influences, regarding the cask selection choices, by: (1) The DOE Yucca Mountain transportation plan; (2) final status of the license for the Private Fuel Storage facility in Utah; and (3) the staff recommendations regarding the NRC package performance study (PPS), as reasons for the request.

Response. NRC acknowledges the request for delaying the final rule regarding the change authority of Part 71; however, potential cask selection choices would not impact the Commission's decision to withdraw the proposed rule.

Comment. One commenter wanted to know if all dual-purpose casks have to have a Type B(DP) approval, or whether they still can get a Type B(U) approval? The commenter also wanted to know if someone does get a Type B(DP) approval, could another person with basically the same design get a Type B(U) approval?

Response. No responses to the commenters questions are needed given NRC's decision to withdraw the Type B(DP) approval process.

Comment. Two commenters noted that there is a great deal of flexibility in the current Part 71 and wondered if NRC is planning to put out additional guidance to alert the designers to the flexibility that is available.

Response. NRC acknowledges the commenters' recommendation regarding the current flexibility in Part 71 and agrees with the potential benefit of guidance on flexibility and making changes for Type B packages under Part 71. NRC understands that it would be helpful to describe and articulate the way that applications should be prepared to allow this flexibility. This includes identifying areas of flexibility,

the kinds of things that are flexible, where we have seen problems, and where there are areas of over-commitment in the applications. Although no decision has been made on the method of communication to be used to inform the stakeholders about the flexibility that is currently available under Part 71, the staff would like to point out that several existing documents provide some of this guidance. Regulatory Guide 7.9, ''Standard Format and Content of Part 71 Applications for Approval of Packaging for Radioactive Material,'' NUREG/CR–5502, ''Engineering Drawings for 10 CFR Part 71 Package Approvals,'' and NUREG/CR–4775, ''Guide for Preparing Operating Procedures for Shipping Packages,'' are three examples that provide guidelines for preparing applications for package approval under the current Part 71.

Comment. One commenter expressed concern that having to do a second safety analysis report, as proposed in Subpart I, to set up a whole set of criteria and identify another set of accident scenarios, probabilities, and consequence analyses, etc., is going to be very burdensome on the front end. The commenter cautioned that a lot more questions will be raised, rather than answered, if the industry goes down the path of having everyone develop their own accident scenarios, probabilities, and consequence assessments. The commenter suggested that the cost associated with doing a second SAR may be more expensive than doing an SAR under the current Part 71, because the regulations under the current Part 71 are very well defined and the industry knows exactly what it has to address. The commenter further suggested that it will take a lot of license amendments, under the current Part 71, to get a payback on the additional cost for second SAR approval.

Response. NRC acknowledges the commenter's information about potential burdens and costs that the proposed rule could impose on stakeholders.

Comment. One commenter suggested that the change authority included in the proposed Subpart I would not benefit existing packages; however, it might benefit new applications because they can build in enough flexibility in the drawings of the new applications. The commenter also called for an industry forum to develop a set of accident scenarios that will be binding for everybody.

Response. The NRC has decided to withdraw the proposed rule for the reasons previously explained.

Comment. Two commenters noted that, based on their respective experience in Part 72, the percentage of changes made, under § 72.48, that require a corresponding change to the Part 71 Certificate of Compliance, will be very low.

Response. NRC acknowledges the commenter's experience about changes that were made, under § 72.48, for dual-purpose casks, that would still require a Part 71 Certificate amendment.

Comment. One commenter wanted to know whether changes can be made, under the regular Part 71 approval, without coming to NRC for amendments, if the same changes were first made under the change authority of Part 71, for Type (DP) packages.

Response. This comment is now moot, given NRC's decision to withdraw the proposed Subpart I.

Comment. One commenter used an example of minor design change to illustrate what would happen under the current Part 71 and what it might look like under the proposed Subpart I. Based on the scenario discussed, the commenter predicted that no one will be using the proposed Subpart I because a minor design change does not appear be a particularly time-consuming or costly operation under the current Part 71, as compared to the proposed Subpart I.

Response. NRC acknowledges the comparison about making design changes under the current Part 71, and the proposed Subpart I.

Comment. One commenter suggested that a well developed full-scale cask testing program would address cask performance issues and eliminates the need to do a very detailed SAR, as proposed in Subpart I.

Response. NRC acknowledges the recommendation of using full-scale tests for certification, however, Part 71 does not require full-scale tests for certification. It is the applicant's decision as to whether to use full-scale tests, scale model tests, or analyses, for certification. Therefore, this comment is beyond the scope of this rulemaking.

Comment. One commenter wanted to know whether separate certificates are required for a common design with different sizes and weights.

Response. Under the current Part 71, variations in design like that are handled under a single certificate. They would be evaluated by looking at bounding configurations.

Comment. Four commenters suggested that the proposed Subpart I will not work unless NRC were to provide detailed guidance, developed in consultation with affected stakeholders, on the methods, data, and assumptions to be used in such safety analyses. NRC should not expect individual applicants to have to take that responsibility. One commenter suggested the NRC Modal Study and another suggested NUREG/CR 6672, ''Reexamination of Spent Fuel Shipment Risk Estimates,'' as good representative models of the types of accident analyses that the applicants may want to consider. One commenter cautioned that the standardized accident analysis may not be applicable to an applicant who only uses casks for localized shipments.

Response. NRC understands that it is ineffective, inefficient, and possibly confusing to have many different groups and entities creating accident analyses, predicting transport accident probabilities for individual designs. This supports NRC's decision to withdraw the proposed Subpart I.

Comment. Two commenters noted that the change authority would not benefit them during the next few years because the spent fuel transportation program is not active at the present time nor expected to be, in the near future. Consequently, most of the current Part 71 amendment requests, rather than dealing with design changes, are dealing with upgrade contents and adding contents to the existing packages, which would not be benefitted by the change authority.

Response. NRC acknowledges the commenter's opinion that the proposed change authority of Subpart I lacked near-term benefit.

Comment. One commenter, associated with several utilities that store fuel in dry casks at this time, expressed disapproval of paying for the implementation of the change authority without seeing any benefit to the utilities. The same commenter also questioned about paying for the implementation of the change authority while the benefit goes to the public relations for Yucca Mountain Project, as suggested by another commenter.

Response. No response to the commenter is needed, given NRC's decision to withdraw the proposed Subpart I.

Comment. One commenter noted that the greatest cost for preparation of a SAR associated with the proposed Subpart I would likely occur for the first cask analyzed under the new requirements. The commenter suggested that such cost might appropriately be borne by NRC as part of the PPS. The commenter also suggested that, for those casks to be used for shipments to Yucca Mountain, the cost might appropriately be borne by DOE.

Response. No response to the commenter is needed, given NRC's

decision to withdraw the proposed Subpart I.

Dated at Rockville, Maryland, this 28th day of December, 2004.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 05–25 Filed 1–3–05; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19982; Directorate Identifier 2004–NM–142–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–223, –321, –322, and –323 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus Model A330–223, –321, –322, and –323 airplanes. This proposed AD would require repetitive inspections of the firewall of the lower aft pylon fairing (LAPF), and corrective actions if necessary. This proposed AD is prompted by reports of cracking of the LAPF firewall. We are proposing this AD to detect and correct this cracking, which could reduce the effectiveness of the firewall and result in an uncontrolled engine fire.

DATES: We must receive comments on this proposed AD by February 3, 2005.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, Room PL–401, Washington, DC 20590.
- By fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France.

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Room PL–401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA–2004–19982; the directorate identifier for this docket is 2004–NM–142–AD.

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2797; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES.** Include ''Docket No. FAA–2004–19982; Directorate Identifier 2004–NM–142–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments submitted by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of our docket Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You can review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you can visit *http://dms.dot.gov.*

Examining the Docket

You can examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

Discussion

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified us that an unsafe condition may exist on all Airbus Model A330–223, –321, –322, and –323 airplanes. The DGAC advises that cracks have been found in the firewall of the lower aft pylon fairing (LAPF) on several airplanes. This firewall is intended to contain an engine fire inside the engine core compartment. Cracking of the firewall, if not corrected, could reduce the effectiveness of the firewall and result in an uncontrolled engine fire.

Relevant Service Information

Airbus has issued Service Bulletin A330–54–3021, dated February 4, 2004. The service bulletin describes procedures for performing repetitive detailed visual inspections for cracking of the LAPF firewall on the left and right sides of the airplane. If any cracking is found, the service bulletin describes procedures for corrective actions. The corrective actions include, depending on the size of the crack, stop-drilling the crack and applying sealant, repairing the firewall, or replacing the firewall with a new firewall. The DGAC mandated the service information and issued French airworthiness directive F–2004–028 R1, dated September 15, 2004, to ensure the continued airworthiness of these airplanes in France. The service bulletin also specifies to report inspection findings to the airplane manufacturer.

The Airbus service bulletin refers to Pratt & Whitney Alert Service Bulletin PW4G–100–A54–5, dated February 13, 2003, as an additional source of service information for doing the inspection and corrective actions.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in France 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. According to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Among Proposed AD, DGAC Action, and Airbus Service Bulletin.''

Clarification of Inspection Terminology

The Airbus service bulletin refers to a ''detailed visual inspection'' for cracking of the LAPF firewall on the left and right sides of the airplane. This proposed AD refers to this inspection as a ''detailed inspection.'' Note 1 of this proposed AD defines this type of inspection.

Differences Among Proposed AD, DGAC Action, and Airbus Service Bulletin

The French airworthiness directive and Airbus service bulletin allow continued flight with known cracks. We accept the provision allowing continued flight with an unrepaired crack that is less than or equal to 1.2 inches long. This provision is acceptable to us because Airbus has provided data showing that the LAPF firewall has no structural function for pylon integrity and retains fireproof capability with a crack that is less than or equal to 1.2 inches long. However, we do not accept the provision allowing continued flight with an unrepaired firewall that has a crack greater than 1.2 inches long. Airbus has not provided data showing that the fireproof capability is retained with a crack greater than 1.2 inches long. Thus, this proposed AD would require that, if any crack in the LAPF firewall is found that is greater than 1.2 inches long, the LAPF firewall must be repaired or replaced with a new firewall, as applicable, before further flight after the crack is found. This difference has been coordinated with the DGAC, and it expressed no concern with our action.

The French airworthiness directive specifies to report inspection results to the airplane manufacturer. However, this proposed AD would require reporting inspection results to the airplane manufacturer only when cracking is found.

Interim Action

We consider this proposed AD interim action. If final action is later identified, we may consider further rulemaking then.

Costs of Compliance

This proposed AD would affect about 20 airplanes of U.S. registry. The proposed actions would take about 2 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the proposed AD for U.S. operators is $2,600, or $130 per airplane, per inspection cycle.

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in title 49 of the United States Code. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart III, section 44701, ''General requirements.'' Under that section, the FAA is charged with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this AD.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

For the reasons discussed above, I certify that the 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. 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.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 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. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Airbus: Docket No. FAA–2004–19982; Directorate Identifier 2004–NM–142–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this AD action by February 3, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Airbus Model A330–223, –321, –322, and –323 airplanes; certificated in any category.

Unsafe Condition

(d) This AD was prompted by reports of cracking of the firewall of the lower aft pylon fairing (LAPF). We are issuing this AD to detect and correct this cracking, which could reduce the effectiveness of the firewall and result in an uncontrolled engine fire.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Repetitive Inspections

(f) Prior to the accumulation of 3,000 total flight hours on the LAPF, or within 500 flight hours after the effective date of this AD, whichever is later: Perform a detailed inspection for cracking of the LAPF firewall, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–54–3021, including Appendix 01, dated February 4, 2004. If no cracking is found, repeat the inspection thereafter at intervals not to exceed 1,000 flight hours.

Note 1: For the purposes of this AD, a detailed inspection is: ''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.''

Note 2: Airbus Service Bulletin A330–54–3021, dated February 4, 2004, refers to Pratt & Whitney Alert Service Bulletin PW4G–100-A54–5, dated February 13, 2003, as an additional source of service information for doing the inspection and corrective actions.

Corrective Actions and Repetitive Inspections (Cracking Found)

(g) If any crack is found during any inspection required by paragraph (f) of this AD, do paragraph (g)(1) or (g)(2) of this AD.

(1) If the crack is less than or equal to 1.2 inches long: Before further flight, stop-drill the crack and apply sealants, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–54–3021, including Appendix 01, dated February 4, 2004, or do paragraph (h) of this AD. If the crack is stop-drilled and sealants applied, then repeat the inspection required by paragraph (f) of this AD at intervals not to exceed 500 flight hours, and do paragraph (g)(1)(i) or (g)(1)(ii) of this AD, as applicable.

(i) During the repeat inspections required by paragraph (g)(1) of this AD, if the existing crack does not extend to be longer than 1.2 inches, and no additional crack is found: Within 4,600 flight cycles after the crack is initially found, do paragraph (h) of this AD.

(ii) During any repeat inspection required by paragraph (g)(1) of this AD, if any crack that was previously less than or equal to 1.2 inches long is found to have extended to be greater than 1.2 inches long; or if an additional crack is found: Before further flight, do paragraph (h) of this AD.

(2) If any crack is found that is greater than 1.2 inches long: Before further flight, do paragraph (h) of this AD.

Note 3: This AD does not allow continued flight with a known crack that is greater than 1.2 inches long.

Repair or Replacement of Firewall

(h) If any crack is found: At the applicable time specified in paragraph (g) of this AD, repair the LAPF firewall or replace the LAPF firewall with a new firewall, as applicable, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–54–3021, including Appendix 01, dated February 4, 2004. Then, within 3,000 flight hours after replacement of the LAPF firewall, inspect the firewall in accordance with paragraph (f) of this AD.

Note 4: There is no terminating action at this time for the inspections required by this AD.

Reporting Requirement

(i) If any crack is found during any inspection required by this AD: Submit a report of the findings to Airbus, Department AI/SE–E5, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Submit the report at the applicable time specified in paragraph (i)(1) or (i)(2) of this AD. The report must include the inspection results, a description of any discrepancies found, the airplane serial number, and the number of landings and flight hours on the airplane. Submitting Appendix 01 of Airbus Service Bulletin A330–54–3021, dated February 4, 2004, is an acceptable means of accomplishing this requirement. Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements contained in this AD and has assigned OMB Control Number 2120–0056.

(1) If the inspection was done after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

Alternative Methods of Compliance (AMOCs)

(j) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

Related Information

(k) French airworthiness directive F–2004–028 R1, dated September 15, 2004, also addresses the subject of this AD.

Issued in Renton, Washington, on December 27, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–50 Filed 1–3–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket Nos. RM96–1–026 and RM96–1–015]

Standards for Business Practices of Interstate Natural Gas Pipelines

December 21, 2004.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking and termination order.

SUMMARY: The Federal Energy Regulatory Commission is proposing to amend in Docket No. RM96–1–026 its regulations governing standards for conducting business practices with interstate natural gas pipelines. The Commission is proposing to incorporate by reference the most recent version of the standards, Version 1.7, promulgated December 31, 2003, by the Wholesale Gas Quadrant (WGQ) of the North American Energy Standards Board (NAESB); the standards ratified by NAESB on June 25, 2004, to implement Order No. 2004, and the standards implementing gas quality reporting requirements ratified by NAESB on October 20, 2004. These standards can be obtained from NAESB at 1301 Fannin, Suite 2350, Houston, TX 77002, 713–356–0060, *http://www.naesb.org.* The Commission is also terminating a rulemaking, instituted by a Notice of Proposed Rulemaking in Docket No. RM96–1–015, issued on June 30, 2000, which examined whether the Commission should require pipelines to permit shippers to designate and rank the contracts under which gas flows on their systems.

DATES: Comments in Docket No. RM96–1–026 are due February 18, 2005.

ADDRESSES: Comments may be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* Commenters unable to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426. Refer to Comment Procedures Section of the preamble for additional information on how to file comments.

FOR FURTHER INFORMATION CONTACT:

Jamie Chabinsky, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. 202–502–6040.

Marvin Rosenberg, Office of Markets, Tariffs, and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. 202–502–8292.

Kay Morice, Office of Markets, Tariffs, and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. 202–502–6507.

SUPPLEMENTARY INFORMATION:

1. The Federal Energy Regulatory Commission (Commission) proposes in Docket No. RM96–1–026 to amend § 284.12 of its open access regulations governing standards for conducting business practices and electronic communications with interstate natural gas pipelines. The Commission is proposing to adopt the most recent version, Version 1.7, of the consensus standards promulgated by the Wholesale Gas Quadrant (WGQ) of the North American Energy Standards Board (NAESB). The Commission is also proposing to adopt the standards ratified by NAESB on June 25, 2004, to implement Order No. 2004 [1] and the standards to implement gas quality reporting requirements ratified by NAESB on October 20, 2004, in Recommendation R03035A, which NAESB intends to include in its next

[1] Order No. 2004, 68 FR 69134 (Dec. 11, 2003), III FERC Stats. & Regs. Regulations Preambles ¶ 31,155 (Nov. 25, 2003); Order No. 2004–A, 69 FR 23562 (Apr. 29, 2004), III FERC Stats. & Regs. Regulations Preambles ¶ 31,161 (Apr. 16, 2004); Order No. 2004–B, 69 FR 48371 (Aug. 10, 2004) III FERC Stats. & Regs. Regulations and Preambles ¶ 31,166 (Aug. 2, 2004).

version of standards (Version 1.8). The proposed rule is intended to benefit the public by adopting the most recent and up-to-date standards governing business practices and electronic communication. The Commission is also terminating a rulemaking instituted by a Notice of Proposed Rulemaking issued in Docket No. RM96–1–015 on June 30, 2000 (65 FR 41885), which examined whether the Commission should require pipelines to permit shippers to designate and rank the contracts under which gas flows on their systems.

Background

2. Since 1996, in the Order No. 587 series,[2] the Commission has adopted regulations to standardize the business practices and communication methodologies of interstate pipelines in order to create a more integrated and efficient pipeline grid. In this series of orders, the Commission incorporated by reference consensus standards developed by the WGQ (formerly the Gas Industry Standards Board or GISB), a private consensus standards developer composed of members from all segments of the natural gas industry.

3. NAESB is an accredited standards organization under the auspices of the American National Standards Institute (ANSI).

4. On April 14, 2004 NAESB filed with the Commission a report informing the Commission that the WGQ had adopted a new version of its standards, Version 1.7. NAESB reports that Version 1.7 includes standards for partial day recalls which were requested in Order No. 587–N. The Commission previously incorporated these standards by reference in Order No. 587–R.[3] Version 1.7 also contains ten standards regarding creditworthiness[4] which the Commission proposed to adopt in a Notice of Proposed Rulemaking (NOPR) in Docket No. RM04–4–000.[5] Version 1.7 contains revisions that more accurately reflect the workings of the market including the definition of transaction types, charge types, Service Codes, and Reduction Reason Codes. Other revisions update standards that contained outmoded references, make the naming conventions more uniform, and permit use of proprietary entity codes when D–U–N–S® numbers are not available. In addition, the Version 1.7 standards update the treatment of allocations as well as requests for information on scheduled quantities, allocations, and shipper imbalances. Finally, NAESB reports that the WGQ continues work on requests for new and revised business practices, information requirements, code value assignments, technical implementation and mapping or interpretations.

5. On August 6, 2004, NAESB filed with the Commission a report informing the Commission that on June 25, 2004 the WGQ membership ratified a package of modifications to the Version 1.7 standards to implement Order No. 2004 (2004 Annual Plan Item 2 FERC Order 2004).[6] These standards modify the Informational Posting requirements for pipeline Web sites to reflect the information required to be posted pursuant to Order No. 2004 and will be included as part of Version 1.8.

6. On October 1, 2004, NAESB filed a report with the Commission informing the Commission that errata to Version 1.7 of the NAESB WGQ standards were adopted by the Executive Committee on August 26, 2004 and, following a member comment period, the errata would be applied to Version 1.7 on October 15, 2004. The errata contain minor corrections which remove the table of code values for Bidder Affiliate from Standard 5.4.13 and correct the Transaction Status Code data element in the Code Values Dictionary of Standard 1.4.2.

7. On November 1, 2004, NAESB filed a report with the Commission informing the Commission that on October 20, 2004 the WGQ membership ratified standards to implement gas quality reporting requirements (Recommendation R03035A).[7] These standards require a pipeline to provide a link on its Informational Posting Web Site to its gas quality tariff provisions, or a simple reference guide to such information. In addition, a pipeline is required to provide on its Informational Postings Web site, in a downloadable format, daily average gas quality information for prior day(s) to the extent available for locations(s) that are representative of mainline gas flow for the most recent three-month period.

Discussion

8. The Commission is proposing to adopt Version 1.7 of the NAESB WGQ's consensus standards;[8] the standards to implement Order No. 2004 ratified by NAESB on June 25, 2004 (2004 Annual Plan Item 2 FERC Order 2004); and the standards governing gas quality reporting ratified by NAESB on October 20, 2004 (Recommendation R03035A).[9] Pipelines would be required to implement the standards three months after a final rule is issued. Because the Version 1.7 standards include the partial day recall standards adopted by the Commission in Order No. 587–R, separate reference to these standards is no longer necessary and is proposed to be removed.

9. Adoption of Version 1.7[10] of the NAESB WGQ standards will help continue the process of updating and improving the current standards. In

[2] Standards For Business Practices Of Interstate Natural Gas Pipelines, Order No. 587, 61 FR 39053 (July 26, 1996), FERC Stats. & Regs. Regulations Preambles [July 1996-December 2000] ¶ 31,038 (July 17, 1996), Order No. 587–B, 62 FR 5521 (Feb. 6, 1997), FERC Stats. & Regs. Regulations Preambles [July 1996-December 2000] ¶ 31,046 (Jan. 30, 1997), Order No. 587–C, 62 FR 10684 (Mar. 10, 1997), FERC Stats. & Regs. Regulations Preambles [July 1996-December 2000] ¶ 31,050 (Mar. 4, 1997), Order No. 587–G, 63 FR 20072 (Apr. 23, 1998), FERC Stats. & Regs. Regulations Preambles [July 1996-December 2000] ¶ 31,062 (Apr. 16, 1998), Order No. 587–H, 63 FR 39509 (July 23, 1998), FERC Stats. & Regs. Regulations Preambles [July 1996-December 2000] ¶ 31,063 (July 15, 1998); Order No. 587–I, 63 FR 53565 (Oct. 6, 1998), FERC Stats. & Regs. Regulations Preambles [July 1996-December 2000] ¶ 31,067 (Sept. 29, 1998), Order No. 587–K, 64 FR 17276 (Apr. 9, 1999), FERC Stats. & Regs. Regulations Preambles [July 1996-December 2000] ¶ 31,072 (Apr. 2, 1999); Order No. 587–M, 65 FR 77285 (Dec. 11, 2000), FERC Stats. & Regs. Regulations Preambles [July 1996-December 2000] ¶ 31,114 (Dec. 11, 2000); Order No. 587–N, 67 FR 11906 (Mar. 18, 2002), III FERC Stats. & Regs. Regulations Preambles ¶ 31,125 (Mar. 11, 2002), Order No. 587–O, 67 FR 30788 (May 8, 2002), III FERC Stats. & Regs. Regulations Preambles ¶ 31,129 (May 1, 2002); Order No. 587–R, 68 FR 13813 (Mar. 21, 2003), III FERC Stats. & Regs. Regulations Preambles ¶ 31,141 (Mar. 12, 2003).

[3] Order No. 587–R, 68 FR 13813 (Mar. 21, 2003), III FERC Stats. & Regs. Regulations Preambles ¶ 31,141 (Mar. 12, 2003).

[4] Standards 0.3.3 through 0.3.10, 5.3.59 and 5.3.60.

[5] Creditworthiness Standards for Interstate Natural Gas Pipeline, Notice of Proposed Rulemaking (NOPR), 69 FR 8587 (Feb. 25, 2004), IV FERC Stats. & Regs. Proposed Regulations ¶ 32,573 (Feb. 12, 2004).

[6] The standards ratified June 25, 2004 modified Definition 4.2.1 and Standards 4.3.16, 4.3.18, 4.3.22, 4.3.23, 4.3.25 and deleted Standards 4.3.6, 4.3.19, 4.3.21 and 4.3.63. They added Principle 0.1.z1 and deleted Principle 4.1.25.

[7] The standards ratified October 20, 2004 modified Standard 4.3.23 and added Principle 4.1.p1 and Standards 4.3.s1, 4.3.s2, 4.3.s3, and 4.3.s4.

[8] In Version 1.7 of its standards, the NAESB WGQ added a new implementation guide entitled ''Additional Standards,'' which contains general or topic specific standards. Previously these standards were included in each of five original implementation guides: Nominations, Flowing Gas, Invoicing, Electronic Delivery Mechanism, and Capacity Release.

[9] Pursuant to the regulations regarding incorporation by reference, copies of Version 1.7 are available from NAESB. 5 U.S.C. 552 (a)(1); 1 CFR 51 (2001).

[10] In Version 1.7 the NAESB WGQ made the following changes to its standards, excluding the creditworthiness standards. It revised Standards 1.3.32, 2.3.21, 4.3.1, 4.3.2, 5.3.2, 5.3.7, 5.3.41, and 5.3.42, and Datasets 1.4.1 through 1.4.7, 2.4.1 through 2.4.16, 3.4.1 through 3.4.4, and 5.4.1 through 5.4.22. It added Principles 1.1.22, 2.1.6, 5.1.2, 5.1.3, and 5.1.4, Definitions 2.2.4, 2.2.5 and 5.2.3, and Standards 0.3.2, 2.3.51 through 2.3.64, and 5.3.44 through 5.3.58. It deleted Principles 1.1.6, 1.1.8, 1.1.19, and 4.1.14, and Standards 1.3.78, 2.3.24, 2.3.36 through 2.3.39, and 5.3.6.

adopting the Version 1.7 standards, the Commission is proposing to adopt the new ''Additional Standards'' implementation guide that contains standards generally applicable to all the business processes. This section includes the creditworthiness standards that have already been noticed for comment in Docket No. RM04–4–000. The Commission will address the comments filed on these standards prior to issuing a final rule, and, therefore, there is no need to file comments on these standards in this proceeding. The Additional Standards also include standards governing the use of common codes to identify entities in transactions.

10. The NAESB standards with respect to the Order No. 2004 affiliate standards establish uniform posting requirements for the Commission requirements. The NAESB standards, however, were developed prior to the issuance of Order No. 2004–A, and Revised Standard 4.3.23 does not specify a location for posting voluntary consent to information disclosure by non-affiliated customers as required by § 358 of the Commission regulations.[11] Electric utilities and pipelines have been posting this information as a separate category from other non-discrimination requirements.[12] Posting this information as a separate category represents a better practice, since it will make it easier for the Commission as well as other parties to find and access this information, and the Commission expects all electric utilities and pipelines to follow this practice. Since requiring a separate posting is not inconsistent with the NAESB standard, the Commission is proposing to incorporate the NAESB standard by reference. We expect that in future versions of its standards, NAESB will reflect such a requirement.

11. The Commission recognizes that the NAESB Wholesale Electric Quadrant is also working on posting standards, and NAESB should ensure that the standards relating to Order No. 2004 postings are as similar as possible across the industries. This will ensure that locating information is as seamless as possible for the Commission and common users of these Web sites.

12. The Commission is also proposing to adopt the NAESB standards related to gas quality in WGQ Recommendation R03035A. These standards require a pipeline to provide a link on its Informational Posting Web site to its gas quality tariff provisions, or a simple reference guide to such information. In addition, a pipeline is required to provide on its Informational Postings Web site, in a downloadable format, daily average gas quality information for prior day(s) to the extent available for locations(s) that are representative of mainline gas flow for the most recent three-month period. Adoption of these standards will provide greater transparency to shippers with respect to the gas quality requirements of interstate pipelines and available information on gas quality on such pipelines' systems.

13. The NAESB WGQ approved the standards under NAESB's consensus procedures.[13] As the Commission found in Order No. 587, adoption of consensus standards is appropriate because the consensus process helps ensure the reasonableness of the standards by requiring that the standards draw support from a broad spectrum of all segments of the industry. Moreover, since the industry itself has to conduct business under these standards, the Commission's regulations should reflect those standards that have the widest possible support. In section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTT&AA), Congress affirmatively requires federal agencies to use technical standards developed by voluntary consensus standards organizations, like NAESB, as means to carry out policy objectives or activities.[14]

14. Additionally, the Commission is terminating a separate rulemaking (proposed in Docket No. RM96–1–015). On June 30, 2000, the Commission issued a NOPR proposing, along with other matters, to adopt a regulation requiring pipelines to permit shippers to designate and rank the transportation contracts under which gas will flow on the pipeline's system.[15] The WGQ standards currently require pipelines to use shipper ''rankings when making reductions during the scheduling process'' (Standard 1.3.23), but the WGQ could not reach consensus on a standard for cross-contract ranking that would apply to all three pipeline scheduling models. The comments and the information provided during the technical conference did not reveal a method of accomplishing cross-contract ranking that would provide improved and more consistent results than the current standards. Accordingly, the Commission is terminating the rulemaking in Docket No. RM96–1–015.

Notice of Use of Voluntary Consensus Standards

15. Office of Management and Budget Circular A–119 (§ 11) (February 10, 1998) provides that Federal Agencies should publish a request for comment in a NOPR when the agency is seeking to issue or revise a regulation proposing to adopt a voluntary consensus standard or a government-unique standard. In this NOPR, the Commission is proposing to incorporate by reference voluntary consensus standards developed by the WGQ.

Information Collection Statement

16. The following collections of information contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d). The Commission solicits comments on the Commission's need for this information, whether the information will have practical utility, the accuracy of the provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques. The following burden estimate includes the costs to implement the NAESB WGQ's Version 1.7 standards as modified by the standards ratified by NAESB on June 25, 2004 and October 20, 2004, which incorporate the most recent and up-to-

[11] 18 CFR 358.5(b)(4). It may be that this information is intended to be posted under the ''Non-discrimination Rqmts.'' category, but there is no specific subcategory dealing with voluntary consent information.

[12] *See* Cinergy Oasis, *http://oasis.midwestiso.org/OASIS/CIN*; National Grid Oasis Log, *http://www.nationalgridus.com/OASIS/keydocs.asp*; Entergy FERC Order No. 2004 Standards of Conduct, *http://oasis.e-terrasolutions.com/documents/EES/Order_2004_Standards_of_Conduct.htm*; Peco FERC Standards of Conduct, *http://oasis.peco.com*; ANR Pipeline Co., *http://tebb.elpaso.com/ebbANR/ebbmain.asp?sPipelineCode=ANR*; Blue Lake Gas Storage Company, *http://www.gasnom.com/ip/bluelake/*; Transcontinental Gas Pipe Line Corp., *http://www.1line.williams.com/Files/Transco/TranscoInfoPostingFrameset.html*; CenterPoint Energy Gas Transmission Company, *http://pipelines.centerpointenergy.com/ebb-main-ngt.html.*

[13] This process first requires a super-majority vote of 17 out of 25 members of the WGQ's Executive Committee with support from at least two members from each of the five industry segments—interstate pipelines, local distribution companies, gas producers, end-users, and services (including marketers and computer service providers). For final approval, 67% of the WGQ's general membership must ratify the standards.

[14] Pub L. 104–113, ''12(d), 110 Stat. 775 (1996), 15 U.S.C. 272 note (1997).

[15] Standards For Business Practices Of Interstate Natural Gas Pipelines, Notice of Proposed Rulemaking, 65 FR 41885 (July 7, 2000), IV FERC Stats. & Regs. Proposed Regulations ¶ 32,552 (June 30, 2000). The Commission has issued a final rule regarding the other proposed regulatory changes in the NOPR. Standards For Business Practices Of Interstate Natural Gas Pipelines, Order No. 587–M, 65 FR 77285 (Dec. 11, 2000), FERC Stats. & Regs. Regulations Preambles [July 1996–December 2000] ¶ 31,114 (Nov. 30, 2000).

date standards governing electronic communication. The burden estimates are primarily related to start-up to implement the latest version of the standards and will not result in on-going costs.

Data collection	Number of respondents	Number of responses per respondent	Hours per response	Total Number of hours
FERC–545	93	1	38	3,534
FERC–549C	93	1	2,614	243,102

Total Annual Hours for Collection (Reporting and Recordkeeping, (if appropriate)) = 246,636.

17. Information Collection Costs: The Commission seeks comments on the costs to comply with these requirements. It has projected the average annualized cost for all respondents to be the following:

	FERC–549C	FERC–545
Annualized Capital/Startup Costs	$12,691,327	$184,495
Annualized Costs (Operations & Maintenance)	0	0
Total Annualized Costs	12,691,327	184,495

Total Cost for all Respondents = $12,875,722.

18. OMB regulations [16] require OMB to approve certain information collection requirements imposed by agency rule. The Commission is submitting notification of this proposed rule to OMB.

Title: FERC–545, Gas Pipeline Rates: Rates Change (Non-Formal); FERC–549C, Standards for Business Practices of Interstate Natural Gas Pipelines.

Action: Proposed collections.

OMB Control Nos.: 1902–0154, 1902–0174.

Respondents: Business or other for profit, (Interstate natural gas pipelines (Not applicable to small business)).

Frequency of Responses: One-time implementation (business procedures, capital/start-up).

Necessity of Information: This proposed rule, if implemented, would upgrade the Commission's current business practice and communication standards to the latest edition approved by the NAESB WGQ (Version 1.7). The implementation of these standards is necessary to increase the efficiency of the pipeline grid and is consistent with the mandate that agencies provide for electronic disclosure of information.[17]

19. The information collection requirements of this proposed rule will be reported directly to the industry users. The implementation of these data requirements will help the Commission carry out its responsibilities under the Natural Gas Act to monitor activities of the natural gas industry to ensure its competitiveness and to assure the improved efficiency of the industry's operations. The Commission's Office of Markets, Tariffs and Rates will use the data in rate proceedings to review rate and tariff changes by natural gas companies for the transportation of gas, for general industry oversight, and to supplement the documentation used during the Commission's audit process.

20. *Internal Review:* The Commission has reviewed the requirements pertaining to business practices and electronic communication with natural gas interstate pipelines and made a determination that the proposed revisions are necessary to establish a more efficient and integrated pipeline grid. Requiring such information ensures both a common means of communication and common business practices which provide participants engaged in transactions with interstate pipelines with timely information and uniform business procedures across multiple pipelines. These requirements conform to the Commission's plan for efficient information collection, communication, and management within the natural gas industry. The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

21. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (Attention: Michael Miller, Office of the Chief Information Officer, phone: (202) 502–8415, fax: (202) 273–0873 e-mail: *michael.miller@ferc.gov*.)

22. Comments concerning the collection of information(s) and the associated burden estimate(s), should be sent to the contact listed above and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503 (Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202) 395–7856, fax: (202) 395–7285).

Environmental Analysis

23. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[18] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[19] The actions proposed here fall within categorical exclusions in the Commission's regulations for rules that are clarifying, corrective, or procedural, for information gathering, analysis, and dissemination, and for sales, exchange, and transportation of natural gas that requires no construction of facilities.[20] Therefore, an environmental assessment is unnecessary and has not been prepared in this NOPR.

Regulatory Flexibility Act Certification

24. The Regulatory Flexibility Act of 1980 (RFA)[21] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The regulations proposed here impose requirements only on interstate pipelines, the majority of which are not

[16] 5 CFR 1320.11.

[17] 44 U.S.C. 3504 note, Pub. L. 105–277, 1701, 112 Stat. 2681–749 (1998).

[18] Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Regulations Preambles 1986–1990 ¶ 30,783 (1987).

[19] 18 CFR 380.4 (2004).

[20] *See* 18 CFR 380.4(a)(2)(ii), 380.4(a)(5), 380.4(a)(27) (2004).

[21] 5 U.S.C. 601–612 (2000).

small businesses, and would not have a significant economic impact. These requirements are, in fact, designed to benefit all customers, including small businesses. Accordingly, pursuant to section 605(b) of the RFA, the Commission hereby certifies that the regulations proposed herein will not have a significant adverse impact on a substantial number of small entities.

Comment Procedures

25. The Commission invites interested persons to submit written comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss.[22] Comments are due February 18, 2005. Comments must refer to Docket No. RM96–1–026, and must include the commenter's name, the organization they represent, if applicable, and their address. Comments may be filed either in electronic or paper format.

26. Comments may be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426. For paper filings, the original and 14 copies of such comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

27. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

Document Availability

28. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's home page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

29. From FERC's home page on the Internet, this information is available in eLibrary. The full text of this document is available in eLibrary both in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

30. User assistance is available for eLibrary and the FERC's Web site during our normal business hours. For assistance contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

List of Subjects in 18 CFR Part 284

Continental shelf, Incorporation by reference, Natural gas, Reporting and recordkeeping requirements.

By direction of the Commission.

Linda Mitry,

Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend part 284, Chapter I, Title 18, *Code of Federal Regulations,* as follows:

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

1. The authority citation for part 284 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352; 43 U.S.C. 1331–1356.

2. Section 284.12 is amended by revising paragraphs (a)(1)(i) through (v) and adding a new paragraph (a)(1)(vi) to read as follows:

§ 284.12 Standards for pipeline business operations and communications.

(a) * * *

(1) * * *

(i) Additional Standards (General Standards and Creditworthiness Standards) (Version 1.7, December 31, 2003);

(ii) Nominations Related Standards (Version 1.7, December 31, 2003, including errata, October 15, 2004);

(iii) Flowing Gas Related Standards (Version 1.7, December 31, 2003);

(iv) Invoicing Related Standards (Version 1.7, December 31, 2003);

(v) Electronic Delivery Mechanism Related Standards (Version 1.7, December 31, 2003) with the exception of Standard 4.3.4, and including the standards contained in 2004 Annual Plan Item 2 (June 25, 2004) (Order No. 2004 standards), and the standards contained in Recommendation R03035A (October 20, 2004) gas quality reporting; and

(vi) Capacity Release Related Standards (Version 1.7, December 31, 2003, including errata, October 15, 2004).

* * * * *

[FR Doc. 05–17 Filed 1–3–05; 8:45 am]

BILLING CODE 6717–01–P

[22] Commenters may request their comments in Docket No. RM04–4–000 to be incorporated by reference into this docket.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 93

[OAR–2003–0049, FRL–7857–2]

Options for $PM_{2.5}$ and PM_{10} Hot-Spot Analyses in the Transportation Conformity Rule Amendments for the New $PM_{2.5}$ and Existing PM_{10} National Ambient Air Quality Standards; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Supplemental notice of proposed rule; extension of comment period.

SUMMARY: The Environmental Protection Agency is extending the comment period for the supplemental proposal that included additional options for assessing localized impacts of individual transportation projects in particulate matter ($PM_{2.5}$ and PM_{10}) nonattainment and maintenance areas and requested comment on all options proposed. The supplemental notice of proposed rulemaking was published in the **Federal Register** on December 13, 2004 (69 FR 72140). EPA is extending the comment period for the proposed rule to January 27, 2005.

DATES: Written comments on this supplemental proposal (69 FR 72140) must be received on or before January 27, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2003–0049 by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *a-and-r-docket@epa.gov.*
- Fax: 202–566–1741.
- Mail: Air Docket, Environmental Protection Agency, Mailcode: 6102T,

1200 Pennsylvania, Ave., NW., Washington, DC 20460, Attention Docket ID No. OAR–2003–0049.

• Hand Delivery: EPA Docket Center, room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. OAR–2003–0049. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov websites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102). For additional instructions on submitting comments, go to Unit I.C. of the Supplementary Information section of this document.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Rudy Kapichak, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, e-mail address: *kapichak.rudolph@epa.gov*, telephone number: (734) 214–4574, fax number 734–214–4052; or Laura Berry, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105, e-mail address: *berry.laura@epa.gov*, telephone number: (734) 214–4858, fax number 734–214–4052.

SUPPLEMENTARY INFORMATION: EPA published a supplemental notice of proposed rulemaking (SNPRM) in the **Federal Register** on December 13, 2004 (69 FR 72140). That notice included a deadline for written comments of January 12, 2005. Since that time we have received requests for an extension of that deadline to allow additional time to review and comment on the proposed options for hot-spot analyses in $PM_{2.5}$ and PM_{10} nonattainment and maintenance areas. As a result of these requests, EPA is extending the comment period on the supplemental proposal to January 27, 2005.

The requests received by EPA regarding an extension of the comment period focus on the ability of transportation conformity stakeholder groups to coordinate with their members and prepare meaningful comments during a 30-day comment period which includes two federal holidays. Stakeholder groups representing state and local air quality and transportation agencies and environmental and transportation advocacy groups frequently submit significant comments on proposed changes to the transportation conformity rule.

In the SNPRM, EPA requested comment on a wide range of options for hot-spot analyses in $PM_{2.5}$ and PM_{10} nonattainment and maintenance areas both before and after state implementation plans are submitted. Specifically, we asked commenters to submit research and data that indicate the existence and prevalence of $PM_{2.5}$ and PM_{10} hot-spots as well as legal rationale to support options that they preferred. Many of the options proposed in the SNPRM require state and local agencies to make decisions regarding the existence of hot-spots in their area as well as decisions regarding the specific types of locations within a nonattainment or maintenance area that are most susceptible to a localized violation of the $PM_{2.5}$ or PM_{10} air quality standard. As such, commenters were requested to submit information indicating whether or not they would have sufficient data to make the decisions required by each of these options. Finally, commenters were asked to submit information on whether the U.S. Department of Transportation should be allowed to make categorical conformity determinations for certain types of highway projects and on what types of highway projects could be eligible for a categorical conformity determination.

It should be noted that EPA was requested to extend the comment period by 30 days to February 11, 2005. EPA believes that it is necessary to strike a balance between the additional time that was requested to complete and submit comments and the need to finalize these requirements in sufficient time so that state and local transportation planners are prepared to implement them by the end of the one year conformity grace period that applies in $PM_{2.5}$ nonattainment areas. Given the timing of the publication of the SNPRM and the significant amount of information that is requested from commenters, EPA is extending the comment period to January 27, 2005.

Dated: December 28, 2004.

Jeffrey Holmstead,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 05–83 Filed 1–3–05; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[I.D. 110904F]

Endangered and Threatened Species: Notice of Public Hearings on Proposed Designation of Critical Habitat for Seven Evolutionarily Significant Units of Pacific Salmon (*Oncorhynchus tshawytscha*) and Steelhead (*O. mykiss*) in California

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

ACTION: Notice of public hearings.

SUMMARY: On December 10, 2004, NMFS proposed critical habitat designations for two Evolutionarily Significant Units (ESUs) of chinook salmon (*Oncorhynchus tshawytscha*) and five ESUs of *O. mykiss* (inclusive of anadromous steelhead and resident rainbow trout) in California that are listed under the Endangered Species Act of 1973. The public comment period for this proposal presently closes on February 8, 2005. In this document, NMFS is announcing that public hearings have been scheduled at four locations in California in January and early February 2005 to provide additional opportunities for the public and other interested parties to comment on the subject proposals.

DATES: Written comments on the proposed critical habitat designations must be received by February 8, 2005. In order to provide the public additional opportunity to comment on these critical habitat designation proposals, NMFS will be holding four public hearings in California at the specific dates and locations listed below:

January 13, 2005; 6:30–9:30pm at the North Coast Inn, 4975 Valley West Blvd., Arcata, CA 95521; January 19, 2005; 6:30–9:30pm at the DoubleTree Hotel Sonoma Wine Country, One DoubleTree Drive, Rohnert Park, CA 94928;

January 20, 2005; 6:30–9:30pm at the Radisson Hotel Sacramento, 500 Leisure Lane, Sacramento, CA 95815;

February 1, 2005; 6:30–9:30pm at Fess Parker's DoubleTree Resort, 633 East Cabrillo Blvd., Santa Barbara, CA 93103.

ADDRESSES: You may submit comments on the proposed critical habitat designations, identified by docket number [041123329–4329–01] and RIN number [0648–AO04], by any of the following methods:

- E-mail: *critical.habitat.swr@noaaa.gov*. Include docket number and RIN number in the subject line of the message.
- Mail: Submit written comments and information to Assistant Regional Administrator, NMFS, Protected Resources Division, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213. You may hand-deliver written comments to our office during normal business hours at the address given above.
- Federal e-Rulemaking Portal: *http://www.regulations.gov*
- Fax: 562–980–4027.

FOR FURTHER INFORMATION CONTACT: Craig Wingert, NMFS, Southwest Region, 562/ 980–4021; or Marta Nammack at 301/713–1401. The proposed rule, maps and other materials related to the proposal can be found on the Southwest Region's website at *http://swr.nmfs.noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

On December 10, 2004, NMFS proposed critical habitat designations for two Evolutionarily Significant Units (ESUs) of chinook salmon (*Oncorhynchus tshawytscha*) and five ESUs of O. mykiss (inclusive of anadromous steelhead and resident rainbow trout) in California that are listed as threatened or endangered species under the Endangered Species Act of 1973 (69 FR 71880). The seven ESU of salmon and *O. mykiss* include: (1) California Coastal chinook salmon, (2) Northern California *O. mykiss*, (3) Central California Coast *O. mykiss*, (4) South-Central California Coast *O. mykiss*, (5) Southern California *O. mykiss*, (6) Central Valley spring-run chinook salmon, and (7) Central Valley *O. mykiss*. The public comment period for these proposals opened on December 10, 2004 and closes on February 8, 2005.

Public Hearings

Joint Commerce-Interior ESA implementing regulations state that the Secretary shall promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed regulation to list a species or to designate critical habitat (see 50 CFR 424.16(c)(3)). NMFS has already scheduled hearings to allow affected stakeholders and members of the public the opportunity to provide comments directly to agency staff during the comment period (see **DATES**, above). However, these public meetings are not the only opportunity for the public to provide input on these proposals. The public and stakeholders are encouraged to continue to comment and provide input to NMFS on the proposals (via correspondence, e-mail, and the Internet; see **ADDRESSES**, above) up until the scheduled close of the comment period on February 8, 2005.

References

Copies of the **Federal Register** notices and related materials cited herein are available on the Southwest Region's website at *http://swr.nmfs.noaa.gov* or upon request (see **ADDRESSES** section above).

Dated: December 29, 2004.

P. Michael Payne,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 05–94 Filed 1–3–05; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 70, No. 2
Tuesday, January 4, 2005

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

Notice of Tri-County Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Beaverhead-Deerlodge National Forest's Tri-County Resource Advisory Committee will meet on Thursday, February 3, 2005, from 4 p.m. to 8 p.m. in Deer Lodge, Montana, for a business meeting. The meeting is open to the public.

DATES: Thursday, February 3, 2005.

ADDRESSES: The meeting will be held at the USDA Service Center, 1002 Hollenback Road, Deer Lodge, Montana.

FOR FURTHER INFORMATION CONTACT: Thomas K. Reilly, Designated Forest Official (DFO), Forest Supervisor, Beaverhead-Deerlodge National Forest, at (406) 683–3973.

SUPPLEMENTARY INFORMATION: Agenda topics for this meeting includes a review of projects approved and proposed for funding as authorized under Title II of Public Law 106–393, new proposals for funding, information about a community fire plan, and public comment. If the meeting location is changed, notice will be posted in local newspaper, including The Montana Standard.

Dated: December 27, 2004.

Thomas K. Reilly,

Forest Supervisor, Designated Federal Official.

[FR Doc. 05–30 Filed 1–3–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–008]

Correction: Notice of Final Results of Antidumping Duty Administrative Review: Circular Welded Carbon Steel Pipes and Tubes From Taiwan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: September 30, 2004

FOR FURTHER INFORMATION CONTACT: Angela Strom at (202) 482–2704, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION: On September 30, 2004, the Department of Commerce published the final results of the administrative review of the antidumping order covering circular welded carbon steel pipes and tubes from Taiwan. *See Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review*, 69 FR 58390 (*Final Results*). The version published in the **Federal Register** contained a typographical error which is being identified and corrected by this Correction notice.

During the publication process, the title of one of the sections- ''Assessment'' -was transposed into the chart in the previous section that identified the respondent and the final weighted–average margin. The necessary correction is as follows:

Final Results of Review

We determine the following dumping margin exists for the period May 1, 2002, to April 30, 2003.

Producer and Exporter	Weighted–Average Margin (percentage)
Yieh Hsing	1.61

Assessment

The Department shall determine .... (See *Final Results* at 58391 for the balance of this section).''

This notice is published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 28, 2004.

Barbara E. Tillman,

Acting Assistant Secretary for Import Administration.

[FR Doc. E4–3924 Filed 1–3–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–865]

Notice of Final Determination of Sales at Less Than Fair Value: Outboard Engines From Japan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: January 4, 2005.

FOR FURTHER INFORMATION CONTACT: James Kemp or Shane Subler at (202) 482–5346 or (202) 482–0189, respectively; AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230.

Final Determination

We determine that outboard engines from Japan are being sold, or are likely to be sold, in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The estimated margins of sales at LTFV are shown in the *Continuation of Suspension of Liquidation* section of this notice.

Case History

The preliminary determination in this investigation was published on August 12, 2004. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Outboard Engines from Japan, 69 FR 49863 (August 12, 2004) (Preliminary Determination).* Since the publication of the preliminary determination, the following events have occurred:

In September and October 2004, the Department of Commerce (the Department) verified the questionnaire responses submitted by Yamaha Motor Company, Ltd., Yamaha Marine Company, Ltd., and Yamaha Motor Corporation, U.S.A. (collectively Yamaha). The sales and cost verification

reports were issued on November 1, 2004. On November 10, 2004, we received case briefs from (1) the petitioner; [1] (2) BRP U.S. Inc. and Bombardier Recreational Products Inc. (collectively, BRP), a domestic interested party; (3) American Honda Motor Co., Inc., and Honda Motor Co., Ltd., American Suzuki Motor Corporation and Suzuki Motor Corporation, Tohatsu Corporation, Tohatsu Marine Corporation, and Tohatsu America Corporation, Nissan Marine Co., Ltd. (collectively, the Other Japanese Parties); and (4) Yamaha.[2] On November 17, 2004, we received rebuttal briefs from the petitioner, BRP, and Yamaha. Since no request was made for a public hearing, a public hearing was not held.

Scope of Investigation

For the purpose of this investigation, the products covered are outboard engines (also referred to as outboard motors), whether assembled or unassembled; and powerheads, whether assembled or unassembled. The subject engines are gasoline-powered spark-ignition, internal combustion engines designed and used principally for marine propulsion for all types of light recreational and commercial boats, including, but not limited to, canoes, rafts, inflatable, sail and pontoon boats. Specifically included in this scope are two-stroke, direct injection two-stroke, and four-stroke outboard engines.

Outboard engines are comprised of (1) a powerhead assembly, or an internal combustion engine, (2) a midsection assembly, by which the outboard engine is attached to the vehicle it propels, and (3) a gearcase assembly, which typically includes a transmission and propeller shaft, and may or may not include a propeller. To the extent that these components are imported together, but unassembled, they collectively are covered within the scope of this investigation. An ''unassembled'' outboard engine consists of a powerhead as defined below, and any other parts imported with the powerhead that may be used in the assembly of an outboard engine.

Powerheads are comprised of, at a minimum, (1) a cylinder block, (2) pistons, (3) connecting rods, and (4) a crankshaft. Importation of these four components together, whether assembled or unassembled, and whether or not accompanied by additional components, constitute a powerhead for purposes of this investigation. An ''unassembled'' powerhead consists of, at a minimum, the four powerhead components listed above, and any other parts imported with it that may be used in the assembly of a powerhead.

The scope does not include parts or components (other than powerheads) imported separately.

The outboard engines and powerheads subject to this investigation are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 8407.21.0040 and 8407.21.0080. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

Excluded from the scope of the investigation are five specific models of powerheads.

The specific characteristics for each excluded powehead are described below.

1. 75 Horsepower Carbureted Powerhead: the engine type is four-stroke inline four cylinder internal combustion engine; the valve train consists of sixteen valves and twin cam with timing belt and tensioner; the crankcase is of high-pressure die-cast aluminum; the block is of high-pressure die-cast aluminum with iron cylinder liners; displacement 1.596 liters; bore and stroke 79 mm x 81.4 mm; compression ratio 9.6: 1; fuel supplied by four individual carburetors fitted to left side (as viewed from rear) of engine; power output 55.9 kW at 5000 RPM; fuel consumption 28.0 L/H Max at 6000 RPM; maximum height 539 mm; maximum width 435 mm; maximum length 646 mm; and weight (dry) 180.5 lbs./81.6 kg.

2. 90 Horsepower Carbureted Powerhead: the engine type is four-stroke inline four cylinder internal combustion engine; the valve train consists of sixteen valves and twin cam with timing belt and tensioner; the crankcase is of high-pressure die-cast aluminum; the block is of high-pressure die-cast aluminum with iron cylinder liners; displacement 1.596 liters; bore and stroke 79 mm x 81.4 mm; compression ratio 9.6: 1; fuel supplied by four individual carburetors fitted to left side (as viewed from rear) of engine; power output 67.1 kW at 5500 RPM; fuel consumption 31.5 L/H Max at 6000 RPM; maximum height 539 mm; maximum width 435 mm; maximum length 646 mm; and weight (dry) 180.5 lbs./81.6 kg.

3. 75 Horsepower Electronic Fuel Injection Powerhead: the engine type is four-stroke inline four cylinder internal combustion engine; the valve train consists of sixteen valves and twin cam with timing belt and tensioner; the crankcase is of high-pressure die-cast aluminum; the block is of high-pressure die-cast aluminum with iron cylinder liners; displacement 1.596 liters; bore and stroke 79 mm x 81.4 mm; compression ratio 9.6: 1; fuel supplied by single throttle body multi-point electronic fuel injection; power output 55.9 kW at 5000 RPM; fuel consumption 29.0 L/H Max at 6000 RPM; maximum height 539 mm; maximum width 435 mm; maximum length 646 mm; and weight (dry) 183.0 lbs./83.0 kg.

4. 90 Horsepower Electronic Fuel Injection Powerhead: the engine type is four-stroke inline four cylinder internal combustion engine; the valve train consists of sixteen valves and twin cam with timing belt and tensioner; the crankcase is of high-pressure die-cast aluminum; the block is of high-pressure die-cast aluminum with iron cylinder liners; displacement 1.596 liters; bore and stroke 79 mm x 81.4 mm; compression ratio 9.6: 1; fuel supplied by single throttle body multi-point electronic fuel injection; power output 67.1 kW at 5500 RPM; fuel consumption 33.0 L/H Max at 6000 RPM; maximum height 539 mm; maximum width 435 mm; maximum length 646 mm; and weight (dry) 183.0 lbs./83.0 kg.

5. 115 Horsepower Electronic Fuel Injection Powerhead: the engine type is four-stroke inline four cylinder internal combustion engine; the valve train consists of sixteen valves and twin cam with timing belt and tensioner; the crankcase is of high-pressure die-cast aluminum; the block is of high-pressure die-cast aluminum with iron cylinder liners; displacement 1.741 liters; bore and stroke 79 mm x 89 mm; compression ratio 9.7: 1; fuel supplied by multi-point electronic fuel injection with four individual throttle bodies; power output 85.8 kW at 5500 RPM; fuel consumption 38.0 L/H Max at 5500 RPM; maximum height 539 mm; maximum width 444 mm; maximum length 637 mm; and weight (dry) 189.0 lbs./85.7 kg.

Period of Investigation

The period of investigation (POI) is January 1, 2003, through December 31, 2003. This period corresponds to the four most recent fiscal quarters prior to the month of filing of the petition (*i.e.,* January 2004) involving imports from a market economy, and is in accordance with our regulations. *See* 19 CFR 351.204(b)(1).

[1] The petitioner in this investigation is Mercury Marine, a division of Brunswick Corporation.

[2] On December 6, 2004, we rejected the case briefs submitted by Yamaha and the Other Japanese Parties because they contained new factual information. After making the revisions requested by the Department, Yamaha and the Other Japanese Parties resubmitted the briefs on December 7, 2004.

Scope Issues

Outboard Engines Under 25 Horsepower

In the preliminary determination, we analyzed parties' comments regarding the appropriateness of including engines of 25 horsepower or less in the scope of investigation and determined that the engines were within the scope. *See Preliminary Determination* at 49864. For the final determination, we affirm our decision in the preliminary determination and continue to find that these engines are included in the scope of the investigation. No parties commented on this issue for the final determination.

Powerheads Imported as Replacement Parts

In the preliminary determination, we found that engines imported for the purpose of repairing outboard engines previously sold are properly included in the scope of the investigation. *See Preliminary Determination* at 49865. The Other Japanese Parties submitted a case brief arguing that the Department should exclude these engines from the scope for the final determination. The petitioner and BRP submitted rebuttal briefs on this issue. After analyzing the parties' arguments, we continue to find that engines imported for the purpose of repair are properly included in the scope of the investigation for the reasons outlined at Comment 2 of the *Memorandum from Barbara E. Tillman, Acting Deputy Assistant Secretary, to James J. Jochum, Assistant Secretary for Import Administration, RE: Issues and Decision Memorandum for the Final Determination of the Investigation of Outboard Engines from Japan (Decision Memorandum),* dated December 27, 2004.

Treatment of Powerheads as a Separate Class or Kind

In the preliminary determination, we found that completed engines and powerheads constituted the same class or kind of merchandise. *See Preliminary Determination* at 49865. Yamaha and the Other Japanese Parties submitted case briefs arguing that the Department should find that powerheads are a separate class or kind from completed outboard engines. The petitioner and BRP submitted a rebuttal brief on this issue. After analyzing the parties' arguments, we continue to find that completed engines and powerheads constitute the same class or kind of merchandise for the reasons outlined at Comment 1 of the *Decision Memorandum.*

Amendment to the Scope of Investigation

In a separate November 17, 2004, submission, the petitioner requested that the Department exclude certain models of powerheads from the scope of the investigation. On November 23, 2004, Yamaha submitted comments on the petitioner's request.[3] The petitioner submitted a response to these comments on November 30, 2004. After analyzing the parties' arguments, we accepted the petitioner's proposed scope amendment to exclude certain powerhead models for the reasons outlined at Comment 17 of the *Decision Memorandum.* For a description of the excluded powerheads, see the *Scope of Investigation* section of this notice.

Verification

As provided in section 782(i) of the Act, we conducted verification of the cost and sales information submitted by Yamaha. We used standard verification procedures including examination of relevant accounting and production records, and original source documents provided by the respondent.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by parties to this proceeding are listed in the appendix to this notice and addressed in the *Decision Memorandum* hereby adopted by this notice. The *Decision Memorandum* is on file in room B–099 of the main Department building. In addition, a complete version of the *Decision Memorandum* can be accessed directly on the World Wide Web at *http://www.ita.doc.gov/frn.* The paper and electronic versions of the *Decision Memorandum* are identical in content.

Changes Since the Preliminary Determination

Based on our findings at verification and our analysis of comments received, we have made adjustments to the preliminary determination calculation methodologies in calculating the final dumping margin for Yamaha. These adjustments are discussed in the *Decision Memorandum and the Memorandum from James Kemp and Shane Subler, International Trade Compliance Analysts, through Constance Handley, Program Manager, RE: Final Determination Analysis Memorandum for Yamaha Motor Company, Ltd., Yamaha Marine Company, Ltd., and Yamaha Motor Corporation,* USA, dated December 27, 2004.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we are directing U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all entries of outboard engines exported from Japan, that are entered, or withdrawn from warehouse, for consumption on or after the date of the preliminary determination. CBP shall continue to require a cash deposit or the posting of a bond based on the estimated weighted-average dumping margins shown below. The suspension of liquidation instructions will remain in effect until further notice.

We determine that the following weighted-average dumping margin exists for Japan:

Manufacturer/exporter	Margin (percent)
Yamaha	18.98
All others	18.98

International Trade Commission Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of our determination. The ITC will determine, within 45 days, whether imports of subject merchandise from Japan are causing material injury, or threaten material injury, to an industry in the United States. If the ITC determines that material injury or threat of material injury does not exist, this proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP officials to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse for consumption on or after the effective date of the suspension of liquidation.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to complywith the regulations and the terms of an APO is a sanctionable violation.

[3] On December 6, 2004, we rejected Yamaha's comments because they contained new factual information submitted after the Department's regulatory deadline. The date of Yamaha's revised submission is December 7, 2004.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: December 27, 2004.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

Appendix

Issues Covered in Decision Memorandum

1. Class or Kind.
2. Powerheads Imported for Repair Purposes.
3. Treatment of Non-Dumped Sales.
4. Level of Trade (LOT) Adjustment for Yamaha's Sales to Original Equipment Manufacturer (OEM) Customers.
5. Surrogate Prices for Yamaha's CEP Sales to Its Affiliated Boat Builders.
6. Per-Unit Cap on the CEP Offset.
7. Home Market Levels of Trade.
8. Adjustments to U.S. Price.
9. Reported Home Market Payment Dates.
10. Certain Home Market Sales within the Ordinary Course of Trade.
11. Credit Expenses for Export Price Sales.
12. Reporting of the REBATE4U Field.
13. Minor Corrections Submitted at Verification.
14. Application of LOT Adjustment.
15. Home Market Consignment Sales.
16. Packing Costs.
17. Amendment to Scope.
18. Yamaha's Standard Cost System.
19. Certain Excluded Costs.
20. Parent Company G&A Expenses.
21. Affiliated Supplier Inputs.

[FR Doc. E4–3925 Filed 1–3–05; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department ofCommerce.

EFFECTIVE DATE: January 4, 2005.

FOR FURTHER INFORMATION CONTACT: Aishe Allen, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0172.

Amendment to Final Determination

In accordance with sections 735(d) and 777(i)(1) of the Tariff Act of 1930, as amended, (''the Act''), on November 17, 2004, the Department of Commerce (''the Department'') published the *Notice of Final Determination of Sales at Less Than Fair Value in the investigation of wooden bedroom furniture from the People's Republic of China (''PRC'')* (''*Final Determination*''). *See Final Determination* and corresponding ''Issues and Decision Memorandum'' dated November 8, 2004. Between November 12, 2004, and November 22, 2004, the following parties filed timely allegations that the Department made various ministerial errors in the Final Determination: Superwood Company Limited; Shanghai SMEC Corporation; follows: Dongguan Chunsan Wood Products Co., Ltd.; Trendex Industries Limited; the American Furniture Manufacturers Committee for Legal Trade and its individual members and the Cabinet Makers, Millmen, and Industrial Carpenters Local 721, UBC Southern Council of Industrial Worker's Local Union 2305, United Steel Workers of American Local 193U, Carpenters Industrial Union Local 2093, and Teamsters, Chauffeurs, Warehousemen and Helper Local 991 (collectively ''Petitioners''); Rui Feng Woodwork Co., Ltd., Rui Feng Lumber Development Co., Ltd., and Dorbest Limited (''Dorbest''); Lacquer Craft Mfg. Co., Ltd. (''Lacquer Craft''); Dongguan Lung Dong Furniture Co., Ltd., and Dongguan Dong He Furniture Co., Ltd., (''Lung Dong''); and Shing Mark Enterprise Co., Ltd., Carven Industries Limited (BVI), Carven Industries Limited (HK), Dongguan Zhenxin Furniture Co., Ltd., and Dongguan Yongpeng Furniture Co., Ltd. (''Shing Mark''); Hongyu Furniture (Shenzhen) Limited (''Hongyu''); American Signature, Inc., and Value City Furniture (''ASI/VCF'') and Pulaski Furniture Corp. (''Pulaski'') with respect to ministerial errors in the calculation of the margin for their supplier, Dorbest.

On November 29, 2004, Petitioners filed comments rebutting the interested parties' ministerial-error allegations. On the same day, Lacquer Craft, Lung Dong, Shing Mark, and Starcorp Furniture (Shanghai) Co., Ltd., Orin Furniture (Shanghai) Co., Ltd., and Shanghai Starcorp Furniture Co., Ltd. (''Starcorp''), filed comments rebutting the Petitioners ministerial-error allegations. Further, on November 29, 2004, Petitioners submitted a letter requesting the Department to strike from the record Exhibit 12 and any references to this Exhibit in Shing Mark's November 22, 2004, ministerial-error submission because it contains new untimely factual information. On November 30, 2004, Shing Mark filed a letter stating the Department should reject Petitioners' request to strike certain information because the information is not new or untimely. Also, on November 30, 2004, Petitioners filed a letter requesting the Department to strike from the record Starcorp's November 29, 2004, submission as untimely filed ministerial- error comments. On December 1, 2004, Starcorp filed a letter stating that its letter was both timely and appropriate. On December 6, 2004, Petitioners filed a letter requesting the Department to strike from the record portions of Lung Dong's November 29, 2004, rebuttal comments because it allegedly contained untimely raised ministerial-error allegations. On December 10, 2004, we returned Lung Dong's and Starcorp's November 29, 2004, submissions because they contained untimely ministerial-error allegations. Lung Dong submitted an amended version of its November 29, 2004, submission on December 14, 2004.

After analyzing all interested parties comments and rebuttal comments, we have determined, in accordance with 19 CFR 351.224(e), that we made ministerial errors in the calculations we performed for the final determination. For a detailed discussion of these ministerial errors, and our analysis, see the ''*Amended Issues and Decision Memorandum*'' dated December 27, 2004, and the company specific amended final determination analysis memoranda dated December 27, 2004.

Additionally, in the *Final Determination,* we determined that several companies qualified for separate-rate status. The margin we calculated in the *Final Determination* for these companies was 8.64 percent. Because the rates of the selected mandatory respondents have changed since the *Final Determination,* we have recalculated the rate for the non-mandatory respondents which the Department determined to be entitled to separate rate. The rate for Section A respondents is now 6.65%. *See* Memorandum to the File from Eugene Degnan, *Amended Calculation of Section A Rate,* dated December 27, 2004.

Therefore, in accordance with 19 CFR 351.224(e), we are amending the final determination of sales at LTFV in the antidumping duty investigation of wooden bedroom furniture from the PRC. The revised weighted-average dumping margins are in the ''Antidumping Duty Order'' section, below.

Antidumping Duty Order

On December 23, 2004, in accordance with section 735(d) of the Act, the International Trade Commission (''ITC'')

notified the Department of its final determination pursuant to section 735(b)(1)(A)(i) of the Act that an industry in the United States is materially injured by reason of less-than-fair-value imports of subject merchandise from the PRC. Therefore, in accordance with section 736(a)(1) of the Act, the Department will direct U.S. Customs and Border Protection (''CBP'') to assess, upon further instruction by the Department, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price of the merchandise for all relevant entries of wooden bedroom furniture from the PRC. With the exception of wooden bedroom furniture produced and exported by Markor International Furniture (Tianjin) Manufacturing Company, Ltd. (a company excluded from this order), these antidumping duties will be assessed on all unliquidated entries of wooden bedroom furniture from the PRC entered, or withdrawn from the warehouse, for consumption on or after June 24, 2004, the date on which the Department published its *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Wooden Bedroom Furniture from the People's Republic of China,* 69 FR 35312 (June 24, 2004) (''*Preliminary Determination*'').

Section 733(d) of the Act states that instructions issued pursuant to an affirmative preliminary determination may not remain in effect for more than four months except where exporters representing a significant proportion of exports of the subject merchandise request the Department to extend that four-month period to no more than six months. At the request of exporters that account for a significant proportion of wooden bedroom furniture, we extended the four-month period to no more than six months. *See Preliminary Determination.* In this investigation, the six-month period beginning on the date of the publication of the preliminary determination ends on December 21, 2004. Furthermore, section 737 of the Act states that definitive duties are to begin on the date of publication of the ITC's final injury determination. Therefore, in accordance with section 733(d) of the Act and our practice, we will instruct CBP to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of wooden bedroom furniture from the PRC entered, or withdrawn from warehouse, for consumption on or after December 21, 2004, and before the date of publication of the ITC 's final injury determination in the **Federal Register**. Suspension of liquidation will continue on or after this date.

On or after the date of publication of the ITC's notice of final determination in the **Federal Register,** CBP will require, at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the estimated weighted-average antidumping duty margins as listed below. The ''PRC-wide'' rate applies to all exporters of subject merchandise not listed specifically. The weighted-average dumping margins are as follows:

Company	Weighted-average margin (percent)
Dongguan Lung Dong Furniture Co., Ltd., or Dongguan Dong He Furniture Co., Ltd	2.32
Rui Feng Woodwork Co., Ltd., or Rui Feng Lumber Development Co., Ltd. or Dorbest Limited	7.87
Lacquer Craft Mfg. Co., Ltd	2.66
Markor International Furniture (Tianjin) Manufacturing Company, Ltd	0.83
Shing Mark Enterprise Co., Ltd., or Carven Industries Limited (BVI), or Carven I Industries Limited (HK), or Dongguan Zhenxin Furniture Co., Ltd., or Dongguan Yongpeng Furniture Co., Ltd	4.96
Starcorp Furniture (Shanghai) Co., Ltd., or Orin Furniture (Shanghai) Co., Ltd., or Shanghai Starcorp Furniture Co., Ltd	15.78
Alexandre International Corp., or Southern Art Development Ltd., or Alexandre Furniture (Shenzhen) Co., Ltd., or Southern Art Furniture Factory	6.65
Art Heritage International, Ltd., or Super Art Furniture Co., Ltd., or Artwork Metal & Plastic Co., Ltd., or Jibson Industries Ltd., or Always Loyal International	6.65
Billy Wood Industrial (Dong Guan) Co., Ltd., or Great Union Industrial (Dongguan) Co., Ltd., or Time Faith Ltd	6.65
Changshu HTC Import & Export Co., Ltd	6.65
Cheng Meng Furniture (PTE) Ltd., or China Cheng Meng Decoration & Furniture (Suzhou) Co., Ltd	6.65
Chuan Fa Furniture Factory	6.65
Classic Furniture Global Co., Ltd	6.65
Clearwise Co., Ltd	6.65
COE Ltd	6.65
Dalian Guangming Furniture Co., Ltd	6.65
Dalian Huafeng Furniture Co., Ltd	6.65
Dongguan Cambridge Furniture Co., or Glory Oceanic Co., Ltd	6.65
Dongguan Chunsan Wood Products Co., Ltd., or Trendex Industries Ltd	6.65
Dongguan Creation Furniture Co., Ltd., or Creation Industries Co., Ltd	6.65
Dongguan Grand Style Furniture, or Hong Kong Da Zhi Furniture Co., Ltd	6.65
Dongguan Great Reputation Furniture Co., Ltd	6.65
Dongguan Hero Way Woodwork Co., Ltd., or Dongguan Da Zhong Woodwork Co., Ltd., or Hero Way Enterprises Ltd., or Well Earth International Ltd	6.65
Dongguan Hung Sheng Artware Products Co., Ltd., or Coronal Enterprise Co., Ltd	6.65
Dongguan Kin Feng Furniture Co., Ltd	6.65
Dongguan Kingstone Furniture Co., Ltd., or Kingstone Furniture Co., Ltd	6.65
Dongguan Liaobushangdun Huada Furniture Factory, or Great Rich (HK) Enterprise Co. Ltd	6.65
Dongguan Qingxi Xinyi Craft Furniture Factory (Joyce Art Factory)	6.65
Dongguan Singways Furniture Co., Ltd	6.65
Dongguan Sunrise Furniture Co., or Taicang Sunrise Wood Industry Co., Ltd., or Shanghai Sunrise Furniture Co., Ltd., or Fairmont Designs	6.65
Dongying Huanghekou Furniture Industry Co., Ltd	6.65
Dream Rooms Furniture (Shanghai) Co., Ltd	6.65
Eurosa (Kunshan) Co., Ltd., or Eurosa Furniture Co., (PTE) Ltd	6.65

Company	Weighted-average margin (percent)
Ever Spring Furniture Co. Ltd., or S.Y.C. Family Enterprise Co., Ltd	6.65
Fine Furniture (Shanghai) Ltd	6.65
Foshan Guanqiu Furniture Co., Ltd	6.65
Fujian Lianfu Forestry Co., Ltd., or Fujian Wonder Pacific Inc	6.65
Gaomi Yatai Wooden Ware Co., Ltd., or Team Prospect International Ltd., or Money Gain International Co	6.65
Garri Furniture (Dong Guan) Co., Ltd., or Molabile International, Inc., or Weei Geo Enterprise Co., Ltd	6.65
Green River Wood (Dongguan) Ltd	6.65
Guangming Group Wumahe Furniture Co., Ltd	6.65
Hainan Jong Bao Lumber Co., Ltd., or Jibbon Enterprise Co., Ltd	6.65
Hamilton & Spill Ltd	6.65
Hang Hai Woodcraft's Art Factory	6.65
Hualing Furniture (China) Co., Ltd., or Tony House Manufacture (China) Co., Ltd., or Buysell Investments Ltd., or Tony House Industries Co., Ltd	6.65
Jardine Enterprise, Ltd	6.65
Jiangmen Kinwai Furniture Decoration Co., Ltd	6.65
Jiangmen Kinwai International Furniture Co., Ltd	6.65
Jiangsu Weifu Group Fullhouse Furniture Manufacturing. Corp	6.65
Jiangsu Yuexing Furniture Group Co., Ltd	6.65
Jiedong Lehouse Furniture Co., Ltd	6.65
King's Way Furniture Industries Co., Ltd., or Kingsyear Ltd	6.65
Kuan Lin Furniture (Dong Guan) Co., Ltd., or Kuan Lin Furniture Factory, or Kuan Lin Furniture Co., Ltd	6.65
Kunshan Lee Wood Product Co., Ltd	6.65
Kunshan Summit Furniture Co., Ltd	6.65
Langfang Tiancheng Furniture Co., Ltd	6.65
Leefu Wood (Dongguan) Co., Ltd., or King Rich International, Ltd	6.65
Link Silver Ltd. (V.I.B.), or Forward Win Enterprises Co. Ltd., or Dongguan Haoshun Furniture Ltd	6.65
Locke Furniture Factory, or Kai Chan Furniture Co., Ltd., or Kai Chan (Hong Kong) Enterprise Ltd., or Taiwan Kai Chan Co., Ltd	6.65
Longrange Furniture Co., Ltd	6.65
Nanhai Baiyi Woodwork Co., Ltd	6.65
Nanhai Jiantai Woodwork Co., Ltd., or Fortune Glory Industrial Ltd. (H.K. Ltd.)	6.65
Nantong Dongfang Orient Furniture Co., Ltd	6.65
Nantong Yushi Furniture Co., Ltd	6.65
Nathan International Ltd., or Nathan Rattan Factory	6.65
Orient International Holding Shanghai Foreign Trade Co., Ltd	6.65
Passwell Corporation, or Pleasant Wave Ltd	6.65
Perfect Line Furniture Co., Ltd	6.65
Prime Wood International Co., Ltd., or Prime Best International Co., Ltd., or Prime Best Factory, or Liang Huang (Jiaxing) Enterprise Co., Ltd	6.65
PuTian JingGong Furniture Co., Ltd	6.65
Qingdao Liangmu Co., Ltd	6.65
Restonic (Dongguan) Furniture Ltd., or Restonic Far East (Samoa) Ltd	6.65
RiZhao SanMu Woodworking Co., Ltd	6.65
Season Furniture Manufacturing Co., or Season Industrial Development Co	6.65
Sen Yeong International Co., Ltd., or Sheh Hau International Trading Ltd	6.65
Shanghai Jian Pu Export & Import Co., Ltd	6.65
Shanghai Maoji Imp and Exp Co., Ltd	6.65
Sheng Jing Wood Products (Beijing) Co., Ltd., or Telstar Enterprises Ltd	6.65
Shenyang Shining Dongxing Furniture Co., Ltd	6.65
Shenzhen Forest Furniture Co., Ltd	6.65
Shenzhen Jiafa High Grade Furniture Co., Ltd., or Golden Lion International Trading Ltd	6.65
Shenzhen New Fudu Furniture Co., Ltd	6.65
Shenzhen Wonderful Furniture Co., Ltd	6.65
Shenzhen Xiande Furniture Factory	6.65
Shenzhen Xingli Furniture Co., Ltd	6.65
Shun Feng Furniture Co., Ltd	6.65
Songgang Jasonwood Furniture Factory, or Jasonwood Industrial Co., Ltd. S.A	6.65
Starwood Furniture Manufacturing Co. Ltd	6.65
Starwood Industries Ltd	6.65
Strongson Furniture (Shenzhen) Co., Ltd., or Strongson Furniture Co., Ltd., or Strongson (HK) Co	6.65
Sunforce Furniture (Hui-Yang) Co., Ltd., or Sun Fung Wooden Factory, or Sun Fung Co., or Shin Feng Furniture Co., Ltd., or Stupendous International Co., Ltd	6.65
Superwood Co., Ltd., or Lianjiang Zongyu Art Products Co., Ltd	6.65
Tarzan Furniture Industries Ltd., or Samso Industries Ltd	6.65
Teamway Furniture (Dong Guan) Ltd., or Brittomart Inc	6.65
Techniwood Industries Ltd., or Ningbo Furniture Industries Limited, or Ningbo Hengrun Furniture Co., Ltd	6.65
Tianjin Fortune Furniture Co., Ltd	6.65
Tianjin Master Home Furniture	6.65
Tianjin Phu Shing Woodwork Enterprise Co., Ltd	6.65
Tianjin Sande Fairwood Furniture Co., Ltd	6.65
Tube-Smith Enterprise (ZhangZhou) Co., Ltd., or Tube-Smith Enterprise (Haimen) Co., Ltd., or Billonworth Enterprises Ltd	6.65

Company	Weighted-average margin (percent)
Union Friend International Trade Co., Ltd	6.65
U-Rich Furniture (Zhangzhou) Co., Ltd., or U-Rich Furniture Ltd	6.65
Wanhengtong Nueevder (Furniture) Manufacture Co., Ltd., or Dongguan Wanengtong Industry Co., Ltd	6.65
Woodworth Wooden Industries (Dong Guan) Co., Ltd	6.65
Xiamen Yongquan Sci-Tech Development Co., Ltd	6.65
Jiangsu XiangSheng Bedtime Furniture Co., Ltd	6.65
Xingli Arts & Crafts Factory of Yangchun	6.65
Yangchun Hengli Co. Ltd	6.65
Yeh Brothers World Trade, Inc	6.65
Yichun Guangming Furniture Co., Ltd	6.65
Yida Co., Ltd., or Yitai Worldwide, Ltd., or Yili Co., Ltd., or Yetbuild Co., Ltd	6.65
Yihua Timber Industry Co., Ltd	6.65
Zhang Zhou Sanlong Wood Product Co., Ltd	6.65
Zhangjiagang Zheng Yan Decoration Co., Ltd	6.65
Zhangjiagang Daye Hotel Furniture Co., Ltd	6.65
Zhangzhou Guohui Industrial & Trade Co. Ltd	6.65
Zhanjiang Sunwin Arts & Crafts Co., Ltd	6.65
Zhong Shan Fullwin Furniture Co., Ltd	6.65
Zhongshan Fookyik Furniture Co., Ltd	6.65
Zhongshan Golden King Furniture Industrial Co., Ltd	6.65
Zhoushan For-Strong Wood Co., Ltd	6.65
PRC-Wide Rate*	198.08

* In the *Final Determination*, the Department inadvertently listed Tech Lane Wood Mfg. and Kee Jia Wood Mfg. separately in the weighted-average dumping margin chart, which may have led parties to conclude that these companies were entitled to a separate rate. This, in fact, is not the case. Subject merchandise produced/exported by Tech Lane Wood Mfg. and Kee Jia Wood Mfg. is subject to the PRC-wide rate.

This notice constitutes the antidumping duty order with respect to wooden bedroom furniture from the PRC pursuant to section 735(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room B–099 of the main Commerce building, for copies of an updated list of antidumping duty orders currently in effect.

Scope of Order

The product covered by the order is wooden bedroom furniture. Wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and approximately the same material and/or finish. The subject merchandise is made substantially of wood products, including both solid wood and also engineered wood products made from wood particles, fibers, or other wooden materials such as plywood, oriented strand board, particle board, and fiberboard, with or without wood veneers, wood overlays, or laminates, with or without non-wood components or trim such as metal, marble, leather, glass, plastic, or other resins, and whether or not assembled, completed, or finished.

The subject merchandise includes the following items: (1) Wooden beds such as loft beds, bunk beds, and other beds; (2) wooden headboards for beds (whether stand-alone or attached to side rails), wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds; (3) night tables, night stands, dressers, commodes, bureaus, mule chests, gentlemen's chests, bachelor's chests, lingerie chests, wardrobes, vanities, chessers, chifforobes, and wardrobe-type cabinets; (4) dressers with framed glass mirrors that are attached to, incorporated in, sit on, or hang over the dresser; (5) chests-on-chests [1], highboys [2], lowboys [3], chests of drawers [4], chests [5], door chests [6], chiffoniers [7], hutches [8], and armoires [9]; (6) desks, computer stands, filing cabinets, book cases, or writing tables that are attached to or incorporated in the subject merchandise; and (7) other bedroom furniture consistent with the above list.

The scope of the Petition excludes the following items: (1) Seats, chairs, benches, couches, sofas, sofa beds, stools, and other seating furniture; (2) mattresses, mattress supports (including box springs), infant cribs, water beds, and futon frames; (3) office furniture, such as desks, stand-up desks, computer cabinets, filing cabinets, credenzas, and bookcases; (4) dining room or kitchen furniture such as dining tables, chairs, servers, sideboards, buffets, corner cabinets, china cabinets, and china hutches; (5) other non-bedroom furniture, such as television cabinets, cocktail tables, end tables, occasional tables, wall systems, book cases, and entertainment systems; (6) bedroom furniture made primarily of wicker, cane, osier, bamboo or rattan; (7) side

[1] A chest-on-chest is typically a tall chest-of-drawers in two or more sections (or appearing to be in two or more sections), with one or two sections mounted (or appearing to be mounted) on a slightly larger chest; also known as a tallboy.

[2] A highboy is typically a tall chest of drawers usually composed of a base and a top section with drawers, and supported on four legs or a small chest (often 15 inches or more in height).

[3] A lowboy is typically a short chest of drawers, not more than four feet high, normally set on short legs.

[4] A chest of drawers is typically a case containing drawers for storing clothing.

[5] A chest is typically a case piece taller than it is wide featuring a series of drawers and with or without one or more doors for storing clothing. The piece can either include drawers or be designed as a large box incorporating a lid.

[6] A door chest is typically a chest with hinged doors to store clothing, whether or not containing drawers. The piece may also include shelves for televisions and other entertainment electronics.

[7] A chiffonier is typically a tall and narrow chest of drawers normally used for storing undergarments and lingerie, often with mirror(s) attached.

[8] A hutch is typically an open case of furniture with shelves that typically sits on another piece of furniture and provides storage for clothes.

[9] An armoire is typically a tall cabinet or wardrobe (typically 50 inches or taller), with doors, and with one or more drawers (either exterior below or above the doors or interior behind the doors), shelves, and/or garment rods or other apparatus for storing clothes. Bedroom armoires may also be used to hold television receivers and/or other audio-visual entertainment systems.

rails for beds made of metal if sold separately from the headboard and footboard; (8) bedroom furniture in which bentwood parts predominate [10]; (9) jewelry armories [11]; (10) cheval mirrors [12] (11) certain metal parts [13] (12) mirrors that do not attach to, incorporate in, sit on, or hang over a dresser if they are not designed and marketed to be sold in conjunction with a dresser as part of a dresser-mirror set.

Imports of subject merchandise are classified under statistical category 9403.50.9040 of the HTSUS as ''wooden * * * beds'' and under statistical category 9403.50.9080 of the HTSUS as ''other * * * wooden furniture of a kind used in the bedroom.'' In addition, wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds may also be entered under statistical category 9403.50.9040 of the HTSUS as ''parts of wood'' and framed glass mirrors may also be entered under statistical category 7009.92.5000 of the HTSUS as ''glass mirrors * * * framed.'' This investigation covers all wooden bedroom furniture meeting the above description, regardless of tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we will instruct U.S. Customs and Border Protection (''CBP'') to continue to suspend liquidation of all entries of subject merchandise from the PRC (except for entries of Markor International Furniture (Tianjin) Manufacture Co., Ltd. (''Markor Tianjin'') because this company has a de minimis margin). We will also instruct CBP to require cash deposit or the posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as indicated in the chart above. These instructions suspending liquidation will remain in effect until further notice.

This order is published in accordance with section 736(a) of the Act and 19 CFR 351.211.

Dated: December 27, 2004.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E4–3926 Filed 1–3–05; 8:45 am]

BILLING CODE 3510–DS–P

[10] As used herein, bentwood means solid wood made pliable. Bentwood is wood that is brought to a curved shape by bending it while made pliable with moist heat or other agency and then set by cooling or drying. See Customs' Headquarters' Ruling Letter 043859, dated May 17, 1976.

[11] Any armoire, cabinet or other accent item for the purpose of storing jewelry, not to exceed 24″ in width, 18″ in depth, and 49″ in height, including a minimum of 5 lined drawers lined with felt or felt-like material, at least one side door lined with felt or felt-like material, with necklace hangers, and a flip-top lid with inset mirror. See Memorandum from Laurel LaCivita to Laurie Parkhill, Office Director, Issues and Decision Memorandum Concerning Jewelry Armoires and Cheval Mirrors in the Antidumping Duty Investigation of Wooden Bedroom Furniture from the People's Republic of China dated August 31, 2004.

[12] Cheval mirrors, *i.e.*, any framed, tiltable mirror with a height in excess of 50″ that is mounted on a floor-standing, hinged base.

[13] Metal furniture parts and unfinished furniture parts made of wood products (as defined above) that are not otherwise specifically named in this scope (*i.e.*, wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds) and that do not possess the essential character of wooden bedroom furniture in an unassembled, incomplete, or unfinished form. Such parts are usually classified in subheading 9403.90.7000, HTSUS.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 072204A]

Taking Marine Mammals Incidental to Specified Activities; Sandholdt Road Bridge Replacement, Moss Landing, California

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

ACTION: Notice of issuance of an incidental harassment authorization.

SUMMARY: In accordance with provisions of the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that an Incidental Harassment Authorization (IHA) has been issued to the Monterey County Department of Public Works (Monterey County DPW) to take small numbers of marine mammals, by harassment, incidental to the replacement of the Sandholdt Road Bridge (Bridge) in Moss Landing, Monterey County, CA.

DATES: This authorization is effective from April 15, 2005, through April 14, 2006.

ADDRESSES: A copy of the application, IHA, and/or a list of references used in this document may be obtained by writing to Steve Leathery, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225.

FOR FURTHER INFORMATION CONTACT: Kenneth Hollingshead, Office of Protected Resources, NMFS, (301) 713–2389, ext 128 or Monica DeAngelis, NMFS, (562) 980–3232.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Permission may be granted if NMFS finds that the taking will have no more than a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses and that the permissible methods of taking and requirements pertaining to the monitoring and reporting of such taking are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as: ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Subsection 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except for certain categories of actions not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Subsection 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

On February 26, 2004, NMFS received an IHA application from the California Department of Transportation (CALTRANS) on behalf of the Monterey County DPW. The IHA request is for the potential harassment of small numbers of Pacific harbor seals (*Phoca vitulina*) and possibly some California sea lions (*Zalophus californianus*), incidental to demolition of the current Bridge and construction of a new Bridge. Construction is scheduled to extend from early to mid–2005 until the fall of 2006. A detailed description of the work planned is contained in the CALTRANS application and in LSA Associates, Inc. (1999).

The County of Monterey, with funding from the Federal Highway Administration (FHWA), proposes to replace the existing one-lane Bridge over the Moss Landing Slough. Sandholdt Road, a two-lane county road, carries an average of about 2700 vehicles per day between Moss Landing Road and part of the community of Moss Landing. The Bridge is of unknown age with a deck replacement having taken place over 54 years ago. The wooden piling system has been weakened by marine bore worms and is decaying. The Bridge, therefore, is at the end of its useful service life. The one-lane Bridge is a traffic safety concern and does not meet Federal standards for rural roads, which require such bridges to have a minimum of two traffic lanes and safe access for pedestrians. The Bridge does not meet structural capacity requirements as it is incapable of withstanding loads over minimum highway legal loads. Further, because of its age and dilapidated condition, the structure is not capable of withstanding a significant earthquake without the possibility of incurring significant damage that may require the Bridge to be closed for repairs. Bridge closure may result in significant economic impact to the community, as the Bridge is the only public access point to the island.

Description of the Activity

The proposed new Bridge will improve traffic operations and safety and provide safe access for pedestrians and bicyclists. The following improvements are planned: (1) Construct a new 321–ft (98–m) long bridge with two 12–ft (3.6–m) travel lanes; (2) improve pedestrian safety by constructing a 5–ft (1.5–m) sidewalk on the north side of the new Bridge with pedestrian lighting; (3) improve safety for bicyclists by constructing 4–ft (1.2–m) bicycle lanes on each side of the new Bridge; and (4) improve the turn radius of the Bridge approach on the west and the Bridge alignment with Sandholdt Road on the east by constructing the new Bridge 23 m (75 ft) south of the existing structure.

The Bridge will be supported by two bridge abutments and 3 pairs of 1.7–m (5.6–ft) diameter columns. Each of the columns will be supported by a Cast-In-Shell (CISS) pile of the same diameter. Each CISS pile will be installed using standard bridge construction practices. This includes the use of a vibratory hammer to drive the piles down into the substrate and an impact hammer to drive the piles the last 1.7 m (5.6 ft) in order to determine if load capacity has been reached.

The Bridge replacement work will include construction of a temporary access trestle for equipment access during construction that includes installation of wood pilings, installation of temporary supporting framework (falsework) piles, and, later, removal of existing wood piles. The piles and trestle deck will be installed at the same time and the crane that drives the piles will be mounted on the previously constructed portion of the trestle span. The falsework piles will be installed in a similar manner. Construction of the access trestle and falsework will require a total of approximately 200 piles (0.3 to 0.6 m by 15 m (11.8 in. to 24 in. by 49 ft), wood or steel). These piles could be installed with a vibratory hammer and/or drop (impact) hammer. The time to install each pile will be about 30 to 60 minutes.

Construction of the bridge span will require 6 piles (1.7 by 31.75 m (5.6 by 104 ft)) in the slough and 12 piles (0.61 by 19.05 m (2 by 62.5 ft)) on the shore, for the abutment foundation. These will be the CISS piles. They will be installed using a vibratory hammer and a drop (impact) hammer.

A work barge will be anchored at the Bridge site for approximately 3 months to assist with the construction of the temporary access trestle, which will take about 2 weeks. It will take approximately 2 weeks to place embankment earthwork, four weeks to drive the bridge piles, 3 weeks to drive the falsework piles, and approximately 3 weeks to construct the abutments. After the falsework is in place, the superstructure will take approximately 36 weeks to construct.

Once the superstructure is completed, it will take 2 weeks to remove the falsework piles, 2 weeks to remove the access trestle, and about 4 weeks to remove the existing Bridge. The existing piles will be removed from the channel by a crane lifting and applying vibration. Additional dilapidated pilings along the adjacent shoreline will be removed in a similar manner. These activities will presumably take place under a future IHA because they will occur after the subject IHA expires.

The Monterey County DPW has divided the work year into two seasons, an in-water period and an out-of-water period. In-water construction is limited to the months of June through October, as required by condition 15 of the California Coastal Commission's Coastal Development Permit (CCC CDP). Out-of-water construction activities are defined as any activities located above mean high water (MHW), which is +0.61 m (2.0 ft) at the Sandholdt Road Bridge site. Activities, such as pile driving, are considered ''in-water'' regardless of the actual tide level at the time of construction. Certain activities, however, are classified as both in-water and out-of-water because some portions of the activity take place above and below the MHW. Most of the activities described in this document are considered ''in-water'' activities. Because construction activities have the potential to disturb harbor seals moving to and from a haul-out site located about 500–800 m (1640 to 2625 ft) south of the Bridge along the Old Salinas River, an IHA is warranted.

Comments and Responses

A notice of receipt and request for 30–day public comment on the application and proposed authorization was published on August 24, 2004 (69 FR 51992). During the 30–day public comment period, comments were received from the Marine Mammal Commission, Monterey County DPW and one individual. The Commission concurs with NMFS' determinations concerning the impacts of the proposed activities on harbor seals and California sea lions and recommends that the authorization be granted.

Comment 1: Without providing supporting documentation, the individual commenter believes that the project cannot be accomplished without killing seals and that the pinniped population estimates are flawed. In addition, this person believes that seals have few places acceptable to them to live and this construction project will drive them from one of these few sites.

Response: Information was provided in the proposed IHA notice that harbor seals are found at 400 to 500 haul-out sites along the mainland coast and offshore islands of California. Based on the most recent counts, the California stock of the Pacific harbor seal is estimated at 27,863 (Carretta *et al.*, 2003) having a net annual increase of

approximately 3.5 percent, but are increasing at about 7.7 percent annually in Monterey Bay. During Bridge construction, harbor seals will not be killed or seriously injured, but may be disturbed on a daily basis as they are moving to and from the haul-out site located about 500–800 m (1640 to 2625 ft) south of the Bridge site. Due to this distance, no harbor seals are expected to flush from the haul-out.

In the project area approximately 35 individuals are known to haul out along the Old Salinas River approximately 500 to 800 m (1640 to 2625 ft) south of the current Bridge location, with more seals generally found at about 800 m (2625 ft) or more south of the Bridge (J. Harvey, pers. comm). The new Bridge will not eliminate or significantly alter haul-out sites. Therefore, as seen at other construction sites, although there may be short-term abandonment of these haul-out sites due to construction noise, long-term abandonment is unlikely. In addition, since these sites are not prime locations for pupping and nursing (a prime location is nearby in Elkhorn Slough) and in-water work is limited to the period from June through October, it is highly unlikely that this project will significantly impact harbor seals. As California sea lions do not haul out in this area, no impact on sea lion haul-outs is likely.

Comment 2: The Monterey County DPW had several technical corrections to the proposed mitigation measures. First, backup alarms are important for public safety and, therefore, cannot be disabled to reduce noise levels. Second, the County does not have authority to restrict vessel traffic in the vicinity of the Bridge or near the pinniped haul-out site, except to limit vessel traffic by County staff and contractors. Therefore, Monterey County DPW states, neither of these mitigation measures are feasible.

Response: NMFS has not included in the IHA a requirement to disable back-up alarms and has modified the vessel traffic restriction to vessels associated with the construction activity itself.

Comment 3: The Monterey County DPW recommends that the biological monitor(s) record noise levels by noting the types of construction equipment being used each day and then refer to the table provided in the CALTRANS application (which provides the typical noise level for each type of equipment). Alternatively, Monterey County DPW recommends the monitor could record in-air noise levels with a simple decibel meter, but it would be difficult to standardize such measurements in a way that would make them meaningful (and in a way that would not interfere with the biologist's primary responsibility of monitoring the marine mammals).

Response: NMFS believes that in-air noise levels produced by the construction equipment will not cause more than a short-term behavioral response by the affected pinnipeds. As a result, noting behavioral responses made by the harbor seals to the specific type of equipment being used at the time will be sufficient for this activity.

Comment 4: The Monterey County DPW requests that in-water monitoring be restricted to the establishment of in-water buffer zone (as described later in this document), as the cost of more frequent underwater sound monitoring would be prohibitive.

Response: As noted in the CALTRANS' application, when pile-driving is started, a qualified underwater acoustic monitor will record sound pressure levels (SPLs) from the pile driving to determine the distance to the 160- and 190–dB re 1 μPa (root-mean-squared or rms) isopleths. The measured 160–dB radius will be the new marine mammal buffer zone and the 190–dB radius will be the marine mammal safety zone for that specific type of activity. This same procedure will be followed to establish the appropriate buffer and safety zones for each type of loud in-water construction activity (e.g., impact hammer, vibratory hammer), different hammer sizes and types of piles (e.g., hollow steel, wood). Alternatively, the Monterey County DPW can conduct underwater measurements of the loudest in-water activity (presumably the largest impact hammer) and use those measurements to establish conservative buffer and safety zones for pinnipeds.

Comment 5: Monterey County DPW requests that the IHA have a delayed effectiveness until April 15, 2005, when out-of-water construction work is scheduled to start.

Response: NMFS agrees. Early issuance of an IHA with a delayed effectiveness date allows a Holder of an IHA time to incorporate marine mammal mitigation measures into work contracts and to establish the marine mammal monitoring program.

Description of Habitat and Marine Mammals Affected by the Activity

A description of the habitat and its associated marine mammals affected by the proposed Bridge replacement project can be found in the CALTRANS application and in Monterey County DPW Marine Mammal and Bird Mitigation Plan (CALTRANS, 2004). Harbor seals routinely move between the Old Salinas River, beneath and south of the existing Bridge, and the adjoining Moss Landing Harbor, on the north side of the site. Approximately 35 individuals are known to haul out along the Old Salinas River approximately 500 to 800 m (1640 to 2625 ft) south of the current Bridge location, with more seals generally found at about 800 m (2625 ft) or more south of the Bridge. California sea lions only occasionally transit through the project area, but are not known to haul-out in the area.

Marine Mammals

General information on harbor seals and other marine mammal species found in Central California waters can be found in Carretta *et al.* (2002, 2003), which are available at the following URL: *http://www.nmfs.noaa.gov/prot_res/PR2/Stock_Assessment_Program/sars.html*. Please refer to these documents for information on these species. The marine mammals likely to be affected by work in the Bridge area are limited to harbor seals and California sea lions. The harbor seal and California sea lion are the only marine mammal species expected to be found regularly in the Bridge area and are described in detail below.

Harbor Seals

The California stock of harbor seals is comprised of those seals found at the 400 to 500 haul-out sites along the mainland coast and offshore islands of California. Based on the most recent counts, the California stock of the Pacific harbor seal is estimated at 27,863 (Carretta *et al.*, 2003). A rapid increase in harbor seal abundance was recorded from 1972 to 1990, but there has been no net growth along the mainland or Channel Islands since 1990. The annual growth rate estimate is 3.5 percent, however, the current rate of reproduction is greater than this observed rate because fishery mortality takes a fraction of the net production (Carretta *et al.*, 2003).

Harbor seals are considered non-migratory, generally making local movements in association with the distribution of food resources, tides, weather, season and breeding activities (Bigg, 1973, 1981; Stewart and Yochem, 1994). Harbor seals are found in estuaries and marine embayments, and typically rest ashore or haul out on beaches and tidal-inundated habitats such as mudflats, marshes, and near-shore rocky outcroppings (Kopec and Harvey, 1995; Zeiner et al., 1990). They often use these isolated, undisturbed sites for pupping, molting, and resting.

Harbor seals are very skittish by nature, and a startle response in harbor seals can vary from a temporary state of

agitation by a few individuals to the permanent abandonment of the haul-out site by the entire colony. Normally, when harbor seals are frightened by a noise, the approach of a boat, plane, human, predator, or another seal, for example, they will move rapidly to the water or flush. Disturbances have the potential to cause a more serious effect during pupping or nursing, or when aggregations are dense during the molting season, as mothers may become separated from their pups or individuals may be injured.

Harbor seals feed opportunistically on a variety of fish, crustaceans, and cephalapods (Zeiner *et al.*, 1990). Harbor seals are year-round residents in the Monterey Bay area and, contrary to the trend noted above for the stock as a whole, Hanan et al. (1992), as reported in Harvey (2003), report that the Monterey Bay population is increasing at an annual rate of approximately 7.7 percent. Within the Monterey Bay area, there are numerous haul-out sites. Several locations in Elkhorn Slough are of particular importance, as they provide the gently-sloped, isolated, undisturbed conditions critical to harbor seals. Within the Sandholdt Road Bridge Replacement project vicinity, harbor seals are known to routinely haul out at a recently established site, located approximately 800 m (2625 ft) south of the Bridge, along the Old Salinas River. This is not a location typically used by harbor seals for pupping and nursing, and although such activities could occur at the site, it is considered a rare event. Harbor seals may use the Old Salinas River haul out during the molting season, but it is presumed that long-established alternative sites in this region (i.e. along Elkhorn Slough) are more preferable to seals during these sensitive time periods. Bridge construction may temporarily restrict a small number of harbor seals from using this haul-out site during the construction period.

California Sea Lions

The geographic range of the U.S. stock of the California sea lion extends from the U.S./Mexico border north into Canada. Breeding occurs only in the Gulf of California, western Baja California, and southern California. Population estimates for this stock range from 244,000 to 237,000. The minimum population size is based on counts of all age and sex classes that were ashore at all major rookeries and haul-out sites during the 2001 breeding season, the number of births estimated from the pup count, and the proportion of the pups in the population. Current trends indicate that the stock as a whole has been growing at a rate of 5.4 to 6.1 percent per year (Carretta *et al.*, 2003). The Monterey Bay population is reported to be increasing at a slightly higher rate of 6 to 8 percent (Harvey, 2003).

California sea lions are the most abundant pinniped in the Monterey Bay region, with the highest numbers occurring during the spring and fall migrations (MBA, 1999). At least 12,000 California sea lions may be present within the entire Monterey Bay National Marine Sanctuary at any one time (Harvey, 2003), although only a few individuals are typically present within the Moss Landing Harbor-Sandholdt Road Bridge Project area (S. Dearn pers. comm.). Most of the sea lions within the region are males of varying age classes that arrive in early fall from their southern breeding grounds (MBA, 1999). Many individuals remain over the course of the winter until the following spring, with just a few sea lions staying through the summer. There are no breeding areas for the California sea lion located in the Monterey Bay area, and most individuals migrate to offshore breeding sites in southern California and Mexico.

Potential Effects on Marine Mammals

The impact to harbor seals and California sea lions is expected to be disturbance by the presence of workers, construction noise, and construction vessel traffic. The crane used to construct the access trestle will generate a moderate degree of noise (similar to that of a diesel truck). Pile driving will be noisier and will also cause ground vibrations. Vibratory hammers usually create less noise than pile driving, but noise will also be created by rock drills, other tools and also several of the vehicles commonly used on construction sites. The pile drivers planned for use at the Bridge have energy levels of approximately 16–24 kiloJoules (kJ). This is significantly less energy than either of the pile drivers being used on the San Francisco-Oakland Bay Bridge (SF-OBB)(see 68 FR 64595, November 14, 2003), which are 500 kJ and 1700 kJ. As a result, airborne and underwater impact zones for marine mammals (and other estuarine life) will be significantly smaller than at SF-OBB. At a distance of 50 ft (15.2 m) from the specific activity, CALTRANS believes airborne noise levels from the pile driver (and other construction equipment) will not exceed 100 dBA and most sounds will be 90 dBA or lower at that distance. Previously, NMFS has determined that sound exposure levels (SELs) of 100 dBA and 90 dBA (re 20 micro-Pa^2 -sec) or greater are the levels where California sea lions (and northern elephant seals) and Pacific harbor seals, respectively, will sometimes be harassed. Pinnipeds inside these airborne SEL isopleths at the time of pile driving and other equipment activity are presumed to be harassed, whether or not an actual behavioral disturbance occurs. NMFS does not believe that any airborne sounds from the Bridge construction site are sufficient to cause Level A harassment (injury or potential therefor). However, harbor seals and possibly some California sea lions may be disturbed on a daily basis as they are moving within the area and harbor seals are transiting to and from the haul-out site located about 500–800 m (1640 to 2625 ft) south of the Bridge site. Moreover, due to the distance between the construction site and the haul-out, no harbor seals are expected to be disturbed sufficiently to cause them to flush from the haul-out.

In addition to airborne sounds, loud underwater sounds, such as those produced by in-water pile driving, can have detrimental effects on marine mammals, causing stress, changes in behavior, and interference with communication and predator/prey detection. The most significant detrimental effect that loud underwater noises can have on marine mammals is a temporary or permanent loss of hearing.

Based on studies, previous pile-driving projects, consultation with experts, and review of the literature, NMFS has determined that marine mammals may exhibit behavioral changes when exposed to underwater impulse SPLs of 160 dB re 1 μPa (rms). In addition, current NMFS policy is that underwater SPLs at 190 dB re 1 micro-Pa RMS (impulse) and above could cause temporary or permanent hearing impairment in harbor seals and sea lions and therefore, activities should be designed to ensure, to the greatest extent practicable, that pinnipeds are not exposed to SPLs greater than 190 dB dB re 1 μPa rms.

While disturbances can consist of head alerts, approaches to the water, and flushes into the water, only the latter behavior is considered by NMFS to be Level B harassment in this situation. During the in-water work period (June through October), the incidental harassment of harbor seals is expected to occur on a daily basis upon initiation of the work. During the out-of-water work period, incidental harassment of harbor seals is expected to occur less frequently than what is expected for in-water construction activities. In addition, the number of seals disturbed will vary daily

depending upon tidal elevations. Although California sea lions have been shown to react to pile driving noise by porpoising quickly away from other bridge construction sites (SRS Technologies, 2001), it is not known whether they will react to general construction noise and move away from the area during construction activities. However, sea lions are generally thought to be more tolerant of human activities than harbor seals and are, therefore, less likely to be affected. However, Level B harassment of California sea lions may occur on rare occasions during the in-water work and out-of-water work periods.

However, disturbance from these activities is expected to have no more than a short-term negligible impact on the affected species or stocks and will result in harassment takes of small numbers of harbor seals and sea lions. These disturbances will be reduced to the lowest level practicable by implementation of the work restrictions and mitigation measures (see Mitigation).

Potential Effects on Habitat

The activities are expected to result in a temporary reduction in utilization of the Old Salinas River haulout site while work is in progress or until seals acclimate to the disturbance. This will not likely result in any permanent reduction in the number of seals at the Old Salinas River haul out. Permanent abandonment of the haul-out site is not anticipated since traffic noise from the Bridge, commercial activities along the river front area, and recreational boating that currently occurs within the area have not caused long-term abandonment. In addition, mitigation measures and work restrictions are designed to preclude abandonment. Therefore, as described in detail in the CALTRANS (2004), other than the potential short-term abandonment by harbor seals of part or all of the Old Salinas River haul-out site during Bridge construction, no impact on the habitat or food sources of marine mammals are likely from this construction project.

Mitigation

Among other local, state and Federal requirements, the Monterey County DPW marine mammal (and bird) mitigation plan was prepared to comply with condition 8 of the Monterey County Coastal Development Permit and the CCC CDP. The access trestle and falsework piles will be located such that they do not pose more of a barrier to marine mammals than do the support structures for the existing Bridge. In addition, construction barges and/or other in-water support construction equipment will be located in an area that would not restrict the movements of harbor seals or California sea lions through the work area.

To minimize underwater noise levels, the loudest pile-driving activities will be restricted to low-water periods. The loudest in-water noise levels are expected to occur during pile driving of the 6 large CISS piles with an impact hammer (driving steel piles is much louder than driving wooden piles, and an impact hammer is much louder than a vibratory hammer). As a result, the following mitigation measures will apply to pile driving: (1) for the two CISS piles in the deeper channel area, the impact hammer will not be used when water depth is more than 5 ft (1.5 m); and (2) for the other 4 CISS piles, the impact hammer will be used when the water depth is more than 3 ft (1 m).

Several mitigation measures to reduce the potential for general noise have been implemented by the Monterey County DPW as part of their activity. General restrictions include: piles will only be driven during daylight hours and all in-water support equipment will be located so as not to restrict marine mammal movement.

To minimize potential harassment of marine mammals to the lowest level practicable, the following mitigation measures are also required: (1) limit all in-water construction activity (as described in the Marine Mammal and Bird Mitigation Plan (Monterey County DPW, 2004)) to the period from June 1 through October 31, and (2) minimize Bridge construction-related vessel traffic to the greatest extent practicable in the in-water buffer zone (described in the next paragraph) when conducting in-water construction activities and to the greatest extent practicable near the haul-out site.

Underwater sound measurements have not been made for the pile driving equipment planned for use at the Bridge. Until the distance at which underwater sound levels equal 160 db and 190 dB re 1 μPa rms can be determined and implemented, Monterey County DPW will establish a preliminary in-water marine mammal impact zone, delineated by a 500–ft (152–m) radius from the in-water construction activity. The preliminary in-water, 500–ft (152–m) impact zone will be clearly marked by highly visible stakes securely placed on the banks.

Once pile-driving has started, a qualified underwater acoustic monitor will record SPLs from the pile driving to determine the distance to 160- and 190–dB re 1 μPa rms isopleths. When these radii are established, they will replace the 500–ft (152–m) impact zone and will be used as the 160–dB pinniped buffer and 190–dB pinniped safety zones. This same procedure will be followed to establish the appropriate buffer and safety zones for each type of loud in-water construction activity (e.g., impact hammer, vibratory hammer), different hammer sizes and types of piles (e.g., hollow steel, wood). The 160–dB radius will be called the pinniped buffer zone and the 190–dB radius will be called the pinniped safety zone for the specific type of activity currently underway. Alternatively, under the IHA, the Monterey County DPW can conduct underwater measurements of only the loudest in-water activity (presumably the largest impact hammer) and use those measurements to establish conservative buffer and safety zones for pinnipeds. The new safety zones will be clearly marked by highly visible stakes and the stakes delineating the initial 500–ft (152–m) impact zone will be removed.

Each day, before pile-driving (or other loud in-water construction activity) begins, the marine mammal monitor will survey the appropriate impact, buffer and/or safety zones for harbor seals and California sea lions. If any pinnipeds are sighted within the impact or safety zones, the monitor will require the contractor to delay pile-driving until the monitor determines that the marine mammal(s) has moved beyond the impact or safety zone, either through sighting or by waiting until enough time has elapsed (about 15 minutes) to assume that the animal has moved beyond the safety zone. However, once pile driving has begun, that individual pile can be driven to depth without cessation notwithstanding any pinniped presence.

Other in-water and out-of-water construction activities not related to pile driving, such as the use of heavy equipment to place embankment earthwork and rock slope protection, construct bridge abutments and the superstructure, and complete the roadway and embankment structural section (*i.e.*, activities not involving loud, impulsive hammering sounds), will generate noise levels equivalent to that of a diesel truck. For these activities, a 50–ft (15.2–m) radius impact zone will be established if that radius extends into the water. This pinniped impact zone will be clearly marked by highly visible stakes securely placed into the banks.

Each day before non-pile driving construction begins, the monitor will search the 50–ft (15.2–m) impact zone for marine mammals. If a marine

mammal is sighted within the impact zone, the monitor will require the contractor to delay in-water or out-of-water construction activities until the monitor determines that no marine mammals are present within the impact zone.

Monitoring

In addition to monitoring and recording behavioral responses within the 50–ft (15.2–m) pinniped impact zone, the preliminary 500–ft (152–m) pinniped impact zone, and the buffer and safety zones, NMFS is requiring the Monterey County DPW to monitor the impact of Bridge replacement construction activities on harbor seals (and California sea lions, if present) at the Old Salinas River haul-out site. In addition to specific monitoring tasks mentioned herein, all biological monitor(s) will record general construction activity (including all equipment being used), location, duration, and standardized noise levels for the construction equipment.

Monitoring will be divided into the in-water and out-of-water construction periods. Monitoring will be conducted every day during in-water construction activities and for an 8–hour period once a week during out-of-water activities, by at least one trained, NMFS-approved, biological monitor. The following data will be recorded: (1) Number of seals and sea lions on site; (2) date; (3) time; (4) tidal height; (5) number of adults, subadults, and pups; (6) number of females and males; (7) number of molting seals; and (8) details of any observed disturbances. The monitor(s) will conduct baseline observations of pinniped behavior at the Old Salinas River haul-out site, once a day for a period of 5 consecutive days immediately before the initiation of construction in the area to establish pre-construction behavioral patterns. In addition, NMFS requires that, immediately following the completion of the construction of the Bridge, the monitor(s) will conduct observations of pinniped behavior at the Old Salinas River haul out, for at least 5 consecutive days for approximately 1 tidal cycle (high tide to high tide) each day.

Reporting

NMFS will be notified in writing within 10 working days of any changes to the impact, buffer and safety zones due to completion and analysis of the SPL measurements.

The Monterey County DPW will provide weekly reports to the Southwest Regional Administrator (Regional Administrator), NMFS, including a summary of the previous week's monitoring activities and an estimate of the number of pinnipeds that may have been disturbed as a result of Bridge replacement construction activities. These reports will provide dates, time, tidal height, maximum number of harbor seals ashore, number of adults, sub-adults and pups, number of females/males, and any observed disturbances. The Monterey County DPW will also provide a description of construction activities at the time of observation and any SPL measurements made at the haulout site. The Monterey County DPW must submit draft final reports to NMFS within 90 days of completion of the 2005 in-water work phase and the 2005/2006 out-of-water work phase. The draft interim reports are considered final reports unless NMFS requests modifications to those reports within 90 days of receipt. The Monterey County DPW will also provide NMFS with a follow-up report on the post-construction monitoring activities within 18 months of project completion in order to evaluate whether haulout patterns are similar to the pre-Bridge replacement haul-out patterns at the Old Salinas River site.

Endangered Species Act (ESA)

NMFS has determined that this action will have no effect on species listed under the ESA that are under the jurisdiction of NMFS. On April 12, 2000, the U.S. Fish and Wildlife Service (USFWS) concurred with the determination of the FHWA that the proposed Bridge project was not likely to adversely affect the federally endangered goby (*Eucyclobgobius newberryi*), the brown pelican (*Pelecanus occidentalis*) and southern sea otter (*Enhydra lutris nereis*). However, issuance of an IHA to the Monterey County DPW also constitutes an agency action subject to section 7 of the ESA. As the effects of the Bridge activities on listed species were analyzed earlier, and as the action has not changed from that considered in that informal consultation, the discussion of effects that is contained in the April 12, 2000 concurrence letter from the USFWS to the FHWA pertains also to this action. In conclusion, NMFS has determined that issuance of an IHA does not lead to any effects to listed species apart from those that were considered in the consultation on FHWA's action.

National Environmental Policy Act (NEPA)

NMFS has prepared an Environmental Assessment (EA) on this action and has made a Finding of No Significant Impact (FONSI). Therefore, preparation of an environmental impact statement on this action is not required. A copy of the EA and FONSI are available upon request (see **ADDRESSES**).

Conclusions

NMFS has determined that the Bridge replacement, as described in this document, should result, at worst, in the temporary modification in behavior of small numbers of harbor seals and, possibly, of small numbers of California sea lions. While behavioral modifications, including temporarily vacating the haulout, may be made by these species to avoid the resultant visual and acoustic disturbance, this action is expected to have a negligible impact on the affected species and stocks of pinnipeds. In addition, no take by injury and/or death is anticipated, and harassment takes will be at the lowest level practicable due to incorporation of the mitigation measures described in this document.

Authorization

For the reasons previously discussed, NMFS has issued an IHA for a 1–year period, for the incidental harassment of small numbers of harbor seals and California sea lions incidental to Bridge replacement construction, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: December 27, 2004.

Donna Wieting,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 05–97 Filed 1–3–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Director, Regulatory Information Management Services, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before March 7, 2005.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or

waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) title; (3) summary of the collection; (4) description of the need for, and proposed use of, the information; (5) respondents and frequency of collection; and (6) reporting and/or recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 28, 2004.

Jeanne Van Vlandren,

Director, Regulatory Information Management Services, Office of the Chief Information Officer.

Institute of Education Sciences

Type of Review: New.

Title: Evaluation of the Impact of Literacy Interventions in Freshman Academies—Baseline Intake and Administrative Records Forms.

Frequency: Annually; one time.

Affected Public:

Individuals or household; not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 9,600.

Burden Hours: 6,259.

Abstract: The current OMB package requests clearance for the baseline intake and administrative records instruments to be used in the Evaluation of the Impact of Literacy Interventions in Freshman Academies. The baseline intake instrument will collect information from parents of children applying for admission to the literacy intervention included in the study. The administrative records instruments will be used to collect information on student outcomes such as test scores and will be completed by school or district staff in these schools as well as by control group students who attend the same schools. The study will examine the impacts of these literacy interventions on student outcomes over a one year follow-up period.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2660. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to (202) 245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address *Kathy.Axt@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 05–13 Filed 1–3–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Director, Regulatory Information Management Services, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before March 7, 2005.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) title; (3) summary of the collection; (4) description of the need for, and proposed use of, the information; (5) respondents and frequency of collection; and (6) reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 29, 2004.

Jeanne Van Vlandren,

Director, Regulatory Information Management Services, Office of the Chief Information Officer.

Office of Postsecondary Education

Type of Review: New.

Title: Individual Student Performance Report for the Jacob K. Javits Fellowship Program.

Frequency: Annually.

Affected Public: Individuals or household.

Reporting and Recordkeeping Hour Burden:

Responses: 190.

Burden Hours: 570.

Abstract: This information collection provides the U.S. Department of Education with information needed to determine if fellows have make substantial progress toward meeting the Program's objectives and allows Program staff to monitor and evaluate time-to-degree completion. The Congress has mandated (through the Government Performance Results Act of 1993) that the U.S. Department of

Education provide documentation about the progress being made by the Program.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2655. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to (202) 245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at his e-mail address *Joe.Schubart@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 05–86 Filed 1–3–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2210–108]

Appalachian Power Company, dba American Electric Power; Notice of Intent to File License Application, Filing of Pre-Application Document (PAD), Commencement of Licensing Proceeding, Issuance of Scoping Document, Solicitation of Study Requests and Comments on the PAD and Scoping Document

December 30, 2004.

a. *Type of Filing:* Notice of intent to file a license application for a new license under the integrated licensing process and commencing licensing proceeding.

b. *Project No.:* 2210–108.

c. *Date Filed:* October 25, 2004.

d. *Submitted By:* Appalachian Power Company, d/b/a American Electric Power.

e. *Project Name:* Smith Mountain Hydroelectric Project.

f. *Location:* On the headwaters of the Roanoke River in south-central Virginia, within the counties of Bedford, Campbell, Franklin and Pittsylvania, and near the city of Roanoke, Virginia. No federal lands are occupied by the project works or otherwise located within the project boundary.

g. *Filed Pursuant to:* 18 CFR part 5 of the Commission's Regulations.

h. *Appalachian Power Contact:* Frank M. Simms, Hydro Support Manager, Appalachian Power Company, Hydro Generation, PO Box 2021, Roanoke, VA 24022–2121; (540) 985–2875; *fmsimms@aep.com.*

i. *FERC Contact:* Allan Creamer, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426; (202) 502–8365; *allan.creamer@ferc.gov.*

j. We are asking federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues to cooperate with us in the preparation of the environmental document. Agencies who would like to request cooperating status should follow the instructions for filing comments described in paragraph p below.

k. With this notice, we are initiating informal consultation with: (1) The U.S. Fish and Wildlife Service and NOAA Fisheries, as appropriate, under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR 402; and (2) the State Historic Preservation Officer, as required by section 106, National Historic Preservation Act, and the implementing regulations of the Advisory council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Appalachian Power Company as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act. By letter dated November 4, 2003, we designated Appalachian Power Company as the Commission's non-federal representative for carrying out informal consultation pursuant to section 106 of the National Historic Preservation Act.

m. Appalachian Power Company filed a Pre-Application Document (PAD), including a proposed process plan and schedule, with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site, *http://www.ferc.gov*, using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field, to access the document. For assistance, contact FERC Online Support at *FERCONlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at Appalachian Power Company, Hydro Generation, 40 Franklin Road, Roanoke, VA 24022.

Register online at *http://ferc.gov/esubscribenow.htm* to be notified via e-mail of new filings and issuances related to this or other Commission projects. For assistance, contact FERC Online Support.

o. Concurrent with this notice, we are issuing Scoping Document 1 (SD1), which outlines the alternatives and issues to be addressed in our environmental document, to the individuals and entities on the Commission's mailing list. Copies of SD1 will be available at the scoping meetings described in item r below, or is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site, *http://www.ferc.gov*, using the ''eLibrary'' link, as described in item n above. Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 will include any revisions to the list of issues outlined in SD1 that are identified during the scoping process, and may include a revised process plan and schedule.

p. With this notice, we are soliciting comments on the PAD and SD1, as well as any study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications with Commission staff related to the merits of the proposed application (original and eight copies) must be filed with the Commission at the following address: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All filings with the Commission must include, on the first page, the project name (Smith Mountain Hydroelectric Project) and number (P–2210–108), and bear the heading ''Comments on Pre-Application Document,'' ''Study Requests,'' ''Comments on Scoping Document 1,'' ''Request for Cooperating Agency Status,'' or ''Communications with Commission Staff.'' Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by March 1, 2005.

Comments on the PAD and SD1, study requests, requests for cooperating agency status, and other permissible forms of communications with the Commission 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, *http://www.ferc.gov*, under the ''e-Filing'' link. The Commission strongly encourages electronic filings. For assistance, please contact FERC Online Support.

q. At this time, the Commission intends to prepare an Environmental Assessment for the project, in accordance with the National Environmental Policy Act.

r. *Scoping Meetings:* Commission staff will hold two scoping meetings in the vicinity of the project, at the time and place noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

Daytime Scoping Meeting

Date and Time: January 26, 2005 from 3 to 5 p.m. (EST), and continuing on January 27 at 9 a.m.

Location: First Baptist Church, 502 South Main St., Gretna, VA 24557.

Phone: (434) 656–2600.

Evening Scoping Meeting

Date and Time: January 27, 2005 at 7 p.m. (EST).

Location: First Baptist Church, 502 South Main St., Gretna, VA 24557.

The scoping meetings are posted on the Commission's calendar, located on the Internet at *http://www.ferc.gov/EventCalendar/EventsList.aspx*, along with other related information.

Site Visit

Appalachian Power Company will conduct a site visit of the project on January 26, 2005, beginning at 9 a.m. All participants should meet at the First Baptist Church, located at 502 South Main St. in Gretna, VA. We will tour the Smith Mountain dam and powerhouse, the Leesville dam and powerhouse, and view Smith Mountain and Leesville Lakes from the facilities. Participants should be prepared to provide their own transportation. Anyone with questions about the site visit should contact Frank Simms of Appalachian Power Company at (540) 985–2875. Those individuals planning to participate should notify Mr. Simms of their intent, on or before January 19, 2005.

Meeting Objectives

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activities that incorporates the time frames provided for in part 5 of the Commission's regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of our environmental document.

Meeting Procedures

The scoping meetings will be recorded by a court reporter and all statements, oral and written, will become part of the Commission's official public record for this project.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3916 Filed 1–3–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR05–4–000]

Consumers Energy Company; Notice of Petition for Rate Approval

December 27, 2004.

Take notice that on November 24, 2004, Consumers Energy Company (Consumers) filed pursuant to section 284.123(b)(2) of the Commission's regulations, a petition for rate approval requesting that the Commission approve the proposed rates as fair and equitable for firm and interruptible transmission services performed under section 311 of the Natural Gas Policy Act of 1978 (NGPA).

Consumers states that it is an intrastate pipeline company providing services through its facilities located in Michigan.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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 notice of intervention or motion to intervene, on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling link'' at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Intervention and Protest Date: 5 p.m. Eastern Time on January 18, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3917 Filed 1–3–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–131–000]

Dauphin Island Gathering Partners; Notice of Proposed Changes in FERC Gas Tariff

December 27, 2004.

Take notice that on December 20, 2004, Dauphin Island Gathering Partners (Dauphin Island) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, tariff sheets included in Appendix A to the filing, to become effective January 20, 2005. Dauphin Island states that these tariff sheets reflect the addition of negotiated rates language to the FT1 (DI) and FT–1 (MP) Rate Schedules.

Dauphin Island states that copies of the filing are being served contemporaneously on its customers and other interested parties.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3919 Filed 1–3–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–130–000]

Sea Robin Pipeline Company; Notice of Flowthrough Crediting Mechanism

December 27, 2004.

Take notice that on December 20, 2004, Sea Robin Pipeline Company (Sea Robin) submitted for filing its Annual Flowthrough Crediting Mechanism.

Sea Robin states that this filing was made pursuant to section 27 of the General Terms and Conditions of Sea Robin's FERC Gas Tariff which requires the crediting of certain amounts received as a result of resolving monthly imbalances between its gas and liquefiables shippers and under its operational balancing agreements as described in section 6 of Sea Robin tariff. Sea Robin further explains that section 27 also requires Sea Robin to accumulate amounts received as a result of imposing scheduling penalties as described in section 5.8 of its tariff.

Sea Robin further states copies of this filing are being served on all affected customers and applicable state regulatory agencies.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Intervention and Protest Date: 5 p.m. Eastern Time on January 4, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3918 Filed 1–3–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–133–000]

Transcontinental Gas Pipe Line Corporation; Notice of Refund Report

December 27, 2004.

Take notice that, on December 10, 2004, Transcontinental Gas Pipe Line Corporation (Transco) submitted pursuant to section 3.4 of Transco's Rate Schedule PAL and section 7 of Transco's Rate Schedule ICTS a report of refund detailing PAL and ICTS revenue sharing refunds totaling $387,398.70 of principal and interest. Transco states that the refund report is for the annual periods May 1, 2003 through April 30, 2004.

Transco states that copies of the filing were served on affected parties and state commissions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for

review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Intervention and Protest Date: 5 p.m. Eastern Time January 4, 2005.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3920 Filed 1–3–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP05–134–000]

Young Gas Storage Company, Ltd.; Notice of Proposed Changes in FERC Gas Tariff

December 27, 2004.

Take notice that on December 21, 2004, Young Gas Storage Company, Ltd. (Young) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, to become effective January 21, 2005:

Sixth Revised Sheet No. 53
Eighth Revised Sheet No. 55
Seventh Revised Sheet No. 61
Fifth Revised Sheet No. 63A
Sixth Revised Sheet No. 66
Fourth Revised Sheet No. 68

Young states that the tariff sheets are filed to remove the tariff provisions applicable to the temporary waiver of the maximum rate ceiling for capacity release transactions that expired on September 30, 2002.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3915 Filed 1–3–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–49–000]

Exelon Corporation, Complainant v. PPL Electric Utilities Corporation, PJM Interconnection, L.L.C., Respondents; Notice of Complaint

December 27, 2004.

Take notice that on December 23, 2004, Exelon Corporation filed a Complaint against PJM Interconnection, L.L.C. (PJM), and PPL Electric Utilities Corporation (PPL) pursuant to Rule 206 of the Commission's Rules of Practice and Procedure, 18 CFR 385.206 (2004) seeking compensation for improperly calculated and billed Transmission Congestion Charges to PECO in violation of the PJM Open Access Transmission Tariff and Operating Agreement.

Exelon states that copies of the complaint were served on the contacts for PJM and PPL as listed on the Commission's list of corporate officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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 notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: January 12, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E4–3922 Filed 1–3–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–24–000]

Survey on Operator Training Practices; Order Requiring Response to Survey on Operator Training Practices by Control Area Operators and Transmission Providers

December 27, 2004.

Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly.

1. In this order, pursuant to section 311 of the Federal Power Act (FPA),[1]

[1] 16 U.S.C. 825j (2000). Section 311 of the FPA authorizes the Commission to conduct investigations in order to secure information necessary or appropriate as a basis for recommending legislation. Section 311 makes clear

Continued

the Commission directs specified control area operators and transmission providers,[2] whether or not they are otherwise subject to the Commission's jurisdiction as a public utility, to complete a survey on their operator training practices.[3] This order implements the findings and recommendations set forth in the U.S.-Canada Power System Outage Task Force's (Task Force) Final Report on the August 14, 2003 Blackout in the United States and Canada (Blackout Report)[4] and benefits customers because better understanding of operator training practices will help to support improvements to overall grid reliability.

2. The Task Force found operator performance was one of the root causes of the August 14, 2003 blackout. According to the Blackout Report, deficiencies in operator performance that contributed to the blackout included lack of situational awareness, failure of personnel to declare an emergency, and failure to take appropriate action to ensure that the bulk electric system remained in a secure and reliable state. Participation in the operator training survey is required by this order because it will provide the Commission with valuable information regarding operator training problems that could prevent line outages or improve grid reliability so that we can report to Congress on actions that could be taken to reduce the potential of operator-caused problems.

3.The Commission strongly supports legislative reform to provide a clear federal framework for developing and enforcing mandatory reliability rules. The information collected from the reporting requirement herein will be reflected in a Commission report to Congress on legislation concerning the reliability of the nation's interstate bulk electric systems, consistent with section 311 of the FPA.

Background

4. On August 14, 2003, an electric power blackout occurred over large portions of the Northeast and Midwest United States and Ontario, Canada. The blackout lasted up to two days in some areas of the United States and longer in some areas of Canada. It affected an area with over 50 million people and 61,800 megawatts of electric load. In the wake of the blackout, the Task Force was created to study the causes of the blackout and possible solutions to avoid such future blackouts. On April 5, 2004, the Task Force made publicly available the Blackout Report, which described the blackout investigation findings and identified the causes of the blackout and made recommendations to minimize the future occurrences of large-scale blackouts.

5. The Task Force identified FirstEnergy Corporation's (FirstEnergy) inadequate situational awareness, that is, its failure to recognize or understand the deteriorating condition of its system, as one of the four primary causes of the August 14, 2003 blackout.[5] It explained that FirstEnergy's operations personnel were not adequately trained to maintain reliable operation under emergency conditions.[6] In addition, the Task Force stated that significant training above the standards set by NERC is needed to perform system operation and management functions.[7]

6. The Blackout Report also compared the August 2003 blackout with seven previous major outages and concluded that inadequate training of operating personnel was a common factor among major outages.[8] The Task Force concluded that ''operating procedures were necessary but not sufficient to deal with severe power system disturbances in several of the events [leading to the blackouts].''[9] It also noted that investigation reports from previous major outages recommended enhanced procedures and training for operating personnel.[10]

7. Responding to the blackout and the blackout investigation, on February 10, 2004, the NERC Board of Trustees approved recommendations to take steps to improve the reliability of the bulk electric system, including a recommendation to improve operator and reliability coordinator training.[11] This recommendation directed that all reliability coordinators, control areas, and transmission operators provide at least five days per year of training and drills in system emergencies using realistic simulations. This training was to be completed by June 30, 2004. On October 3, 2004, NERC issued an update on status of emergency training across the NERC regions.[12] NERC's assessment indicated that all operating entities in three regions met the requirements of the recommendation; all reliability coordinators, in all regions, met the required training; 70 percent of all control areas met the requirement; and 89 percent of all individual operators had completed the training requirements, based upon available data provided by seven of the ten regional reliability councils.

8. The Final Blackout Report's Recommendation No. 19 supported NERC's near-term training requirements. In addition, the Task Force made several recommendations to improve both near-term and long-term training requirements. An essential element to this recommendation includes commissioning an advisory report by an independent panel to address a wide range of issues concerning reliability training programs and certification requirements. The Task Force concluded that the report should be delivered by March 31, 2005 and that the Commission and Canadian authorities, in consultation with NERC and others, ''should evaluate the report and consider its findings in setting minimum training and certification requirements for control areas and reliability.''[13]

Discussion

9. The Blackout Report indicates that inadequate power system operator training was a major cause of the August 14, 2003 blackout. Further, the Task Force's analysis of seven other major outages identified operator training as a contributing factor to such outages. It is clear from these reports that a higher standard of training for those that operate the transmission grid is needed to minimize the risk of regional power outages and ensure the uninterrupted flow of electricity in the nation's

that the Commission's authority in conducting such investigations extends to entities otherwise not subject to the Commission's jurisdiction ''including the generation, transmission, distribution and sale of electric energy by any agency, authority or instrumentality of the United States, or of any State or municipality* * *.'' ''The Commission shall report to Congress the results of investigations made under authority of this section.'' 16 U.S.C. 825j.

[2] A list of survey respondents appears in Appendix A to this order. The Commission has hired a contractor to conduct this survey. The contractor will contact all survey respondents with instructions on how to complete the survey.

[3] A copy of this survey is found in Appendix B to this order and at *http://www.ferc.gov/industries/electric/indus-act/reliability/2004-sys-op-survey.pdf.*

[4] The Blackout Report, which was made public on April 5, 2004, is available on the Commission's Web site at *http://www.ferc.gov/cust-protect/moi/blackout.asp.*

[5] Blackout Report at 19. The other primary causes identified by the Task Force were inadequate system understanding by FirstEnergy and the East Central Area Reliability Coordination Agreement (ECAR), a North American Electric Reliability Council (NERC) Regional Reliability Council, failure to adequately manage tree growth in transmission rights-of-way, and failure of the interconnected grid's reliability organizations to provide effective diagnostic support. *Id.* at 17–20.

[6] *Id.* at 19.

[7] *Id.* at 20.

[8] *Id.* at 107.

[9] *Id.* at 110.

[10] *Id.*

[11] *See* Recommendation 6. The text of the February 10, 2004 document is available on NERC's Web site, *http://www.nerc.com.*

[12] *See* Status Report on Recommendation 6a at *ftp://www.nerc.com/pub/sys/all_updl/docs/blackout/Recommendation_6a.pdf*

[13] Blackout Report at 157.

interconnected bulk electric systems. As noted above, NERC requested that all reliability coordinators, control areas, and transmission operators provide at least five days of training and drills in system emergencies using realistic simulations to be completed by June 30, 2004. Although this is a useful step to promote near-term reliability, the Task Force recommended that, in order to improve long-term training and certification requirements, an advisory report by an independent panel should address a wide range of issues concerning reliability training programs and certification requirements.

10. The Commission has hired a consultant to examine operator training practices. The consultant has prepared the attached survey, which will be submitted to power system operators, as a part of the Commission's effort to determine the breadth of training practices across the industry, identify best practices, and evaluate minimum requirements for an effective operator training program. The Commission will analyze the data and provide a timely report to Congress on the need for legislation to ensure the reliability of the U.S. bulk power system. Accordingly, pursuant to section 311 of the FPA, the Commission is requiring that specified control areas and transmission providers, as specified in Appendix A, (whether or not they are otherwise subject to the Commission's jurisdiction as public utilities) submit the information requested in the survey contained in Appendix B to this order.[14]

11. Respondents must submit the report by January 31, 2005 to the Commission.

Document Availability

12. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington DC 20426.

13. From the Commission's Home Page on the Internet, this information is available using the *e*Library link. The full text of this document is available on *e*Library in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in *e*Library, type the docket number excluding the last three digits of this document in the docket number field.

14. User assistance is available for *e*Library and the Commission's Web site during normal business hours at *FERCOnlineSupport@ferc.gov* or by calling (866) 208–3676 or for TTY, contact (202) 502–8659.

The Commission orders:

(A) The specified control area operators and transmission providers, whether or not they are otherwise subject to the Commission's jurisdiction as public utilities, are directed to submit to the Commission, by January 31, 2005, a completed survey of their operator training practices, as discussed in the body of this order.

(B) The Secretary shall promptly publish a copy of this order in the **Federal Register**.

By the Commission.

Linda Mitry,

Deputy Secretary.

Appendix A—Control Areas and Transmission Providers

Alabama Electric Cooperative Corp.
Alabama Power Company
Allegheny Electric Cooperative, Inc.
Allegheny Power
American Electric Power Service Corp.
American Municipal Electric Power-Ohio, Inc.
American Transmission Company, LLC
Aquila Inc.
Arizona Electric Power Cooperative Corp.
Arizona Power Authority
Arkansas Electric Cooperative Corp.
Associated Electric Cooperative, Inc.
Austin Energy Company
Baltimore Gas and Electric Company
Big Rivers Electric Corp.
Bonneville Power Administration
Brazos Electric Power Cooperative
Brownesville Public Utilities Board
Buckeye Power Inc.
California Independent System Operator Corp.
Calpine Corporation
CenterPoint Energy, Inc.
Central Iowa Power Coop
Cincinnati Gas & Electric Company
Cinergy Corp.
City of Tallahassee, Florida
City Utilities of Springfield, Illinois
Clay Electric Cooperative
Cleco Power LLC
Cleveland Electric Illuminating Company (First Energy)
Commonwealth Edison Company
Conectiv Energy Supply Inc.
ConEdison Energy, Inc.
Connecticut Light and Power Company
Corn Belt Power Coop
Dairyland Power
Detroit Edison Company
Dominion Generation
Dominion Virginia Power
DTE Energy Trading, Inc.
Duke Energy
Duquesne Light Company
East Kentucky Power Cooperative Inc.
East Texas Electric Cooperative Inc.
El Paso Electric Company
Electric Energy, Inc.
Electric Reliability Council of Texas, Inc.
Entergy Services Inc.
Excel Energy
Exelon Corp.
First Energy Corp.
Florida Municipal Power Agency
Florida Power & Light Company
Fort Pierce Utilities Authority
Gainesville Regional Utilities
Garland Power & Light
Georgia Power Company
Georgia Transmission Company
Grand River Dam Authority
GridAmerica LLC
Gulf Power Company
Hoosier Energy Rural Electric Coop Inc.
Idaho Power Company
Imperial Irrigation District
Indiana Municipal Power Agency
Indianapolis Power & Light Company
Indiantown Cogeneration, LP
International Transmission Company
ISO New England, Inc.
Jacksonville Electric Authority
Kansas City Power & Light Company
Keys Energy Services
Kissimmee Utility Authority
KPL-Westar Energy
L.A. Dept Water & Power
Lansing Board of Water and Light
LGE Energy
Long Island Lighting Company
Louisiana Energy & Power Authority
Lower Colorado River Authority
Michigan Electric Transmission Company LLC
Mid-America Interconnected Network, Inc.
Mid-American Energy Company
Midwest Independent System Transmission Operator Corp
MIECO Inc.
Minnesota Power
Mirant Americas Development, Inc.
Mississippi Power Company
Missouri River Energy Service
Modesto Irrigation District
Municipal Electric Authority of Georgia
National Grid
Nebraska Public Power District
New England Electric Transmission Company
New York Independent System Operator, Inc.
New York Power Authority
New York State Electric & Gas Corp.
North Carolina Eastern Municipal Power Agency
North Carolina Electric Membership Corp.
Northeast Texas Electric Cooperative
Northeast Utilities Service Company
Northern California Power Agency
Northern Indiana Public Service Company
Northwest Power Pool
Ocala Electric Utility
Oglethorpe Power Corp.
Ohio Edison Company (First Energy)
Ohio Power Company (AEP)
Ohio Valley Electric Corp
Oklahoma Gas & Electric
Oklahoma Municipal Power Authority
Orange & Rockland
Orlando Utility Commission
Otter Tail Power Company
Pacific Corp

[14] OMB Control Number 1902–0209; expiration date June 30, 2005.

Pacific Gas & Electric Company
PECO Energy Company
PJM Interconnection, Inc.
PPL Utilities
Progress Energy
PSEG
Public Service Company of Colorado (New Century Energies)
Public Service Company of New Mexico
Puget Sound Energy, Inc.
Reedy Creek Energy Services
Reliant Energy Services, Inc.
Rochester Public Utilities
Sacramento Municipal Utility District
Salt River Project
San Diego Gas & Electric Company
Savannah Electric & Power Company
Seminole Electric Cooperative
Sierra Pacific Resources Transmission
Silicon Valley Power—City of Santa Clara
So. Mississippi Electric Power Assoc.
South Carolina Electric & Gas
South Carolina Public Service Authority
Southeastern Power Administration
Southern California Edison
Southern Company Services, Inc.
Southern Minnesota Municipal Power Agency
Southwest Power Pool, Inc.
Sunflower Electric Power Corp.
Tampa Electric Company
Tennessee Valley Authority
Tucson Electric Power Company
TXU Electric Delivery
Vermont Electric Power Company
Virginia Electric & Power Company
Wabash Valley Power Association Inc.
WE Energies
Westar Energy
Western Area Power Administration
Western Farmers Electric Cooperative
Wisconsin Public Service Corp.
Yadkin, Inc.

Attachment B

This FERC Operator Training Study survey is based upon the template used in DOE STANDARD DOE–STD–1070–94 (June 1994), titled Guidelines for Evaluation of Nuclear Facility Training Programs.

Part A—Management and Administration

1. Which of the following best describes the type of organization in which you work?
   A. NERC Regional Council
   B. Regional Transmission Operator (RTO)
   C. Independent System Operator (ISO)
   D. Integrated Utility
   E. Control Area
   F. Transmission Company
   G. Energy Marketing Company
   H. NERC Reliability Coordinator
   I. Municipal/Cooperative Company
2. Which of the following best describes your job position within the organization in which you work?
   A. Transmission Operator
   B. Generation Operator
   C. Interchange Operator
   D. Marketing Operations Authority
   E. System Reliability Authority
   F. Balancing Authority
3. Which of the following best describes your company's policy regarding training?
   A. Training is not available
   B. A training program exists and completion of the program is required
   C. Training program exists but completion of the program is not required but is encouraged
4. How many staff are dedicated to providing training at your location?
   A. 0
   B. 1
   C. 2 or more
   D. I do not know
5. Do you have a training department?
   A. Yes
   B. No
   C. I do not know
6. Do you have dedicated training program developers?
   A. Yes
   B. No
   C. I do not know
7. Do you have dedicated training program instructors?
   A. Yes
   B. No
   C. I do not know
8. Does your training program have written program goals?
   A. Yes
   B. No
   C. I do not know
9. Does your training program have written objectives?
   A. Yes
   B. No
   C. I do not know
10. Is operational philosophy documented and used at your site?
   A. Yes
   B. No
   C. I do not know
11. If you are responsible for conducting training, do you perform a routine audit of the training program against the current tasks required to be performed, the administrative requirements concerning system operation, current regulatory requirements affecting the program, and the adequacy of the resources necessary to run the training program successfully?
   A. Yes
   B. No
   C. I do not know
   D. N/A
12. If you are responsible for conducting training, do you deliver a report to management on the findings of your training program audit?
   A. Yes
   B. No
   C. I do not know
   D. N/A
13. If you are responsible for conducting training, does management respond positively to the findings of your training program audit?
   A. Yes
   B. No
   C. I do not know
   D. N/A
14. If you are responsible for conducting training, are you required by your training program to keep records of student performance at the objective level (task, knowledge, and performance level)?
   A. Yes
   B. No
   C. I do not know
   D. N/A
15. If you are responsible for conducting training, are you required to report on student progress to management at regular or predefined intervals using data?
   A. Yes
   B. No
   C. I do not know
   D. N/A
16. If you are responsible for conducting training, do you have a process in place that provides quality management of your training program?
   A. Yes
   B. No
   C. I do not know
   D. N/A
17. If you are responsible for conducting training, does your training program have defined customers (classifications of System Operators or maintenance personnel) to be served by the program?
   A. Yes
   B. No
   C. I do not know
   D. N/A
18. Does your training program have a published schedule of training program events?
   A. Yes
   B. No
   C. I do not know
19. Does your training program have a person who is responsible for overseeing the program?
   A. Yes
   B. No
   C. I do not know
20. Does your training program have a budget process that exists to fund training?
   A. Yes
   B. No
   C. I do not know
21. Does your training program have a means to keep records for individuals participating in the program?
   A. Yes
   B. No
   C. I do not know
22. Does your training program have a means to evaluate the effectiveness of the training program?
   A. Yes
   B. No
   C. I do not know
23. Does your training program have an annual budget sufficient to meet the needs of the training program?
   A. Yes
   B. No
   C. I do not know
24. Does your facility have a site specific validated Job and Task Analysis that was the basis for the design of your training program?
   A. Yes
   B. No
   C. I do not know
25. Does this validated Job and Task Analysis have a specific Difficulty, Importance,

and Frequency score associated with it that is used to determine its criticality within the training program?
A. Yes
B. No
C. I do not know

26. Does your training program have sufficient training aid capability (*i.e.* overhead projectors, PowerPoint projectors, computer terminals, white boards, mock-ups, etc.) to adequately present the current training material?
A. Yes
B. No
C. I do not know

Part B—Training Staff Qualification

27. Does your training program have full time dedicated instructors with no other concurrent duties for administration of the training program at your location?
A. Yes
B. No
C. I do not know

28. How many full time dedicated instructors are assigned to the training program at your location?
A. 0
B. 1
C. 2 or more
D. I do not know

29. Does your training program have an Instructor Qualification program at your location?
A. Qualification is required and completed at our location
B. Qualification is required but not followed through at our location
C. Qualification is not required, but will be in the future at our location
D. Qualification is not required; there is no plan in place for qualification at our location

30. Does the Instructor Qualification program develop instructor skills required for effective presentation of training materials?
A. Yes
B. No
C. I do not know
D. No qualification program is in place

31. Does the Instructor Qualification program ensure that the instructors possess adequate technical qualifications in the subjects they are assigned to teach?
A. Yes
B. No
C. I do not know
D. No qualification program is in place

32. Does the Instructor Qualification program provide for qualification of each instructor for each of the student training settings in place at your location (*i.e.* classroom, simulator, on the job training and/or computer based training)?
A. Yes
B. No
C. I do not know
D. No qualification program is in place

33. If instructors who are not fully qualified under your Instructor Qualification program or subject matter experts are used for class presentations are they under supervision and provided guidance by a fully qualified instructor?
A. Yes
B. No
C. I do not know
D. No qualification program is in place

34. Does your training program have training workshops for the trainers and evaluators in support of program goals?
A. Yes
B. No
C. I do not know

35. Does your training program have designated individuals trained to perform objective evaluations of the trainee's performance?
A. Yes
B. No
C. I do not know

36. In your training program, are the evaluators qualified to a specific standard before they are allowed to evaluate student performance?
A. Yes
B. No
C. I do not know

37. Does your training program monitor and evaluate instructor performance to determine need for improvement in instructor technical knowledge and/or instructional skills?
A. Yes
B. No
C. I do not know

38. Do you have a process in place for making changes to your training program?
A. Yes
B. No
C. I do not know

39. Who can make recommendations for improvements to training? (Select all that apply.)
A. Trainees
B. Managers
C. Supervisors
D. Trainers

Part C—Program Entrance Experience and Education Requirements

40. Are the majority of candidates for entry into the training program employees from inside your company or new hires from outside your company?
A. Employees from inside your company
B. New hires from outside your company
C. I do not know

41. For candidates from inside your company, does the training program specify previous job requirements or job specialties for entry into the training program?
A. Yes
B. No
C. I do not know

42. For candidates from inside your company, does the training program specify any educational requirements for entry into the training program?
A. Yes
B. No
C. I do not know

43. For candidates from inside your company, is company or union seniority a determining factor for entry into the training program?
A. Yes
B. No
C. I do not know

44. For candidates from inside your company, does company or union seniority override previous job requirements, job specialties or educational requirements for entry into the training program?
A. Yes
B. No
C. I do not know

45. For candidates from outside your company, does the training program specify previous job requirements or job specialties for entry into the training program?
A. Yes
B. No
C. I do not know

46. For candidates from outside your company, does the training program specify any educational requirements for entry into the training program?
A. Yes
B. No
C. I do not know

47. For candidates from inside or outside your company, which of the following does the training program specify as prerequisites for entry into the training program? (Check all that are applicable to your location.)
A. Physical requirements (*i.e.* ability to stand, walk or sit for long periods etc.)
B. Medical health screening
C. Psychological screening
D. Personality screening

48. For candidates from inside or outside your company, does the training program specify any knowledge screening test requirements for entry into the training program?
A. Yes
B. No
C. I do not know

49. Are requirements for entry into the training program reviewed and evaluated periodically to ensure trainees capable of completing the course are selected for entry into the training program?
A. Yes
B. No
C. I do not know

Part D—Training Program Content Determination

50. Does your organization have a detailed Job Task Analysis (JTA) for each position staffed at your location?
A. Yes
B. No
C. I do not know
D. A detailed JTA has not been developed for my location

51. Does your organization use a detailed JTA to assure that all tasks required for safe and efficient job performance are addressed by a training program at your location?
A. Yes
B. No
C. I do not know
D. No training program exists at my location

52. Is the JTA for your location reviewed periodically and updated as necessary to incorporate changes resulting from procedure changes, facility systems changes, facility equipment changes, changes in job scope, or technological chances that could affect job performance requirements at your location?
   A. Yes
   B. No
   C. I do not know
   D. A detailed JTA has not been developed for my location
53. Does your training program meet the recommendations of NERC guidelines for recommended training requirements for all positions staffed at your location?
   A. Yes
   B. No
   C. I do not know
   D. No training program exists at my location
54. Does your training program meet the recommendations of FERC guidelines for recommended training requirements for all positions staffed at your location?
   A. Yes
   B. No
   C. I do not know
   D. No training program exists at my location
55. Is facility and/or industry experience used to identify training program requirements for your location?
   A. Yes
   B. No
   C. I do not know
   D. No training program exists at my location
56. Are department managers and/or supervisors trained to the same standard as operational personnel at your location?
   A. Yes
   B. No
   C. I do not know
   D. No training program exists at my location
57. Are technical personnel such as computer maintenance personnel, IT technicians and instrumentation and control technicians trained to the same standard as operational personnel at your location?
   A. Yes
   B. No
   C. I do not know
   D. No training program exists at my location

Part E—Training Program Design and Development

58. Select which of the following best describes Classroom Training at your location?
   A. Classroom Training is required and completed at our location
   B. Classroom Training is required but not followed through at our location
   C. Classroom Training is not required, but will be in the future at our location
   D. Classroom Training is not required; there is no plan in place for classroom training at our location
59. If classroom training is provided at your location, how much time is allocated to classroom training per year?
   A. One week or less
   B. One to three weeks
   C. Three to six weeks
   D. More than six weeks
   E. N/A
60. If classroom training is provided at your location, are detailed lesson plans or training guides available and used to define the objectives, the task performances, associated knowledge and skills and standards of performance required for successful completion of each lesson objective?
   A. Yes
   B. No
   C. I do not know
   D. Classroom training is not provided
61. If classroom training is provided at your location, do the lesson plans or training guides objectives reflect the task performances, associated knowledge and skills and standards of performance required for successful completion of each lesson objective?
   A. Yes
   B. No
   C. I do not know
   D. Classroom training is not provided
62. Select which of the following best describes the Job Qualification program at your location?
   A. Qualification is required and completed at our location
   B. Qualification is required but not followed through at our location
   C. Qualification is not required, but will be in the future at our location
   D. Qualification is not required; there is no plan in place for job qualification at our location
63. If a job qualification program is provided at your location, how much time is allocated to complete the program?
   A. Six weeks or less
   B. Six to twelve weeks
   C. Twelve to sixteen weeks
   D. More than sixteen weeks
   E. N/A
64. If Job Qualification is required at your location, are detailed lesson plans or training guides available and used to define the objectives, the task performances, associated knowledge and skills and standards of performance required for successful completion of the qualification program?
   A. Yes
   B. No
   C. I do not know
   D. Job qualification training is not provided
65. If a Job Qualification program is provided at your location, do the lesson plans or training guides objectives reflect the task performances, associated knowledge and skills and standards of performance required for successful completion of the program objectives?
   A. Yes
   B. No
   C. I do not know
   D. Job Qualification training is not provided
66. Select which of the following best describes a Job Certification program at your location?
   A. Certification is required and completed at our location
   B. Certification is required but not followed through at our location
   C. Certification is not required, but will be in the future at our location
   D. Certification is not required; there is no plan in place for job certification at our location
67. If a job certification program is provided at your location, how much time is allocated to complete the program?
   A. Six weeks or less
   B. Six to twelve weeks
   C. Twelve to sixteen weeks
   D. More than sixteen weeks
   E. N/A
68. If a Job Certification training is provided at your location, are detailed lesson plans or training guides available and used to define the objectives, the task performances, associated knowledge and skills and standards of performance required for successful completion of the job certification program objectives?
   A. Yes
   B. No
   C. I do not know
   D. Job certification training not is provided
69. If a Job Certification program is provided at your location, do the lesson plans or training guides objectives reflect the task performances, associated knowledge and skills and standards of performance required for successful completion of job certification program objectives?
   A. Yes
   B. No
   C. I do not know
   D. Job certification training is not provided
70. Select which of the following best describes On the Job Training program at your location?
   A. On the Job Training is required and completed at our location
   B. On the Job Training is required but not followed through at our location
   C. On the Job Training is not required, but will be in the future at our location
   D. On the Job Training is not required; there is no plan in place for On the Job Training at our location
71. If On the Job training is provided at your location, how much time is allocated to On the Job training?
   A. One week or less
   B. One to three weeks
   C. Three to six weeks
   D. More than six weeks
   E. N/A
72. If On the Job training is provided at your location, are detailed lesson plans or training guides available and used to define the objectives, the task performances, associated knowledge and skills and standards of performance required for successful completion of each lesson objective?
   A. Yes
   B. No
   C. I do not know
   D. On the job training is not provided

73. If On the Job training is provided at your location, do the lesson plans or training guides objectives reflect the task performances, associated knowledge and skills and standards of performance required for successful completion of each lesson objective?
A. Yes
B. No
C. I do not know
D. On the job training is not provided

74. Select which of the following best describes Computer Based Training program at your location?
A. Computer Based Training is required and completed at our location
B. Computer Based Training is required but not followed through at our location
C. Computer Based Training is not required, but will be in the future at our location
D. Computer Based Training is not required; there is no plan in place for computer based training at our location

75. If Computer Based training is provided at your location, how much time is allocated to Computer Based training?
A. One week or less
B. One to three weeks
C. Three to six weeks
D. More than six weeks
E. N/A

76. If Computer Based training is provided at your location, are detailed lesson plans or training guides available and used to define the objectives, the task performances, associated knowledge and skills and standards of performance required for successful completion of each lesson objective?
A. Yes
B. No
C. I do not know
D. Computer based training is not provided

77. If Computer Based training is provided at your location, do the lesson plans or training guides objectives reflect the task performances, associated knowledge and skills and standards of performance required for successful completion of each lesson objective?
A. Yes
B. No
C. I do not know
D. Computer based training is not provided

78. Select which of the following best describes Simulator Training at your location?
A. Simulator Training is required and completed at our location
B. Simulator Training is required but not followed through at our location
C. Simulator Training is not required, but will be in the future at our location
D. Simulator Training is not required; there is no plan in place for Simulator Training at our location

79. If Simulator training is provided at your location, how much time is allocated to Simulator training?
A. One week or less
B. One to three weeks
C. Three to six weeks
D. More than six weeks
E. N/A

80. If Simulator training is provided at your location, are detailed lesson plans or training guides available and used to define the objectives, the task performances, associated knowledge and skills and standards of performance required for successful completion of each lesson objective?
A. Yes
B. No
C. I do not know
D. Simulator training is not provided

81. If Simulator training is provided at your location, do the lesson plans or training guides objectives reflect the task performances, associated knowledge and skills and standards of performance required for successful completion of each lesson objective?
A. Yes
B. No
C. I do not know
D. Simulator training is not provided

82. Select which of the following best describes Self Study Video training at your location?
A. Self Study Video Training is required and completed at our location
B. Self Study Video Training is required but not followed through at our location
C. Self Study Video Training is not required, but will be in the future at our location
D. Self Study Video Training is not required; there is no plan in place for Self Study Video Training at our location

83. If Self Study Video training is provided at your location, how much time is allocated to Simulator training?
A. One week or less
B. One to three weeks
C. Three to six weeks
D. More than six weeks
E. N/A

84. If Self Study Video training is provided at your location, are detailed lesson plans or training guides available and used to define the objectives, the task performances, associated knowledge and skills and standards of performance required for successful completion of each lesson objective?
A. Yes
B. No
C. I do not know
D. Self Study Video training is not provided

85. If Self Study Video training is provided at your location, do the lesson plans or training guides objectives reflect the task performances, associated knowledge and skills and standards of performance required for successful completion of each lesson objective?
A. Yes
B. No
C. I do not know
D. Self Study Video training is not provided

86. Select which of the following best describes Self Study Reading training at your location?
A. Self Study Reading Training is required and completed at our location
B. Self Study Reading Training is required but not followed through at our location
C. Self Study Reading Training is not required, but will be in the future at our location
D. Self Study Reading Training is not required; there is no plan in place for Self Study Reading Training at our location

87. If Self Study Reading training is provided at your location, how much time is allocated to Simulator training?
A. One week or less
B. One to three weeks
C. Three to six weeks
D. More than six weeks
E. N/A

88. If Self Study Reading training is provided at your location, are detailed lesson plans or training guides available and used to define the objectives, the task performances, associated knowledge and skills and standards of performance required for successful completion of each lesson objective?
A. Yes
B. No
C. I do not know
D. Self Study Reading training is not provided

89. If Self Study Reading training is provided at your location, do the lesson plans or training guides objectives reflect the task performances, associated knowledge and skills and standards of performance required for successful completion of each lesson objective?
A. Yes
B. No
C. I do not know
D. Self Study Reading training is not provided

90. Do you feel that lesson plans or training guides used at your location provide sufficient information and detail to ensure consistent and repeatable training each time they are used?
A. Yes
B. No
C. I do not know
D. Lesson plans or training guides are not used at my location

91. Do you feel that lesson plans or training guides used at your location provide sufficient information and detail to ensure training meets the expectations of your company management?
A. Yes
B. No
C. I do not know
D. Lesson plans or training guides are not used at my location

92. Do you feel that lesson plans or training guides used at your location provide adequate standards for evaluating trainee performance?
A. Yes
B. No
C. I do not know
D. Lesson plans or training guides are not used at my location

93. Do you feel that the evaluation standards are fairly and consistently applied to all trainees?
A. Yes
B. No
C. I do not know

D. Evaluation standards are not used at my location

94. Do you feel that lesson plans or training guides used at your location provide sufficient information to guide the instructor and trainee in performing and accomplishing the required tasks?
A. Yes
B. No
C. I do not know
D. Lesson plans or training guides are not used at my location

95. Are lesson plans or training guides used at your location reviewed periodically by subject matter experts to ensure the material contained in the document is both accurate and up to date?
A. Yes
B. No
C. I do not know
D. Lesson plans or training guides are not used at my location

96. Are lesson plans or training guides used at your location reviewed periodically by training department management to ensure the material contained in the document is both accurate and up to date?
A. Yes
B. No
C. I do not know
D. Lesson plans or training guides are not used at my location

97. Are lesson plans or training guides used at your location subject to a document control program to ensure that only the latest approved revisions are used for training?
A. Yes
B. No
C. I do not know
D. Lesson plans or training guides are not used at my location

98. Are lesson plans or training guides used at your location approved by company designated management prior to use in the training program?
A. Yes
B. No
C. I do not know
D. Lesson plans or training guides are not used at my location

99. Is a continuing training program in place at your location to maintain and improve the knowledge and skills of workers?
A. Yes
B. No
C. I do not know
D. Continuing training is not performed at regular intervals at my location

100. If continuing training is provided at your location, how much time is allocated to continuing training on an annual basis?
A. One week or less
B. One to three weeks
C. Three to six weeks
D. More than six weeks
E. N/A

101. Is a continuing training program in place at your location to provide refresher training on overtrain tasks at regular intervals?
A. Yes
B. No
C. I do not know
D. Continuing training is not performed at regular intervals at my location

102. Is a continuing training program in place at your location to provide timely training on facility and industry events?
A. Yes
B. No
C. I do not know
D. Continuing training is not performed at regular intervals at my location

103. Is a continuing training program in place at your location to provide timely training on facility and procedure modifications?
A. Yes
B. No
C. I do not know
D. Continuing training is not performed at regular intervals at my location

104. Is a continuing training program in place at your location to provide timely retraining to address performance deficiencies identified on tasks performed at your location?
A. Yes
B. No
C. I do not know
D. Continuing training is not performed at regular intervals at my location

105. Is a continuing training program in place at your location to provide timely training on infrequently performed tasks prior to expected performance of these tasks?
A. Yes
B. No
C. I do not know
D. Continuing training is not performed at regular intervals at my location

Part F—Conduct of Training Program

Initial Job Training

106. At the start of a training program, are you provided with an overview of your training program describing the different phases or methods of training (*i.e.,* classroom, OJT, simulator, computer based training, laboratory, etc.) that will be required for successful completion of the course?
A. Yes
B. No
C. I do not know

107. At the start of a training program, are you provided with an overview of your training program describing the different subjects to be presented and the order of presentation of subjects that will be required for successful completion of the course?
A. Yes
B. No
C. I do not know

108. At the start of a training program, are you provided with an overview of the learning objectives to be accomplished by the training program?
A. Yes
B. No
C. I do not know

109. Do you feel that training at your location is presented in a proper sequence to provide completion and understanding of basic or necessary prerequisite knowledge prior to receiving training on more advanced knowledge subjects?
A. Yes
B. No
C. I do not know

110. Do you feel that training at your location is presented in a proper sequence to provide completion and proficiency at basic or necessary prerequisite skills prior to receiving training on more advanced skill level tasks?
A. Yes
B. No
C. I do not know

111. Do you feel that the training materials (training manuals, system descriptions, operating and/or maintenance procedures, operating and/or maintenance manuals, administrative guidelines, etc) you were provided were sufficient to achieve the learning objectives required for successful completion of the training program?
A. Yes
B. No
C. I don't know

112. Do you feel that the instructor(s) used the reference material provided in the most effective manner during class presentations?
A. Yes
B. No
C. I don't know

113. Do you feel that the instructor/student ratio during classroom training was adequate to support effective learning?
A. Yes
B. No
C. I don't know

114. How many students are normally present during classroom instruction at your location?
A. 1 to 5
B. 5 to 10
C. 10 to 20
D. 20 or more

115. During classroom training at your location, did the instructor solicit student participation by encouraging student questions during the presentations?
A. Yes
B. No

116. If individualized instructional methods such as computer based training was used was sufficient guidance provided to ensure effective knowledge transfer to the student?
A. Yes
B. No
C. Individualized instructional methods were not used

117. If individualized instructional methods such as computer based training was used was the information presented by this media generic in nature or specific to your location training?
A. Generic
B. Specific to your location training
C. Individualized instructional methods were not used

118. If individualized instructional methods

such as computer based training was used was testing or evaluation of your performance on the material part of the program?
A. Yes
B. No
C. Individualized instructional methods were not used

119. If testing or evaluation of your performance was part of the computer based training were the results discussed with you by an instructor?
A. Yes
B. No
C. Computer based methods of testing or evaluation were not used

120. If testing or evaluation of your performance was part of the computer based training and your results were unsatisfactory did an instructor discuss remedial actions that should be taken by you to correct the deficiency?
A. Yes
B. No
C. Computer based methods of testing or evaluation were not used

121. Do you feel that computer based training is a viable option to instructor led classroom training?
A. Yes
B. No
C. I do not know
D. Computer based training is not used at my location

122. If On the Job training (OJT) is performed is it conducted by personnel trained in the instructional methods of performing OJT?
A. Yes
B. No
C. I do not know
D. OJT is not performed at my location

123. If On the Job training (OJT) is performed are the standards and requirements for successful completion of the program explained to you?
A. Yes
B. No
C. I do not know
D. OJT is not performed at my location

124. During OJT does the trainee manipulate controls and demonstrate task performance on actual equipment to the extent possible based on operational considerations?
A. Yes
B. No
C. I do not know
D. OJT is not performed at my location

125. If manipulation of controls and demonstration of tasks is not possible due to operational considerations during OJT, is a simulated performance or walk-through performed which demonstrates the student's knowledge of the conditions necessary for performance of the task?
A. Yes
B. No
C. I do not know
D. OJT is not performed at my location

126. If manipulation of controls and demonstration of tasks is not possible due to operational considerations during OJT, is a simulated performance or walk-through performed which demonstrates the student's knowledge of reference materials, tools and equipment necessary for performance of the task?
A. Yes
B. No
C. I do not know
D. OJT is not performed at my location

127. Is student performance on OJT tasks evaluated immediately following the exercise to reinforce the student's performance and offer correction to any problems noted during performance of the task?
A. Yes
B. No
C. I do not know
D. OJT is not performed at my location

128. Do you feel that the OJT program training is effective in enhancing the knowledge and performance skills associated with your job?
A. Yes
B. No
C. I do not know
D. OJT is not performed at my location

129. If simulator training is included as part of your initial training program, is it conducted at your location or is travel to another location for simulator training required?
A. Performed at my location
B. Travel to another facility is required within my company
C. Travel is required to a facility outside my company
D. Simulator training is not performed

130. If simulator training is performed is the simulator an exact replica of the actual control stations you are training to use?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

131. If the simulator is not an exact replica of your control station, is sufficient explanation of the differences provided to you to allow correlation of the training back to your actual control stations?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

132. If the simulator is not an exact replica of your control station do you feel that simulator training would be more effective if the simulator was an exact replica?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

133. If simulator training is performed is it conducted by personnel trained in the instructional methods of performing simulator training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

134. If simulator training is performed are the standards and requirements for successful completion of the program explained to you?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

135. Is Simulator training used to teach the trainee to recognize and control normal operations and conditions on your system?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

136. Is Simulator training used to teach the trainee to recognize and control abnormal operations and conditions on your system?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

137. Is Simulator training used to teach the trainee to recognize and control emergency operations and conditions on your system?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

138. Is Simulator training used to teach the trainee to recognize and respond to failures of computer system(s) associated with the process or system function on your actual control stations?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

139. Is Simulator training used to teach the trainee to recognize, interpret, and respond to alarms specific to your system operations conditions?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

140. Is simulator training used to teach the trainee the proper use of normal, abnormal and emergency operating procedures?
A. Yes
B. No
C. Training on the proper use of operating procedures is not performed
D. Simulator training is not performed

141. Is roll playing used during simulator training to teach the trainee proper interaction with other people, groups or entities?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

142. Is team training used during simulator training to teach trainees how to coordinate their activities with the activities of team members?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

143. Is team training used during simulator training to teach trainees the importance of proper and complete communication

of system conditions and changes to system conditions to other team members?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

144. Is student simulator training performance evaluated immediately following the exercise to reinforce the student's performance and offer correction to any problems noted during performance of the training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

145. Do you feel that the Simulator training program is effective in enhancing the knowledge and performance skills associated with your job?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

Continuing Training

146. Do you feel that continuing training at your location is presented in a manner that is effective in enhancing your knowledge on subjects important to your job?
A. Yes
B. No
C. I do not know
D. Continuing training is not performed at my location

147. Do you feel that continuing training at your location is presented in a manner that is effective in enhancing your skills that are important to performance of your job?
A. Yes
B. No
C. I do not know
D. Continuing training is not performed at my location

148. Do you feel that the continuing training program is effective in familiarizing you in a timely manner with changes in documents such as procedural changes and system modifications associated with your area of responsibility?
A. Yes
B. No
C. Continuing training is not performed at my location

149. Do you feel that the instructor(s) are fully versed on changes to facility documents and able to communicate the importance and impact of these changes to personnel during training?
A. Yes
B. No

150. Do you feel that the instructor/student ratio during continuing training is adequate to support effective learning?
A. Yes
B. No
C. I do not know
D. Continuing training is not performed at my location

151. How many students are normally present during continuing training instruction at your location?
A. 1 to 5
B. 5 to 10
C. 10 to 20
D. 20 or more
E. Continuing training is not performed at my location

152. If individualized instructional methods such as computer based training are used for continuing training, is sufficient guidance provided to ensure effective knowledge transfer to the student?
A. Yes
B. No
C. Individualized instructional methods are not used

153. If individualized instructional methods such as computer based training is used for continuing training is testing or evaluation of your performance on the material part of the program?
A. Yes
B. No
C. Individualized instructional methods are not used

154. If testing or evaluation of your performance is part of the computer based training used for continuing training are the results discussed with you by an instructor?
A. Yes
B. No
C. Computer based methods of testing or evaluation are not used

155. If testing or evaluation of your performance is part of the computer based training used for continuing training and your results were unsatisfactory did an instructor discuss remedial actions that should be taken by you to correct the deficiency?
A. Yes
B. No
C. Computer based methods of testing or evaluation are not used

156. Do you feel that computer based training is a viable option to instructor led continuing training?
A. Yes
B. No
C. I do not know
D. Computer based training is not used for continuing training

157. If On the Job training (OJT) is performed as part of your continuing training is it conducted by personnel trained in the instructional methods of performing OJT?
A. Yes
B. No
C. I do not know
D. OJT is not performed for continuing training

158. If On the Job training (OJT) is performed are the standards and requirements for successful completion of the continuing training program explained to you?
A. Yes
B. No
C. I do not know
D. OJT is not performed for continuing training

159. During OJT does the trainee manipulate controls and demonstrate task performance on actual equipment to the extent possible based on operational considerations during continuing training?
A. Yes
B. No
C. I do not know
D. OJT is not performed for continuing training

160. If manipulation of controls and demonstration of tasks is not possible due to operational considerations during OJT, is a simulated performance or walk-through performed as part of the continuing training program which demonstrates the student's knowledge of the conditions necessary for performance of the task?
A. Yes
B. No
C. I do not know
D. OJT is not performed for continuing training

161. If manipulation of controls and demonstration of tasks is not possible due to operational considerations during OJT, is a simulated performance or walk-through performed as part of the continuing training program which demonstrates the student's knowledge of reference materials, tools and equipment necessary for performance of the task?
A. Yes
B. No
C. I do not know
D. OJT is not performed for continuing training

162. Is student performance on OJT tasks evaluated immediately following the exercise to reinforce the student's performance and offer correction to any problems noted during performance of the task for continuing training?
A. Yes
B. No
C. I do not know
D. OJT is not performed for continuing training

163. Do you feel that the OJT program as part of the continuing training is effective in enhancing the knowledge and performance skills associated with your job?
A. Yes
B. No
C. I do not know
D. OJT is not performed for continuing training

164. If simulator training is included as part of your continuing training program, is it conducted at your location or is travel to another location for simulator training required?
A. Performed at my location
B. Travel to another facility is required within my company
C. Travel is required to a facility outside my company
D. Simulator training is not performed

165. If simulator training is performed as part of a continuing training program is the simulator an exact replica of the actual control stations you are training to use?
A. Yes
B. No
C. I do not know

D. Simulator training is not performed

166. If the simulator used for continuing training is not an exact replica of your control station, is sufficient explanation of the differences provided to you to allow correlation of the training back to your actual control stations?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

167. If the simulator used for continuing training is not an exact replica of your control station do you feel that simulator training would be more effective if the simulator was an exact replica?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

168. If simulator training is performed as part of a continuing training program is it conducted by personnel trained in the instructional methods of performing simulator training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

169. If simulator training is performed as part of a continuing training program are the standards and requirements for successful completion of the program explained to you?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

170. Is Simulator training used to teach the trainee to recognize and control normal operations and conditions on your system during continuing training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

171. Is Simulator training used to teach the trainee to recognize and control abnormal operations and conditions on your system during continuing training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

172. Is Simulator training used to teach the trainee to recognize and control emergency operations and conditions on your system during continuing training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

173. Is Simulator training used to teach the trainee to recognize and respond to failures of computer system(s) associated with the process or system function on your actual control stations during continuing training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

174. Is Simulator training used to teach the trainee to recognize, interpret, and respond to alarms specific to your system operations conditions during continuing training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

175. Is Simulator training used to teach the trainee the proper use of normal, abnormal and emergency operating procedures during continuing training?
A. Yes
B. No
C. Operating procedure use training is not performed
D. Simulator training is not performed

176. Is role playing used during simulator training to teach the trainee proper interaction with other people, groups or entities during continuing training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

177. Is team training used during simulator training to teach trainees how to coordinate their activities with the activities of team members during continuing training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

178. Is team training used during simulator training to teach trainees the importance of proper and complete communication of system conditions and changes to system conditions to other team members during continuing training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

179. Is student simulator training performance evaluated immediately following the exercise to reinforce the student's performance and offer correction to any problems noted during performance of the training during continuing training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

180. Do you feel that the Simulator training program is effective in enhancing the knowledge and performance skills associated with your job during continuing training?
A. Yes
B. No
C. I do not know
D. Simulator training is not performed

181. Select which of the following best describes Job Re-Qualification program at your location?
A. Re-Qualification is required and completed at our location
B. Re Qualification is required but not followed through at our location
C. Re-Qualification is not required, but will be in the future at our location
D. Re-Qualification is not required; there is no plan in place for job re-qualification at our location

182. If a job re-qualification program is provided at your location, how often must the program be completed?
A. Every Year
B. Every two years
C. Every five years
D. Longer than five years
E. N/A

183. Select which of the following best describes Job Re-Certification program at your location?
A. Re-Certification is required and completed at our location
B. Re-Certification is required but not followed through at our location
C. Re-Certification is not required, but will be in the future at our location
D. Re-Certification is not required; there is no plan in place for job re-certification at our location

184. If a job re-certification program is provided at your location, how often must the program be completed?
A. Every Year
B. Every two years
C. Every five years
D. Longer than five years
E. N/A

Part G—Training Program Trainee Evaluations and Examinations

185. Does your training program conduct examinations/evaluations to student progress through their initial training program?
A. Yes
B. No
C. I do not know
D. Examination/evaluations are not performed

186. Does your training program conduct examinations/evaluations to student progress during their continuing training program?
A. Yes
B. No
C. I do not know
D. Examination/evaluations are not performed

187. Are examinations/evaluations designed to provide a representative sampling of the knowledge and skills learning objectives presented by your training program?
A. Yes
B. No
C. I do not know
D. Examination/evaluations are not performed

188. Are written test questions, oral evaluations and simulator performance evaluations reviewed by subject matter experts to ensure that technical content, meaning and correct responses are determined prior to administering them to the students?
A. Yes
B. No
C. I do not know
D. Examination/evaluations are not performed

189. Does your training program have administrative controls requiring that the content of both written and oral examinations be changed periodically to

prevent compromise of the material?
A. Yes
B. No
C. I do not know
D. Examination/evaluations are not performed

190. Is the development, approval, security, administration, and maintenance of both oral and written examinations and performance evaluations controlled by a program to limit access to the material to only designated personnel to prevent compromise of the material?
A. Yes
B. No
C. I do not know
D. Examination/evaluations are not performed

191. Is remedial training and reevaluation of students provided by your training program when student examination or performance standards are not met?
A. Yes
B. No
C. I do not know
D. Examination/evaluations are not performed

192. Are remedial training plans specified in advance of testing?
A. Yes
B. No
C. I do not know
D. Examination/evaluations are not performed

193. Is the remedial training program identified to the students and student acknowledgement of the remedial program required prior to testing?
A. Yes
B. No
C. I do not know
D. Examination/evaluations are not performed

194. Is a method of documenting completion of remedial training provided for in your program?
A. Yes
B. No
C. I do not know
D. Examination/evaluations are not performed

Part H—Evaluation of the Training Program

195. Is your training program structured to provide a systematic evaluation of training effectiveness as it relates to on the job performance by personnel at your location?
A. Yes
B. No
C. I do not know
D. Evaluations are not performed

196. Is your training program evaluated to ensure that the program conveys all required knowledge and skills to personnel at you location for performance of their duties?
A. Yes
B. No
C. I do not know
D. Evaluations are not performed

197. Are policies or procedures in place defining the when, how, and by whom of conducting evaluations?
A. Yes
B. No
C. I do not know
D. Examination/evaluations are not performed

198. Are instructors in your training program evaluated periodically by management against an established set of criteria in all settings in which they provide instruction?
A. Yes
B. No
C. I do not know
D. Evaluations are not performed

199. Are evaluations of instructors used to ensure consistent instructor performance and/or identify instructional skills in need of improvement?
A. Yes
B. No
C. I do not know
D. Evaluations are not performed

200. Are trainees provided an opportunity to provide feedback on the effectiveness of the instructor(s) in presentation of training material and the overall quality of the training?
A. Yes
B. No
C. I do not know
D. Feedback is not solicited

201. Is feedback from the trainees and the trainee's supervisor after the trainee has had an opportunity to apply his training to actual job duties solicited to help determine the effectiveness of the training provided?
A. Yes
B. No
C. I do not know
D. Feedback is not solicited

202. Is the feedback obtained from the trainees and their supervisors used to determine areas in which improvements to the training program are needed?
A. Yes
B. No
C. I do not know
D. Feedback is not solicited

203. Is a program in place at your location to review changes to procedures, equipment and/or facilities to ensure that changes are reflected in the training program in a timely manner as applicable?
A. Yes
B. No
C. I do not know
D. Changes are not considered for incorporation into established training plans

204. Does your training program have in place a policy or procedure to identify required changes to both your initial and continuing training programs and provide guidance on documenting, evaluating, tracking and incorporating changes to your training programs?
A. Yes
B. No
C. I do not know
D. Changes are not considered for incorporation into established training plans

205. Are the facilities used for training periodically evaluated to determine their adequacy for use as training facilities and to ensure they remain conducive to providing a disturbance and distraction free learning environment?
A. Yes
B. No
C. I do not know
D. Facilities are not provide for exclusive use of training

[FR Doc. 05–18 Filed 1–3–05; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP05–37–000]

Transcontinental Gas Pipe Line Corporation; Notice of Intent To Prepare an Environmental Assessment for the Proposed Station 170 Clean Air Modifications Project and Request for Comments on Environmental Issues

December 27, 2004.

The staff of the Federal Energy Regulatory Commission will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Station 170 Clean Air Modifications Project involving construction and operation of facilities by Transcontinental Gas Pipe Line Corporation (Transco) in Appomattox County, Virginia.[1] These facilities would consist of 11 reciprocating engines to be upgraded to comply with the State of Virginia's requirements to reduce nitrogen oxide emissions. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

Summary of the Proposed Project

Transco proposes to modify 11 of its existing reciprocating engines at Compressor Station No. 170 in Appomattox County, Virginia in order to reduce oxides of nitrogen emissions to comply with the State of Virginia's plans to implement the Clean Air Act Amendments of 1990 (CAA). In order to reduce emissions and comply with the CAA, Transco seeks authority to:

- Install turbochargers and associated equipment on 7 of the 11 reciprocating engines;
- Increase the capacity of the turbochargers on the remaining 4 reciprocating engines and install associated equipment;

[1] Transco's application was filed with the Commission under section 7 of the Natural Gas Act and part 157 of the Commission's regulations.

• Install a high-pressure fuel gas header;
• Install a new 13-by-28 foot power supply building; and
• Install new fin-fan coolers for the new turbochargers.

The general location of the project facilities is shown in Appendix 1.[2]

Land Requirements for Construction

Construction of the proposed facilities would occur on about one acre of previously disturbed land. No new land would be required for this project. All land would be restored according to the FERC staff's Upland Erosion Control, Revegetation, and Maintenance Plan.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as ''scoping''. The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission staff requests public comments on the scope of the issues to address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

In the EA we [3] will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

• Geology and soils.
• Land use.
• Cultural resources.
• Vegetation and wildlife.
• Air quality and noise.
• Endangered and threatened species.
• Hazardous waste.
• Water resources and fisheries.

We will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to federal, state, and local agencies, public interest groups, interested individuals, affected landowners, newspapers, libraries, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

To ensure your comments are considered, please carefully follow the instructions in the public participation section below.

Currently Identified Environmental Issues

We have already identified air and noise impacts as issues that we think deserves attention based on a preliminary review of the proposed modifications and the environmental information provided by Transco. This preliminary list of issues may be changed based on your comments and our analysis.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. By becoming a commentor, your concerns will be addressed in the EA and considered by the Commission. You should focus on the potential environmental effects of the proposal, alternatives to the proposal, and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded.

• Send an original and two copies of your letter to: Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.
• Label one copy of the comments for the attention of Gas Branch 2.
• Reference Docket No. CP05–37–000.
• Mail your comments so that they will be received in Washington, DC on or before January 27, 2005.

Please note that we are continuing to experience delays in mail deliveries from the U.S. Postal Service. As a result, we will include all comments that we receive within a reasonable time frame in our environmental analysis of this project. However, the Commission strongly encourages electronic filing of any comments or interventions or protests to this proceeding. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link and the link to the User's Guide. Before you can file comments you will need to create a free account which can be created on-line.

We may mail the EA for comment. If you are interested in receiving it, please return the Information Request (Appendix 3). If you do not return the Information Request, you will be taken off the mailing list.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding known as an ''intervenor''. Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must send one electronic copy (using the Commission's eFiling system) or 14 paper copies of its filings to the Secretary of the Commission and must send a copy of its filings to all other parties on the Commission's service list for this proceeding. If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214) (see Appendix 2).[4] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners whose property may be used temporarily for project purposes, or who own homes within distances

[2] The appendices referenced in this notice are not being printed in the **Federal Register.** Copies of all appendices, other than Appendix 1 (maps), are available on the Commission's Web site at the ''eLibrary'' link or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary refer to the last page of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

[3] ''We'', ''us'', and ''our'' refer to the environmental staff of the Office of Energy Projects (OEP).

[4] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

defined in the Commission's regulations of certain aboveground facilities.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Magalie R. Salas,

Secretary.

[FR Doc. E4–3921 Filed 1–3–05; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[RCRA–2004–0020, FRL–7857–3]

Agency Information Collection Activities: Proposed Collection; Comment Request; State Program Adequacy Determination: Municipal Solid Waste Landfills (MSWLFs) and Non-Municipal, Non-Hazardous Waste Disposal Units That Receive Conditionally Exempt Small Quantity Generator (CESQG) Hazardous Waste, EPA ICR Number 1608.04, OMB Control Number 2050–0152

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request to renew an existing approved collection. This ICR is scheduled to expire on June 30, 2005. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before March 7, 2005.

ADDRESSES: Submit your comments, referencing docket ID number RCRA–2004–0020, to EPA online using EDOCKET (our preferred method), by e-mail to *rcra-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 5303T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Craig Dufficy, Municipal and Industrial Solid Waste Division of the Office of Solid Waste (Mail Code 5306W), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–9037; fax number: (703) 308–8686; e-mail address: *dufficy.craig@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has established a public docket for this ICR under Docket ID number RCRA–2004–0020, which is available for public viewing at the Office of Solid Waste and Emergency Response (OSWER) Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the OSWER Docket is (202) 566–0270. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA within 60 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, see EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov./edocket.*

Affected entities: Entities potentially affected by this action are states that seek approval of permit programs for MSWLF's and for non-municipal, non-hazardous waste disposal units that receive CESQG waste.

Title: State Program Adequacy Determination: Municipal Solid Waste Landfills (MSWLFs) and Non-Municipal, Non-Hazardous Waste Disposal Units that Receive Conditionally Exempt Small Quantity Generator (CESQG) Hazardous Waste, EPA ICR Number 1608.04, OMB Control Number 2050–0152.

Abstract: Section 4010(c) of the Resource Conservation and Recovery Act (RCRA) of 1976 requires that EPA revise the landfill criteria promulgated under paragraph (1) of section 4004(a) and section 1008(a)(3). Section 4005(c) of RCRA, as amended by the Hazardous Solid Waste Amendments (HSWA) of 1984, requires States to develop and implement permit programs to ensure that MSWLFs and non-municipal, non-hazardous waste disposal units that receive household hazardous waste or CESQG hazardous waste are in compliance with the revised criteria for the design and operation of non-municipal, non-hazardous waste disposal units under 40 CFR part 257, subpart B and MSWLFs under 40 CFR part 258. (40 CFR part 257, subpart B and 40 CFR part 258 are henceforth referred to as the ''revised federal criteria''.) Section 4005(c) of RCRA further mandates the EPA Administrator to determine the adequacy of State permit programs to ensure owner and/or operator compliance with the revised federal criteria. A State program that is deemed adequate to ensure compliance may afford flexibility to owners or operators in the approaches they use to meet federal requirements, significantly

reducing the burden associated with compliance.

In response to the statutory requirement in section 4005(c), EPA developed 40 CFR part 239, commonly referred to as the State Implementation Rule (SIR). The SIR describes the State application and EPA review procedures and defines the elements of an adequate State permit program.

The collection of information from the State during the permit program adequacy determination process allows EPA to evaluate whether a program for which approval is requested is appropriate in structure and authority to ensure owner or operator compliance with the revised federal criteria. The SIR does not require the use of a particular application form. Section 239.3 of the SIR, however, requires that all State applications contain the following five components:

(1) A transmittal letter requesting permit program approval.

(2) A narrative description of the State permit program, including a demonstration that the State's standards for non-municipal, non-hazardous waste disposal units that receive CESQG hazardous waste are technically comparable to the part 257, subpart B criteria and/or that its MSWLF standards are technically comparable to the part 258 criteria.

(3) A legal certification demonstrating that the State has the authority to carry out the program.

(4) Copies of State laws, regulations, and guidance that the State believes demonstrate program adequacy.

(5) Copies of relevant State-tribal agreements if the State has negotiated with a tribe for the implementation of a permit program for non-municipal, non-hazardous waste disposal units that receive CESQG hazardous waste and/or MSWLFs on tribal lands.

The EPA Administrator has delegated the authority to make determinations of adequacy, as contained in the statute, to the EPA Regional Administrator. The appropriate EPA Regional Office, therefore, will use the information provided by each State to determine whether the State's permit program satisfies the statutory test reflected in the requirements of 40 CFR part 239. In all cases, the information will be analyzed to determine the adequacy of the State's permit program for ensuring compliance with the federal revised criteria.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

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

Burden Statement: Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The total burden for States, territories, and the EPA regions for the collection and evaluation of the information under this ICR is estimated to be about 7,210 hours and $352,800. The estimated burden includes time for reviewing instructions, searching existing data sources, gathering and maintaining necessary data, and completing and reviewing the collection of information. The ICR supporting statement describes the assumptions and information sources used to develop the burden estimate for this ICR. For a copy of the supporting statement, contact Craig Dufficy at (703) 308–9037, or e-mail *dufficy.craig@epa.gov.* Requests should reference the document title, ''Supporting Statement for EPA Information Collection Request #1608.04''. There is no recordkeeping burden associated with this ICR.

Dated: December 20, 2004.

Matt Hale,

Director, Office of Solid Waste.

[FR Doc. 05–102 Filed 1–3–05; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may obtain copies of agreements by contacting the Commission's Office of Agreements at 202–523–5793 or via e-mail at *tradeanalysis@fmc.gov.* Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 011893.

Title: Westwood/Star Sailing and Space Charter Agreement.

Parties: Westwood Shipping Lines, Inc. and Star Shipping A.S.

Filing Party: Pamela J. Auerbach, Esq.; Kirkland & Ellis LLP; 655 Fifteenth Street, NW., Washington, DC 20005.

Synopsis: The proposed agreement would authorize the parties to operate a service and share space in the trade between the U.S. and Canadian Pacific Coasts and ports in Japan, Korea, and China.

By Order of the Federal Maritime Commission.

Dated: December 29, 2004.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. 05–99 Filed 1–3–05; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Early Hearing Detection and Intervention (EHDI) Tracking, Surveillance, and Integration

Announcement Type: New.

Funding Opportunity Number: RFA 05028.

Catalog of Federal Domestic Assistance Number: The Catalog of Federal Domestic Assistance number is 93.283.

DATES:

Letter of Intent Deadline (LOI): February 3, 2005.

Application Deadline: March 7, 2005.

I. Funding Opportunity Description

Authority: This program is authorized under section 317(k)(2) and 317(C) of the Public Health Service Act, [42 U.S.C. sections 247b(k)(2) and 247b–4], as amended.

Purpose: Currently, all States and many territories have established early hearing detection and intervention programs and 37 states, plus the District of Columbia and Puerto Rico, have passed legislation related to universal newborn hearing screening. The purpose of the program is to (1) develop or enhance a sustainable state-based EHDI tracking and surveillance system capable of accurately ascertaining the disposition of every occurrent birth for each step throughout the EHDI process, and (2) integrate the EHDI system with other State/territorial screening, tracking, and surveillance programs that identify children with special health care needs. Data from the integrated EHDI system will enable State/territories and the Directors of Speech and Hearing Programs in State Health and Welfare Agencies (DSHPSHWA) to report accurate data for Healthy People 2010 Objective 28–11, and to assess progress on the EHDI National Goals.

Measurable outcomes of the program will be in alignment with one or more of the following performance goals for the National Center on Birth Defects and Disabilities: Prevent birth defects and developmental disabilities and improve the health and quality of life of Americans with disabilities.

This announcement is only for non-research activities supported by CDC/ATSDR. If research is proposed, the application will not be reviewed. For the definition of research, please see the CDC Web site at the following Internet address: *http://www.cdc.gov/od/ads/opspoll1.htm*.

Activities: Awardee activities for this program are as follows:

- Establish or improve a State/territorial population based surveillance and data tracking system to minimize infants lost to follow-up by monitoring the status and progress of every infant through the three components of the EHDI process including the specific results of screening, audiological diagnosis, enrollment in early intervention, and those lost to follow-up at each stage in the process. EHDI programs that include in-patient and out-patient screening must be able to report specific results for both. The system must be able to accurately ascertain the outcome for every occurrent birth. The applicant should include a data flow chart describing how the disposition of every occurrent birth will be reported.
- Establish or improve methods (*e.g.*, linkage/integration with vital records and newborn dried bloodspot screening) to identify, match, collect, and report standardized unduplicated individual identifiable data (not estimated or only aggregate) on screening results including child date of birth, infant gender, maternal race, maternal ethnicity, and maternal education level, date of screen, results (*e.g.* pass/refer), screening equipment type, and number of families that refuse screening;
- Develop or improve reporting systems that will ensure that accurate tracking and surveillance of unduplicated individual identifiable data (not estimated or only aggregate) are collected, including data such as diagnosis (degree of hearing loss), intervention service (start date and type of service), date of hearing aid fit, and date of cochlear implant. This will necessitate information be obtained from multiple sources, *e.g.* birthing hospitals, diagnostic centers, audiologists, physicians (Medical Home), and intervention programs (Part C Early Intervention). Secure authenticated role-based Web access is encouraged;
- Develop or improve reporting systems that will ensure that unduplicated individual identifiable tracking and surveillance data collected from multiple sources will be used to minimize infants lost to follow-up (*e.g.* linkage/integration with immunization registries and birth defect registries);
- Develop or improve mechanisms to identify and collect standardized data on unduplicated individual infants/children with late onset or progressive hearing loss within the State/territory;
- Outline an analytic plan to use State/territorial level unduplicated individual identifiable (not estimated) EHDI data in order to obtain outcome data such as: Number/percent of infants screened (occurrent births), referred, evaluated, and enrolled in intervention programs; unexpected clusters of infants with hearing loss in particular regions at particular times; unexpected differences in EHDI screening performance between key variables such as participating birthing hospitals, racial ethnic sub-populations, gender and geographic location (urban vs. rural); false positive rates; loss to follow-up rates; developmental indicators such as language scores (quotients), socio-emotional levels, achievement scores, and or intelligence quotients;
- Design or enhance the program so that it can be integrated with other screening and tracking programs that identify unduplicated individual children with special health care needs such as newborn dried blood spot screening, birth defects registries, fetal alcohol syndrome surveillance, and part C of the Individuals with Disabilities Education Act (IDEA) [*http://www.nectac.org*];
- Collaborate with other State/territorial programs such as Maternal and Child Health (MCH) [*http://www.mchb.hrsa.gov*], part C of IDEA, private service programs, and advocacy groups to build a coordinated EHDI infrastructure;
- Develop a quality assurance/improvement plan to monitor the accuracy and quality of reportable data (*e.g.* independent chart review);
- Develop a carefully designed and well-planned evaluation plan to monitor progress on activities and to assess the timeliness, completeness, and success of the project (applicants are encouraged to review the Morbidity and Mortality Weekly Report (MMWR) Recommendations and Reports ''Updated Guidelines for Evaluating Public Health Surveillance Systems'' July 27, 2001/50(RR13);1–35 available at *http://www.cdc.gov/mmwr/PDF/RR/RR5013.pdf* and ''Framework for Program Evaluation in Public Health'' September 17, 1999/48(RR11);1–40 available at *http://www.cdc.gov/mmwr/PDF/RR/RR4811.pdf*). The plan should be based on a clear rationale relating the activities within the cooperative agreement, project goals, and evaluation measures. Wherever possible, the measurement of progress toward goals should focus on health outcome indicators, rather than on intermediate measures such as process or outputs;
- Prepare and publish manuscript(s) which describe(s) and document the tracking system, definitions, methodology, collaborative relationships, data collection, findings, and recommendations across sites. Peer-to-peer interaction and collaboration with participating EHDI programs, public health informatics, and related communities of practice is encouraged;
- Collaborate and share information on effective mechanisms for obtaining screening data with other State/territorial/tribal recipients, the CDC, and other Federal and national agencies. The decision on how to share information will be a collaboration among the States and other parties.

In a cooperative agreement, CDC staff is substantially involved in the program activities, above and beyond routine grant monitoring.

CDC will provide technical assistance as requested by the States/territories for this program as follows:

- Assist in designing, developing, and evaluating methodologies and

approaches used in State/territorial-based data collection and analysis of data across sites.

• Facilitate collaborative efforts to compile and disseminate program results through presentations and publications.

• Assist and provide technical assistance to States/territories on surveillance of systems including hospitals, audiologists, early intervention programs.

• Assist in analyzing surveillance data related to EHDI.

• Assist in designing, developing, and evaluating plans to improve the access of children with hearing loss to health services and intervention programs.

II. Award Information

Type of Award: Cooperative Agreement. CDC involvement in this program is listed in the Activities section above.

Fiscal Year Funds: 2005.

Approximate Total Funding: $4,800,000 (This amount is an estimate, and is subject to availability of funds.)

Approximate Number of Awards: 32.

Approximate Average Award: $150,000 (This amount is for the first 12-month budget period, and includes both direct and indirect costs).

Floor of Award Range: None.

Ceiling of Award Range: $200,000 (This ceiling is for the first 12-month budget period.)

Anticipated Award Date: July 1, 2005.

Budget Period Length: 12 months.

Project Period Length: Three years.

Throughout the project period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the Federal Government.

III. Eligibility Information

III.1. Eligible Applicants

Applications may be submitted by governments and their agencies, such as:

• Federally recognized Indian tribal governments

• Indian tribes

• Indian tribal organizations

• State and local governments or their Bona Fide Agents (this includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Marianna Islands, American Samoa, Guam, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau)

A Bona Fide Agent is an agency/organization identified by the State as eligible to submit an application under the State eligibility in lieu of a State application. If you are applying as a bona fide agent of a State or local government, you must provide a letter from the State or local government as documentation of your status. Place this documentation behind the first page of your application form.

III.2. Cost Sharing or Matching

Matching funds are not required for this program.

III.3. Other

If you request a funding amount greater than the ceiling of the award range, your application will be considered non-responsive, and will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

In order to receive new funding, current CDC–EHDI awardees under PA 00076, 01048, 00355 that successfully compete under this Program Announcement will have their existing budget/project periods end on June 30, 2005, and need to submit a Financial Status Report (FSR) within 90 days of this new end date. This FSR will be used to determine the amount of unobligated funds which can be requested to be carried over into the new budget period.

Special Requirements: If your application is incomplete or non-responsive to the special requirements listed in this section, it will not be entered into the review process. You will be notified that your application did not meet submission requirements.

• Late applications will be considered non-responsive. See section ''IV.3. Submission Dates and Times'' for more information on deadlines.

To be eligible, applicants must document that they:

• Do not have an established State/territory centralized EHDI surveillance and tracking program; or

• Are in the beginning stages of establishing a centralized EHDI tracking and surveillance program; or

• Already have a program but would like to refine their existing surveillance and tracking program to integrate it with other newborn screening, tracking, and surveillance programs; and

• Have previously been awarded a CDC Cooperative Agreement for EHDI Tracking, Surveillance, and Integration (Program Announcements 00076, 01048, or 03055).

The applicant must include this documentation in the cover letter of the application. If it is not included, then the application will be determined as non-responsive and returned without review.

• Additionally, States or territories that have been awarded a previous CDC Cooperative Agreement for EHDI Tracking, Surveillance, and Integration (Program Announcements 00076, 01048, or 03055) need to document progress in developing an EHDI tracking and surveillance system, including reporting data from the most recent birth year. Data reports should include a flow chart with specific data accurately describing the disposition of every occurrent birth for each step throughout screening, evaluation, and intervention. The applicant should include this documentation in the narrative portion ''Understanding of the Problem and Current Status'' of the application.

Note: Title 2 of the United States Code Section 1611 states that an organization described in Section 501(c)(4) of the Internal Revenue Code that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

IV. Application and Submission Information

IV.1. Address to Request Application Package

To apply for this funding opportunity use application form CDC 1246. Application forms and instructions are available on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm*.

If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO–TIM) staff at: 770–488–2700. Application forms can be mailed to you.

IV.2. Content and Form of Submission

Letter of Intent (LOI): Your LOI must be written in the following format:

• Maximum number of pages: Two

• Font size: 12-point unreduced

• Single spaced

• Paper size: 8.5 by 11 inches

• Page margin size: One inch

• Printed only on one side of page

• Written in plain language, avoid jargon

Your LOI must contain the following information:

• Program announcement number

• Program title

• Proposed project director

• The name of the organization

• Primary contact person's name

• Mailing address

• Telephone number and, if available, fax number and e-mail address

Application: Applications should include the following items, in the following order:

(1) Cover Letter: A one page cover letter stating that the applicant is applying and how the applicant fulfills eligibility requirements. Additionally, if the applicant is not the State health agency, the applicant must provide a letter from the appropriate State health agency designating the applicant as a bona fide agent. This information should be placed directly behind the cover letter of the application.

(2) Table of Contents: A table of contents that provides page numbers for the following sections should follow the abstract. All pages must be numbered.

(3) Narrative: You must submit a project narrative with your application forms. The narrative must be submitted in the following format:

- Maximum number of pages: 25 pages. If your narrative exceeds the page limit, only the first pages which are within the page limit will be reviewed.
- Font size: 12 point unreduced
- Double spaced
- Paper size: 8.5 by 11 inches
- Page margin size: One inch
- Printed only on one side of page
- Held together only by rubber bands or metal clips; not bound in any other way.

Your narrative should provide a detailed description of first-year activities and briefly describe future year objectives and activities. It must include the following items in the order listed:

- Understanding of the Problem and Current Status
- Description of Proposed Program and Methodology
- Goals and Objectives
- Collaborative Efforts
- Evaluation Plan
- Staffing and Management System (One-page CV or resume for all key personnel must be included in an attachment). Plan must also provide details of the role of all key personnel.
- Organizational Structure and Facilities (Must include an organizational chart as an attachment)

(4) Budget and Budget Justification: The budget and budget justification will not be counted toward the narrative page limit. The budget should be reasonable, clearly justified, and consistent with the intended use of the cooperative agreement funds. The applicant must include a detailed first-year budget which indicates the anticipated costs for personnel, fringe benefits, travel, supplies, contractual, consultants, equipment, indirect, and other items with future annual projections. Budgets should include travel funds for two project staff per each grant year to participate in mandatory CDC sponsored regional or annual meetings. The applicant should provide a budget justification for each budget item. Proposed sub-contracts should identify the name of the contractor, if known; describe the services to be performed; provide an itemized budget and justification for the estimated costs of the contract; specify the period of performance; and describe the method of selection.

(5) Additional information may be included in the application appendices. The appendices will not be counted toward the narrative page limit. This additional information includes:

- An organizational chart
- Data flow chart
- Time line Gant chart
- One-page CV or resume for all key personnel
- Letters of agreement and cooperation from collaborating programs

You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal Government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711.

For more information, see the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcommt.htm.*

If your application form does not have a DUNS number field, please write your DUNS number at the top of the first page of your application, and/or include your DUNS number in your application cover letter.

Additional requirements that may require you to submit additional documentation with your application are listed in section ''VI.2. Administrative and National Policy Requirements.''

IV.3. Submission Dates and Times

LOI Deadline Date: February 3, 2005.

CDC requests that you send a LOI if you intend to apply for this program. Although the LOI is not required, not binding, and does not enter into the review of your subsequent application, the LOI will be used to gauge the level of interest in this program, and to allow CDC to plan the application review.

Application Deadline Date: March 7, 2005.

Explanation of Deadlines: Applications must be received in the CDC Procurement and Grants Office by 4 p.m. Eastern Time on the deadline date. If you submit your application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery by the closing date and time. If CDC receives your submission after closing due to: (1) Carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carriers guarantee. If the documentation verifies a carrier problem, CDC will consider the submission as having been received by the deadline.

This announcement is the definitive guide on LOI and application content, submission address, and deadline. It supersedes information provided in the application instructions. If your submission does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that you did not meet the submission requirements.

CDC will not notify you upon receipt of your submission. If you have a question about the receipt of your LOI or application, first contact your courier. If you still have a question, contact the PGO-TIM staff at: 770–488–2700. Before calling, please wait two to three days after the submission deadline. This will allow time for submissions to be processed and logged.

IV.4. Intergovernmental Review of Applications

Your application is subject to Intergovernmental Review of Federal Programs, as governed by Executive Order (EO) 12372. This order sets up a system for State and local governmental review of proposed Federal assistance applications. You should contact your state single point of contact (SPOC) as early as possible to alert the SPOC to prospective applications, and to receive instructions on your state's process. Click on the following link to get the current SPOC list: *http://www.whitehouse.gov/omb/grants/spoc.html*

IV.5. Funding Restrictions

Restrictions, which must be taken into account while writing your budget, are as follows:

- Funds may not be used for research.
- Reimbursement of pre-award costs is not allowed.
- Award recipients agree to use cooperative agreement funds for travel by project staff selected by CDC to participate in CDC-sponsored

workshops, or other called meetings such as regional or annual meetings.

• Funds may not be used to supplant other available applicant or collaborating agency funds or to supplant State/territory funds available for screening, diagnosis, intervention or tracking for hearing loss or other disorders detected by newborn screening.

• Funds may not be used for construction, for lease or purchase of facilities or space, purchase of screening and diagnostic equipment, or for patient care.

If you are requesting indirect costs in your budget, you must include a copy of your indirect cost rate agreement. If your indirect cost rate is a provisional rate, the agreement should be less than 12 months of age.

Guidance for completing your budget can be found on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

IV.6. Other Submission Requirements

LOI Submission Address: Submit your LOI by express mail, delivery service, fax, or E-mail to: John Eichwald, EHDI Team Lead, National Center for Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention, 1600 Clifton Road, NE., Mailstop E–88, Atlanta, GA 30333; Telephone: 404–498–3961; E-mail Address: *jeichwald@cdc.gov.*

Application Submission Address: Submit the original and two hard copies of your application by mail or express delivery service to: Technical Information Management–05028, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

Applications may not be submitted electronically at this time.

V. Application Review Information

V.1. Criteria

Applicants are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the performance goals stated in the ''Purpose'' section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation.

Your application will be evaluated against the following criteria:

1. Description of Program and Methodology (30 percent).

a. Extent to which applicant describes an effective and realistic plan to address the challenges, barriers, and problems described in section 4b ''Understanding the Problem and Current Status'' particularly those related to data requests that the EHDI program can not presently provide (*e.g.* maternal race, maternal ethnicity, maternal education level, results of in-patient and out-patient screening, audiologic results, referrals to early intervention, etc.);

b. Extent to which applicant describes the methods they will use establishing or improving methods to identify, match, collect, and report standardized unduplicated individual identifiable data for every occurrent birth;

c. Extent to which applicant describes the methods they will use developing or improving reporting systems that ensure that accurate tracking and surveillance of unduplicated individual identifiable data—secure authenticated role-based Web access is encouraged;

d. Extent to which applicant describes the methods they will use developing or improving reporting systems from multiple sources;

e. Extent to which applicant describes the methods they will use developing or improving mechanisms to identify late onset or progressive hearing loss;

f. Extent to which applicant describes the methods they will use designing an analytic plan;

g. Extent to which applicant describes the methods they will use preparing manuscripts.

2. Goals and Objectives (20 percent).

a. Extent to which applicant clearly describes the short- and long-term goals and measurable objectives of the project;

b. Extent to which applicant's goals and objectives are realistic and are consistent with the stated goals and purpose of this announcement;

c. Extent to which applicant provides a time line which includes activities to be accomplished and personnel responsible to complete the project. The inclusion of a schedule plotting the tasks, people responsible for these tasks, and a timeline (such as a Gant chart) is encouraged and can be included as an attachment;

3. Collaborative Efforts (20 percent).

a. Extent to which applicant describes and documents their methods for collaboration with multiple data sources (include written assurances) such as hospitals, diagnostic centers, and intervention service providers;

b. Extent to which collaborative relationships are documented which will facilitate linkage with other screening, tracking, and surveillance programs. Letters of agreement and cooperation from collaborating programs should be included (such as vital records, newborn dried bloodspot screening, immunization registries, birth defect registries, and notifiable disease systems);

c. Extent to which collaborative efforts with other relevant programs are documented (such as MCH, Early Intervention Part C, etc.);

d. Extent to which applicant describes their plans to work collaboratively with other state/territorial/tribal recipients, the CDC, and other federal and national agencies on effective mechanisms for obtaining data on screening.

4. Understanding the Problem and Current Status (10 percent).

a. Extent to which the applicant has a clear, concise understanding of the requirements and purpose of the cooperative agreement;

b. Extent to which the applicant understands the challenges, barriers, and problems associated with developing and improving an EHDI tracking and surveillance program including those with data collection;

c. Extent to which the applicant describes the need for funds to develop/enhance an EHDI tracking and surveillance program in their State or territory;

d. Extent to which the applicant describes the target population and the current status of their existing EHDI program, *i.e.*, accounting for all occurrent infants born, including number of infants screened, number of infants passing the screen, number of infants receiving audiological diagnosis, number of infants identified with hearing loss and number of infants receiving early intervention services;

e. Extent to which the applicant's data flow chart describes how the disposition of every occurrent birth will be reported.

f. Extent to which applicant describes (1) their current EHDI tracking and surveillance system (if any exists); (2) other relevant tracking, surveillance systems, or registries in the State/Territory; and (3) integration and linkages with other relevant systems;

5. Evaluation Plan (10 percent).

a. Extent to which applicant describes a plan for gathering necessary information for improving and accounting for program effectiveness;

b. Extent to which applicant describes an evaluation plan that will monitor progress toward their goals, and assess timeliness, completeness, and success of the objectives and activities of the project;

c. Extent to which applicant describes a plan that monitors the quality of the data being collected to include the

development of a data quality improvement plan.

6. Staffing and Management System (5 percent).

a. Extent to which key personnel have skills and experience to develop, implement or refine an EHDI tracking and surveillance system;

b. Extent of the managerial ability to coordinate the tracking, surveillance, and integration components of the project;

c. Extent to which expertise in abstracting screening, identification, and intervention records are demonstrated;

d. Extent to which expertise in epidemiologic methods, public health surveillance, data management and computer programming is demonstrated; and

e. Extent to which there is sufficient dedicated staff time to develop, implement or refine an EHDI tracking and surveillance system and to integrate the EHDI system with other newborn screening systems (include percentage of time each staff member will contribute to the project).

7. Organizational Structure and Facilities (5 percent)

Extent to which the organizational structure and the facilities/space/equipment are adequate in carrying out the activities of the program.

8. Budget (not scored).

The budget will be evaluated for the extent to which it is reasonable, clearly justified, and consistent with the intended use of the cooperative agreement funds. The applicant shall describe and indicate the availability of facilities and equipment necessary to carry out this project.

V.2. Review and Selection Process

Applications will be reviewed for completeness by the Procurement and Grants Office (PGO) staff, and for responsiveness by the National Center on Birth Defects and Developmental Disabilities (NCBDDD). Incomplete applications and applications that are non-responsive to the eligibility criteria will not advance through the review process. Applicants will be notified that their application did not meet submission requirements.

An objective review panel will evaluate complete and responsive applications according to the criteria listed in the ''V.1. Criteria'' section above. The objective review panel will consist of CDC employees who will be randomly assigned applications to review and score. Applications will be funded in order by score and rank determined by the review panel. CDC will provide justification for any decision to fund out of rank order.

V.3. Anticipated Announcement and Award Dates

[May 2005 for a] July 1, 2005, project start date.

VI. Award Administration Information

VI.1. Award Notices

Successful applicants will receive a Notice of Grant Award (NGA) from the CDC Procurement and Grants Office. The NGA shall be the only binding, authorizing document between the recipient and CDC. The NGA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review by mail.

VI.2. Administrative and National Policy Requirements

45 CFR Part 92

For more information on the Code of Federal Regulations, see the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

The following additional requirements apply to this project:

- AR–7 Executive Order 12372.
- AR–9 Paperwork Reduction Act Requirements.
- AR–10 Smoke-Free Workplace Requirements.
- AR–11 Healthy People 2010.
- AR–12 Lobbying Restrictions.
- AR–24 Health Insurance Portability and Accountability Act Requirements.
- AR–25 Release and Sharing of Data.

Additional information on these requirements can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm.*

VI.3. Reporting Requirements

You must provide CDC with an original, plus two hard copies of the following reports:

1. Interim progress report, due no less than 90 days before the end of the budget period. The progress report will serve as your non-competing continuation application, and must contain the following elements:

a. Current Budget Period Activities Objectives.

b. Current Budget Period Financial Progress.

c. New Budget Period Program Proposed Activity Objectives.

d. Budget.

e. Measures of Effectiveness.

f. Additional Requested Information.

2. Financial status report and annual progress report, no more than 90 days after the end of the budget period.

3. Final financial and performance reports, no more than 90 days after the end of the project period.

These reports must be mailed to the Grants Management or Contract Specialist listed in the ''Agency Contacts'' section of this announcement.

VII. Agency Contacts

We encourage inquiries concerning this announcement. For general questions, contact: Technical Information Management Section, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341; Telephone: 770–488–2700.

For program technical assistance, contact: John Eichwald, EHDI Team Lead, Centers for Disease Control and Prevention, 1600 Clifton Road, NE., Mailstop E–88, Atlanta, GA 30333; Telephone: 404–498–3961; E-mail Address: *jeichwald@cdc.gov.*

For financial, grants management, or budget assistance, contact: Mildred Garner, Grants Management Specialist, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341; Telephone: 770–488–2745; E-mail: *MGarner@cdc.gov.*

VIII. Other Information

This and other CDC funding opportunity announcements can be found on the CDC Web site, Internet address: *http://www.cdc.gov.* Click on ''Funding'' then ''Grants and Cooperative Agreements.''

Dated: December 28, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 05–32 Filed 1–3–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0534]

Agency Information Collection Activities; Proposed Collection; Comment Request; Format and Content Requirements for Over-the-Counter Drug Product Labeling

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the standardized format and content requirements for the labeling of over-the-counter (OTC) drug products.

DATES: Submit written or electronic comments on the collection of information by March 7, 2005.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.fda.gov/dockets/ecomments*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Karen L. Nelson, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1482.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to 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, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Format and Content Requirements for Over-the-Counter (OTC) Drug Product Labeling—(OMB Control Number 0910–0340)

In the **Federal Register** of March 17, 1999 (64 FR 13254), FDA amended its regulations governing requirements for human drug products to establish standardized format and content requirements for the labeling of all marketed OTC drug products. The rule requires OTC drug product labeling to include uniform headings and subheadings, presented in a standardized order, with minimum standards for type size and other graphical features. The rule is intended to enable consumers to better read and understand OTC drug product labeling and to apply this information to the safe and effective use of OTC drug products. FDA concludes that the labeling statements required under this rule are not subject to review by OMB because they are originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public (5 CFR 1320.3(c)(2)) and therefore do not constitute a collection of information under the PRA (44 U.S.C. 3501 *et seq.*).

Section 201.66 of the labeling requirements (21 CFR 201.66) requires all OTC drug manufacturers to format labeling as set forth in paragraphs (c) and (d). FDA has learned from the industry that OTC drug product manufacturers routinely redesign the labeling of their products as part of their usual and customary business practice. The rule provides varied timeframes for implementing the labeling requirements. Therefore, the majority of respondents will be able to format OTC drug product labeling in accordance with § 201.66 as part of their routine redesign practice, creating no additional paperwork or economic burden.

In discussing the collection of information under the PRA in the final rule (64 FR 13254 at 13274 to 13276), FDA stated that of the 39,310 stock keeping units (SKUs) (individual products, packages, and sizes) currently marketed under a final monograph, approximately 32 percent, or 12,573 products, may necessitate labeling changes sooner than provided under their usual and customary practice of label design. FDA estimated that of the 400 respondents who produce OTC drug products, including the 12,573 products described above, each may be required to respond approximately 31.4 times to this rule outside of their usual and customary practice. Each response was estimated to take, on the average of, 4 hours, for a total of 50,292 hours per year. The burden was expected to be a one-time burden.

FDA stated that although the usual and customary practice of label redesign would minimize the burden for the remaining 68 percent of SKUs currently marketed, or 26,737 products, additional time may be necessary for each company to make the format changes under this rule. FDA estimated that of the 400 respondents who produce OTC drug products, each may be required to respond approximately 66.8 times to bring the 26,737 products into compliance with this rule. FDA estimated that each response for this group will take an average of 2.5 hours for a total of 66,842 hours. The burden was expected to be a one-time burden.

Finally, FDA estimated that approximately 61 respondents hold new drug applications (NDAs) and abbreviated new drug applications (ANDAs) (41 NDA holders and 20 ANDA holders) for which supplements and amendments will be required. FDA expected that 522 submissions (350 to NDAs and 172 to ANDAs) will be required for labeling changes under § 201.66(c) and (d), which averages to 8.5 submissions per respondent. FDA estimated that each submission will take an average of 2 hours to prepare for a total of 1,040 hours annually. The burden was also expected to be a one-time burden.

Because the final rule was issued on March 17, 1999, FDA extended the May 16, 2001, compliance date for products subject to drug marketing applications approved before May 16, 1999, and for products subject to an OTC drug monograph finalized before May 16, 1999, by 1 year to May 16, 2002 (with a corresponding extension of the May 16, 2002, compliance date for products with annual sales of less than $25,000 to May 16, 2003) (65 FR 38191, June 20, 2000). Products subject to an OTC drug monograph finalized on or after May 16, 1999, had to comply within the period specified in the final monograph. However, if a monograph had not been finalized as of May 16, 2002, then the products have to comply as of the first major labeling revision after May 16,

2002, or by May 16, 2005, whichever occurs first.

Since March 17, 1999, FDA has published six major final rules on OTC drug monographs and several minor amendments to existing final monographs. The following are the six major final rules and their date of publication:

- Sunscreen drug products (May 21, 1999),
- Cough-cold combination drug products (December 23, 2002),
- Antidiarrheal drug products (April 17, 2003),
- Ingrown toenail relief drug products (May 7, 2003),
- Skin protectant drug products (June 4, 2003), and
- Antiperspirant drug products (June 9, 2003).

The effective date for the final monograph for OTC sunscreen drug products and for the implementation of the new labeling format for these products has been stayed indefinitely (65 FR 36319, June 8, 2000, and 69 FR 53801, September 3, 2004). The effective date for products subject to the final rules on the other OTC drug monographs to implement the new labeling format will occur by the end of 2004, except for a small number of products with annual sales less than $25,000. Those products will have until June 2005 to implement the new labeling format. These dates should enable manufacturers to coordinate the relabeling required by the final monographs with the relabeling required by the OTC drug product labeling final rule.

FDA previously estimated that 12,573 out of 39,310 SKUs were affected by the March 17, 1999, OTC drug product labeling final rule. Based on information in the six final rules issued since that time, FDA estimates that 11,250 additional SKUs have already been affected by the OTC drug product labeling final rule. Thus, 15,487 SKUs remain to be affected by the OTC drug product labeling final rule. All of these will need to implement the new labeling format by May 16, 2005, except for the sunscreen drug products that are currently deferred.

As the number of products remaining to be affected by the OTC drug product labeling final rule is close to the number of products affected at the time of the May 17, 1999, publication of that final rule, FDA is listing the same numbers of respondents, annual frequency per response, and total annual responses in this notice.

FDA believes the hours per response and total hours may be less than the numbers stated in the final rule for several reasons. First, respondents have made a number of inquiries to FDA already since the final rule was issued in 1999. FDA's experience with these inquiries is that inquiries have been less than 2.5 or 4 hours per response, generally averaging 0.25 to 0.5 hour per inquiry. Second, respondents have gained significant experience with the final rule since 1999, reducing their need to make additional inquiries. Third, FDA issued a draft guidance for industry entitled ''Labeling Over-the-Counter Human Drug Products; Updating Labeling in ANDA's'' (66 FR 11174, February 22, 2001), which included a number of labeling examples to assist holders of ANDAs for OTC drug products and manufacturers of reference listed drugs (RLDs) for the ANDAs to implement the new OTC drug product labeling regulation. FDA issued a final guidance for industry on October 18, 2002 (67 FR 64402). This guidance should have reduced some of the hours per response and total hours for some NDA and ANDA holders. However, FDA is not currently able to estimate how much time has been reduced. Accordingly, FDA is listing the same hours per response and total hours in this notice as appeared in the March 17, 1999, final rule.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours Per Response	Total Hours
201.66[2]	400	31.43	12,573	4	50,292
201.66	400	66.8	26,737	2.5	66,842
201.66(c) and (d)[2]	61	8.5	522	2	1,044
201.66(e)	25	4	100	24	2,400
Total					120,578

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.
[2]One-time burden.

Dated: December 28, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–27 Filed 1–3–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0296]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Good Laboratory Practice Regulations for Nonclinical Studies

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by February 3, 2005.

ADDRESSES: OMB is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs,

OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, rm. 4B–41, Rockville, MD 20857, 301–827–1472.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Good Laboratory Practice (GLP) Regulations for Nonclinical Studies—21 CFR Part 58 (OMB Control Number 0910–0119)—Extension

Sections 409, 505, 512, and 515 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 348, 355, 360b, 360e) and related statues require manufacturers of food additives, human drugs and biological products, animal drugs, and medical devices to demonstrate the safety and utility of their product by submitting applications to FDA for research or marketing permits. Such applications contain, among other important items, full reports of all studies done to demonstrate product safety in man and/or other animals. In order to ensure adequate quality control for these studies and to provide an adequate degree of consumer protection, the agency issued the GLP regulations. The regulations specify minimum standards for the proper conduct of safety testing and contain sections on facilities, personnel, equipment, standard operating procedures (SOPs), test and control articles, quality assurance, protocol and conduct of a safety study, records and reports, and laboratory disqualification.

The GLP regulations contain requirements for the reporting of the results of quality assurance unit inspections, test and control article characterization, testing of mixtures of test and control articles with carriers, and an overall interpretation of nonclinical laboratory studies. The GLP regulations also contain recordkeeping requirements relating to the conduct of safety studies. Such records include: (1) Personnel job descriptions and summaries of training and experience; (2) master schedules, protocols and amendments thereto, inspection reports, and SOPs; (3) equipment inspection, maintenance, calibration, and testing records; (4) documentation of feed and water analyses and animal treatments; (5) test article accountability records; and (6) study documentation and raw data.

The information collected under GLP regulations is generally gathered by testing facilities routinely engaged in conducting toxicological studies and is used as part of an application for a research or marketing permit that is voluntarily submitted to FDA by persons desiring to market new products. The facilities that collect this information are typically operated by large entities, e.g., contract laboratories, sponsors of FDA-regulated products, universities, or government agencies. Failure to include the information in a filing to FDA would mean that agency scientific experts could not make a valid determination of product safety. FDA receives, reviews, and approves hundreds of new product applications each year based on information received. The recordkeeping requirements are necessary to document the proper conduct of a safety study, to assure the quality and integrity of the resulting final report, and to provide adequate proof of the safety of regulated products. FDA conducts onsite audits of records and reports, during the agency's inspections of testing laboratories, to verify reliability of results submitted in applications.

The likely respondents collecting this information are contract laboratories, sponsors of FDA-regulated products, universities, or government agencies.

In the **Federal Register** of July 22, 2004 (69 FR 43853), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Record	Total Annual Records	Hours per Recordkeeper	Total Hours
58.35(b)(7)	300	60.25	18,075	1	18,075
58.185	300	60.25	18,075	27.65	499,774
Total					517,849

[1]There are no capital costs or operating maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Record	Total Annual Records	Hours per Recordkeeper	Total Hours
58.29(b)	300	20	6,000	.21	1,260
58.35(b)(1) through (b)(6) and (c)	300	270.76	81,228	3.36	279,926
58.63(b) and (c)	300	60	18,000	.09	1,620
58.81(a), (b), and (c)	300	301.8	90,540	.14	12,676
58.90(c) and (g)	300	62.7	18,810	.13	2,445
58.105(a) and (b)	300	5	1,500	11.8	17,700
58.107(d)	300	1	300	4.25	1,275
58.113(a)	300	15.33	4,599	6.8	31,273

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]—Continued

21 CFR Section	No. of Recordkeepers	Annual Frequency per Record	Total Annual Records	Hours per Recordkeeper	Total Hours
58.120	300	15.38	4,614	32.7	150,878
58.195	300	251.5	75,450	3.9	294,255
Total					793,308

[1]There are no capital costs or operating maintenance costs associated with this collection of information.

Dated: December 28, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–28 Filed 1–3–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0554]

Agency Information Collection Activities; Proposed Collection; Comment Request; Irradiation in the Production, Processing, and Handling of Food

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the collection of information from manufacturers of monoenergetic neutron sources in order to comply with an amendment to FDA's food additive regulations.

DATES: Submit written or electronic comments on the collection of information by March 7, 2005.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.fda.gov/dockets/ecomments*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane., rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to 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, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Irradiation in the Production, Processing, and Handling of Food—21 CFR 179.21 (OMB Control Number 0910–0549)—Extension

In the **Federal Register** of December 21, 2004 (69 FR 76401), FDA announced OMB's approval of this collection of information (OMB control number 0910–0549). Since this was an emergency approval that expires on January 31, 2005, FDA is following the normal PRA clearance procedures by issuing this document.

Under section 409(a) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348(a)), the use of a food additive is deemed unsafe unless it conforms to the terms of a regulation prescribing its use, or to an exemption for investigational use, or in the case of a food additive that is a food contact substance, there is in effect a regulation prescribing the conditions under which such additive may be safely used or a notification that is effective. In response to a petition that is submitted under section 409 of the act to establish that a food additive is safe, the agency may either: (1) By order establish a regulation (whether or not in accord with that proposed by the petitioner) prescribing, with respect to one or more proposed uses of the food additive involved, the conditions under which such additive may be safely used (including, but not limited to, specifications as to the particular food or classes of food in or on which such additive may be used, the maximum quantity which may be used or permitted to remain in or on such food, the manner in which such additive may be added to or used in or on such food, and any directions or other labeling or packaging requirements for such additive deemed necessary by him to assure the safety of such use), and shall notify the petitioner of such order and the reasons for such action; or (2) by order deny the petition and notify the petitioner of such order and of the reasons for such action.

In response to a petition filed by Science Applications International Corp., who subsequently transferred

their rights to the petition to Ancore Corp., FDA published in the **Federal Register** of December 21, 2004, a document that amended 21 CFR 179.21 to provide for the use of sources of monoenergetic neutrons to inspect cargo containers that may contain food. Under this regulation, monoenergetic neutron sources producing neutrons at energies not less than 1 million electron volts (MeV) but no greater than 14 MeV may be used for inspection of cargo containers that may contain food, providing that the neutron source bears a label stating the minimum and maximum energy of radiation emitted by the source. The regulation also requires that the label or accompanying labeling bear adequate directions for safe use and a statement that no food shall be exposed to this radiation source so as to receive a dose in excess of 0.01 gray. FDA has determined that this information is needed to assure safe use of the source of radiation.

FDA estimates the total annual burden for this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Operating & Maintenance Costs	Total Hours
179.21(a)(5), (b)(1)(iv), and (b)(2)(v)	1	1	1	1	$100	1

[1] There are no capital costs associated with this collection of information.

FDA estimates that the burden will be insignificant because the reporting requirement reflects customary business practice. Based on discussions with an industry representative, the burden hours estimated for this collection of information is 1 hour. The operating and maintenance cost associated with this collection is $100 for preparation of labels.

Dated: December 28, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–29 Filed 1–3–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies Federal agencies of the laboratories currently certified to meet the standards of Subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines). The Mandatory Guidelines were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908), on September 30, 1997 (62 FR 51118), and on April 13, 2004 (69 FR 19644).

A notice listing all currently certified laboratories is published in the **Federal Register** during the first week of each month. If any laboratory's certification is suspended or revoked, the laboratory will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end, and will be omitted from the monthly listing thereafter.

This notice is also available on the Internet at *http://workplace.samhsa.gov* and *http://www.drugfreeworkplace.gov*.

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh or Dr. Walter Vogl, Division of Workplace Programs, SAMHSA/CSAP, Room 2–1035, 1 Choke Cherry Road, Rockville, Maryland 20857; 240–276–2600 (voice), 240–276–2610 (fax).

SUPPLEMENTARY INFORMATION: The Mandatory Guidelines were developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71. Subpart C of the Mandatory Guidelines, ''Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies,'' sets strict standards that laboratories must meet in order to conduct drug and specimen validity tests on urine specimens for Federal agencies. To become certified, an applicant laboratory must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories which claim to be in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines. A laboratory must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with Subpart C of the Mandatory Guidelines dated April 13, 2004 (69 FR 19644), the following laboratories meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

ACL Laboratories, 8901 W. Lincoln Ave., West Allis, WI 53227, 414–328–7840/800–877–7016 (Formerly: Bayshore Clinical Laboratory);

ACM Medical Laboratory, Inc., 160 Elmgrove Park, Rochester, NY 14624, 585–429–2264;

Advanced Toxicology Network, 3560 Air Center Cove, Suite 101, Memphis, TN 38118, 901–794–5770/888–290–1150;

Aegis Analytical Laboratories, Inc., 345 Hill Ave., Nashville, TN 37210, 615–255–2400;

Baptist Medical Center-Toxicology Laboratory, 9601 I–630, Exit 7, Little Rock, AR 72205–7299, 501–202–2783 (Formerly: Forensic Toxicology Laboratory Baptist Medical Center);

Clinical Reference Lab, 8433 Quivira Rd., Lenexa, KS 66215–2802, 800–445–6917;

Diagnostic Services Inc., dba DSI, 12700 Westlinks Dr., Fort Myers, FL 33913, 239–561–8200/800–735–5416;

Doctors Laboratory, Inc., 2906 Julia Drive, Valdosta, GA 31602, 229–671–2281;

DrugProof, Division of Dynacare/Laboratory of Pathology, LLC, 1229 Madison St., Suite 500, Nordstrom Medical Tower, Seattle, WA 98104, 206–386–2661/800–898–0180 (Formerly: Laboratory of Pathology of

Seattle, Inc., DrugProof, Division of Laboratory of Pathology of Seattle, Inc.);

DrugScan, Inc., P.O. Box 2969, 1119 Mearns Rd., Warminster, PA 18974, 215–674–9310;

Dynacare Kasper Medical Laboratories*, 10150–102 St., Suite 200, Edmonton, Alberta, Canada T5J 5E2, 780–451–3702 / 800–661–9876;

ElSohly Laboratories, Inc., 5 Industrial Park Dr., Oxford, MS 38655, 662–236–2609;

Express Analytical Labs, 3405 7th Ave., Suite 106, Marion, IA 52302, 319–377–0500;

General Medical Laboratories, 36 South Brooks St., Madison, WI 53715, 608–267–6225;

Kroll Laboratory Specialists, Inc., 1111 Newton St., Gretna, LA 70053, 504–361–8989/800–433–3823 (Formerly: Laboratory Specialists, Inc.);

LabOne, Inc., 10101 Renner Blvd., Lenexa, KS 66219, 913–888–3927/800–873–8845 (Formerly: Center for Laboratory Services, a Division of LabOne, Inc.);

LabOne, Inc., d/b/a Northwest Toxicology, 1141 E. 3900 S., Salt Lake City, UT 84124, 801–293–2300/800–322–3361 (Formerly: NWT Drug Testing, NorthWest Toxicology, Inc.; Northwest Drug Testing, a division of NWT Inc.);

Laboratory Corporation of America Holdings, 7207 N. Gessner Rd., Houston, TX 77040, 713–856–8288/800–800–2387;

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908–526–2400/800–437–4986 (Formerly: Roche Biomedical Laboratories, Inc.);

Laboratory Corporation of America Holdings, 1904 Alexander Dr., Research Triangle Park, NC 27709, 919–572–6900/800–833–3984 (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group);

Laboratory Corporation of America Holdings, 10788 Roselle St., San Diego, CA 92121, 800–882–7272 (Formerly: Poisonlab, Inc.);

Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671, 866–827–8042/800–233–6339 (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center);

Marshfield Laboratories, Forensic Toxicology Laboratory, 1000 North Oak Ave., Marshfield, WI 54449, 715–389–3734/800–331–3734;

MAXXAM Analytics Inc.*, 6740 Campobello Road, Mississauga, ON, Canada L5N 2L8, 905–817–5700 (Formerly: NOVAMANN (Ontario) Inc.);

MedTox Laboratories, Inc., 402 W. County Rd. D, St. Paul, MN 55112, 651–636–7466/800–832–3244;

MetroLab-Legacy Laboratory Services, 1225 NE 2nd Ave., Portland, OR 97232, 503–413–5295/800–950–5295;

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Dr., Minneapolis, MN 55417, 612–725–2088;

National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304, 661–322–4250/800–350–3515;

One Source Toxicology Laboratory, Inc., 1213 Genoa-Red Bluff, Pasadena, TX 77504, 888–747–3774 (Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory);

Oregon Medical Laboratories, P.O. Box 972, 722 East 11th Ave., Eugene, OR 97440–0972, 541–687–2134;

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800–328–6942 (Formerly: Centinela Hospital Airport Toxicology Laboratory);

Pathology Associates Medical Laboratories, 110 West Cliff Dr., Spokane, WA 99204, 509–755–8991/800–541–7897x7;

Physicians Reference Laboratory, 7800 West 110th St., Overland Park, KS 66210, 913–339–0372/800–821–3627;

Quest Diagnostics Incorporated, 3175 Presidential Dr., Atlanta, GA 30340, 770–452–1590/800–729–6432 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories);

Quest Diagnostics Incorporated, 4770 Regent Blvd., Irving, TX 75063, 800–824–6152 (Moved from the Dallas location on 03/31/01; Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories);

Quest Diagnostics Incorporated, 4230 South Burnham Ave., Suite 250, Las Vegas, NV 89119–5412, 702–733–7866/800–433–2750 (Formerly: Associated Pathologists Laboratories, Inc.);

Quest Diagnostics Incorporated, 400 Egypt Rd., Norristown, PA 19403, 610–631–4600/877–642–2216 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories);

Quest Diagnostics Incorporated, 506 E. State Pkwy., Schaumburg, IL 60173, 800–669–6995/847–885–2010 (Formerly: SmithKline Beecham Clinical Laboratories; International Toxicology Laboratories);

Quest Diagnostics Incorporated, 7600 Tyrone Ave., Van Nuys, CA 91405, 818–989–2520/800–877–2520 (Formerly: SmithKline Beecham Clinical Laboratories);

Scientific Testing Laboratories, Inc., 450 Southlake Blvd., Richmond, VA 23236, 804–378–9130;

Sciteck Clinical Laboratories, Inc., 317 Rutledge Rd., Fletcher, NC 28732, 828–650–0409;

S.E.D. Medical Laboratories, 5601 Office Blvd., Albuquerque, NM 87109, 505–727–6300/800–999–5227.

South Bend Medical Foundation, Inc., 530 N. Lafayette Blvd., South Bend, IN 46601, 574–234–4176 x276;

Southwest Laboratories, 4645 E. Cotton Center Boulevard, Suite 177, Phoenix, AZ 85040, 602–438–8507/800–279–0027;

Sparrow Health System, Toxicology Testing Center, St. Lawrence Campus, 1210 W. Saginaw, Lansing, MI 48915, 517–364–7400 (Formerly: St. Lawrence Hospital & Healthcare System);

St. Anthony Hospital Toxicology Laboratory, 1000 N. Lee St., Oklahoma City, OK 73101, 405–272–7052;

Toxicology & Drug Monitoring Laboratory, University of Missouri Hospital & Clinics, 301 Business Loop 70 West, Suite 208, Columbia, MO 65203, 573–882–1273;

Toxicology Testing Service, Inc., 5426 NW., 79th Ave., Miami, FL 33166, 305–593–2260;

U.S. Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755–5235, 301–677–7085;

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory

Guidelines published in the **Federal Register** on April 13, 2004 (69 FR 19644). After receiving DOT certification, the laboratory will be included in the monthly list of HHS certified laboratories and participate in the NLCP certification maintenance program.

Pat Bransford,

Acting Executive Officer, SAMHSA.

[FR Doc. 05–3 Filed 1–3–05; 8:45 am]

BILLING CODE 4160–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Notice of SAMHSA's Ceasing Publication of Notices of Funding Availability (NOFAs) and Requests for Applications (RFAs) in the Federal Register

SUMMARY: Consistent with the Department of Health and Human Services management objectives, the Substance Abuse and Mental Health Services Administration (SAMHSA) announces a change in its practice of publishing notices of grant funding availability in the **Federal Register**. Rather than continue publishing NOFAs and RFAs in the **Federal Register**, SAMHSA will instead post notices of funding availability only on *http://www.Grants.gov* and *http://www.samhsa.gov*. Only single source or limited competition announcements will continue to be published in the **Federal Register**. This change will be effective January 3, 2005.

Applicants should be aware that all the necessary information to apply for grant funds will continue to be available at SAMHSA's two national clearinghouses: The National Clearinghouse for Alcohol and Drug Information (NCADI)—1–800–729–6686—for substance abuse prevention or treatment grants; and the National Mental Health Information Center—1–800–789–CMHS (2647)—for mental health grants.

FOR FURTHER INFORMATION CONTACT: Cathy J. Friedman, M.A., SAMHSA, 1 Choke Cherry Road, Room 8–1097, Rockville, MD 20857; phone (240) 276–2316; E-mail: *cathy.friedman@samhsa.hhs.gov*.

Dated: December 28, 2004.

Daryl Kade,

Director, Office of Policy, Planning and Budget, Substance Abuse and Mental Health Services Administration.

[FR Doc. 05–34 Filed 1–3–05; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, U.S. Department of Homeland Security.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed new information collections. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)), this notice seeks comments concerning the need to collect program information from stakeholders of the National Fire Programs (NFP), a part of the United States Fire Administration (USFA).

SUPPLEMENTARY INFORMATION: As an entity of the U.S. Department of Homeland Security/Federal Emergency Management Agency (FEMA), the mission of the USFA is to reduce life and economic losses due to fire and related hazards. The NFP, within the USFA, oversees the development of campaigns, products, services, curriculum and doctrine for leadership development training and educational courses. These programs are designed to increase the capacity and interoperability of the fire and emergency services on prevention, mitigation, and response to local emergencies and preparedness for consequences of day-to-day and larger scale disasters.

Collection of Information

Title: National Fire Programs (NFP) Stakeholders Interview.

Type of Information Collection: New collection.

OMB Number: 1660–NEW14.

Form Numbers: None.

Abstract: Consistent with performance-based management practices, the NFP is developing a comprehensive Strategic Business and Implementation Plan. This information collection will capture stakeholders' perspective critical to the NFP's ability to plan effectively and deliver demand-driven products and services. Data findings will be used to: (1) Support the development of the Strategic Business and Implementation Plan, and (2) set customer service standards.

Affected Public: State, local and Tribal governments, and Not-for-Profit Institutions.

Estimated Total Annual Burden Hours: 50 hours.

ANNUAL BURDEN HOURS

Project/activity (survey form(s), focus group, etc.)	Number of respondents (A)	Frequency of responses (B)	Burden hours per respondent (C)	Annual responses (AxB)	Total annual burden hours (AxBxC)
Stakeholders' Interviews	50	1	1	50	50
Total	50	1	1	50	50

Estimated Cost: $23 per response/interview.

Comments: Written comments are solicited to (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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. Comments should be received within 60 days of the date of this notice.

ADDRESSES: Interested persons should submit written comments to Muriel B. Anderson, Chief, Records Management Section, Information Resources Management Branch, Information Technology Services Division, Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security, 500 C Street, SW., Room 316, Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Contact Colleen Heilig, Training Specialist, U.S. Fire Administration at (301) 447–1613 for additional information. You may contact Ms. Anderson for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA-Information-Collections@dhs.gov*.

Dated: December 27, 2004.

George S. Trotter,

Acting Branch Chief, Information Resources Management Branch, Information Technology Services Division.

[FR Doc. 05–26 Filed 1–3–05; 8:45 am]

BILLING CODE 9010–17–P

DEPARTMENT OF HOMELAND SECURITY

National Communications System

National Security Telecommunications Advisory Committee

AGENCY: National Communications System (NCS).

ACTION: Notice of closed meeting.

SUMMARY: The President's National Security Telecommunications Advisory Committee (NSTAC) will meet via conference call on Wednesday, January 19, 2005, from 4 p.m. until 5 p.m. The conference call will be closed to the public. The NSTAC advises the President of the United States on issues and problems related to implementing national security and emergency preparedness (NS/EP) communications policy.

Summary of Agenda

At this meeting, the NSTAC will receive briefings concerning the Department's national planning activities for critical infrastructure protection; the interim findings of the NSTAC's Next Generation Network Task Force (NGNTF), and private sector vulnerability mitigation activities that are expected to include discussion of sensitive, commercially confidential and proprietary vulnerability and infrastructure protection information.

Basis for Closure: In accordance with Section 10(d) of the Federal Advisory Committee Act, Pub. L. 92–463, as amended (5 U.S.C. App. 2), the Department has determined that the aforementioned briefings and the associated discussion will concern matters sensitive to homeland security within the meaning of 5 U.S.C. 552b(c)(4) and (c)(9)(B) and that, accordingly, this meeting will be closed to the public.

FOR FURTHER INFORMATION CONTACT: Call Ms. Kiesha Gebreyes, Chief, Industry Operations Branch at (703) 607–6134, or write the Manager, National Communications System, P.O. Box 4502, Arlington, Virginia 22204–4502.

Peter M. Fonash,

Acting Deputy Manager, National Communications System.

[FR Doc. 05–54 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4903–N–105]

Notice of Submission of Proposed Information Collection to OMB; HUD Standardized Grant Application Forms

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

HUD is requesting approval for a revision of a currently approved information. The proposed forms are to be used to support a consolidated and streamlined grant application processes in accordance with the provisions of Public Law 106–107, The Federal Financial Assistance Improvement Act of 1999. The forms a similar to those used in previous annual grant application processes.

DATES: *Comments Due Date:* February 3, 2005.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2501–0017) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov;* or Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 708–2374. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Mr. Eddins or Ms Deitzer and at HUD's Web site at *http://www5.hud.gov:63001/po/i/icbts/collectionsearch.cfm.*

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: HUD Standardized Grant Application Forms.

OMB Approval Number: 2501–0017.

Form Numbers: HUD–424–B, Applicant Assurances and Certifications; HUD–424–CB, Grant Application Detailed Budget; HUD–424–CBW, Grant Application Detailed Budget Worksheet; HUD–424–M, Federal Assistance Funding Matrix and Certifications.

Description of the Need for the Information and its Proposed Use: The proposed forms are to be used to support a consolidated and streamlined grant application processes in accordance with the provisions of Public Law 106–107, the Federal Financial Assistance Improvement Act

of 1999. The forms a similar to those used in previous annual grant application processes.

Frequency of Submission: On occasion of application for certain HUD grants.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	9,100	1		6.35		57,785

Total Estimated Burden Hours: 57,785.

Status: Revision of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: December 23, 2004.

Wayne Eddins,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. 05–87 Filed 1–3–05; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4904–N–13]

Notice of Proposed Information Collection: Comment Request, Environmental Reviews

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* March 7, 2005.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Shelia Jones, Reports Liaison Officer, Department of Housing Urban and Development, 451 7th Street, SW., Room 7232, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Richard H. Broun, Director, Office of Environment and Energy, Department of Housing and Urban Development, Room 7244, 451 7th Street, SW., Washington, DC 20410–7000. For telephone and e-mail communication, contact Walter Prybyla, Environmental Review Division, (202) 708–1201 x4466 or e-mail: *Walter_Prybyla@hud.gov.* This phone number is not toll-free. Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as Amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Information collection for environmental reviews.

OMB Control Number, if applicable: None.

Description of the need for the information and proposed use: The information collection applies to applicants seeking HUD financial assistance for their project proposals and is used by HUD for the performance of the Department's compliance with the National Environmental Policy Act and related federal environmental laws and authorities in accordance with HUD environmental regulations, 24 CFR part 50: ''Protection and Enhancement of Environmental Quality.''

Agency form numbers, if applicable: None.

The total numbers of hours needed to prepare the information collection is approximately eight hours. The number of respondents is approximately 2,600. The frequency of response is a one-time collection. The proposed information collection is for a new collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 29, 2004.

Nelson R. Bregón,

General Deputy, Assistant Secretary for Community Planning and Development.

[FR Doc. 05–91 Filed 1–3–05; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered Species Recovery Permits and Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: Notice is hereby given that Region 6 of the U.S. Fish and Wildlife Service (Service) has issued the following recovery permits for endangered species, between May 1, 2004, and December 31, 2004. We also announce our intention to issue recovery permits to conduct certain activities pertaining to scientific research and enhancement of survival of endangered species.

DATES: Written comments must be received February 3, 2005.

ADDRESSES: Written data or comments should be submitted to the Assistant Regional Director-Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225–0486; telephone (303) 236–7400, facsimile (303) 236–0027.

FOR FURTHER INFORMATION CONTACT: Documents and other information submitted with these permits are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 20 days of the date of publication of this notice to the address above; telephone (303) 236–7400.

SUPPLEMENTARY INFORMATION: Between April 2004 and December 31, 2004, this office issued or renewed 10 permits for research and enhancement of survival

actions on endangered species pursuant to section 10(a)(1)(A) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*). The permits were issued only for recovery-related activities, for black-footed ferret (*Mustela nigripes*), American burying beetle (*Nicrophorus americanus*), Interior least tern (*Sterna antillarum athalassos*), Southwestern willow flycatcher (*Empidonax traillii extimus*), Topeka shiner (*Notropis topeka*), bonytail (*Gila elegans*), Colorado pikeminnow (*Ptychocheilus lucius*), humpback chub (*Gila cypha*), razorback sucker (*Xyrauchen texanus*), and pallid sturgeon (*Scaphirhynchus albus*). Each permit was granted only after it was determined to be applied for in good faith, contributing to species conservation and recovery, and consistent with the Act and applicable regulations.

The Service anticipates we will issue a similar number of permits for recovery-related activities pertaining to scientific research and enhancement of survival of endangered species through December 31, 2005. We are soliciting comments on issuance of permits during 2004 and 2005. Information on recovery permits may be obtained from the Assistant Regional Director-Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225–0486; telephone (303) 236–7400, facsimile (303) 236–0027.

Applicant: Michael Parker, Laramie Rivers Conservation District, Laramie, Wyoming, TE–078834.

The applicant requests a permit amendment to extend the expiration date to August 26, 2054 in conjunction with recovery activities under a Safe Harbor Agreement for the purpose of enhancing survival and recovery of the Wyoming toad (*Bufo baxteri*).

Applicant: Kevin Conway, Utah Division of Wildlife Resources, Department of Natural Resources, Salt Lake City, Utah, TE–097129.

The applicant requests a permit to take Utah prairie dogs (*Cynomys parvidens*) in conjunction with recovery activities under a Safe Harbor Agreement for the purpose of enhancing survival and recovery of the Utah prairie dog.

Dated: December 15, 2004.

Elliott Sutta,

Acting Regional Director, Denver, Colorado.

[FR Doc. 05–33 Filed 1–3–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Draft List of Bird Species to Which the Migratory Bird Treaty Act Does Not Apply

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We are publishing a draft list of the nonnative bird species that have been introduced by humans into the United States or its territories and to which the Migratory Bird Treaty Act (MBTA) does not apply. This action is required by the Migratory Bird Treaty Reform Act (MBTRA) of 2004. The MBTRA amends the MBTA by stating that it applies only to migratory bird species that are native to the United States or its territories, and that a native migratory bird is one that is present as a result of natural biological or ecological processes. This notice identifies those species that are not protected by the MBTA, even though they belong to biological families referred to in treaties that the MBTA implements, as their presence in the United States and its territories is solely the result of intentional or unintentional human-assisted introductions.

DATES: Submit comments on or before February 3, 2005.

ADDRESSES:

(1) Mail public comments to Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Mail Stop 4107, Arlington, VA 22203.

(2) Hand-deliver public comments and examine materials available for public inspection at U.S. Fish and Wildlife Service, Division of Migratory Bird Management, 4501 North Fairfax Drive, Room 4000, Arlington, VA 22203.

(3) Fax public comments to (703) 358–2272.

(4) E-mail public comments to *nonnativebirds@fws.gov*

FOR FURTHER INFORMATION CONTACT: John L. Trapp, (703) 358–1714.

SUPPLEMENTARY INFORMATION:

Authority

Migratory Bird Treaty Reform Act of 2004 (Division E, Title I, Sec. 143 of the Consolidated Appropriations Act, 2005 [H. Rpt. 108–792, Conference Report to Accompany H.R. 4818]).

What Is the Purpose of This Notice?

The purpose of this notice is to provide the public with an opportunity to review and comment on a draft list of ''all nonnative, human-introduced bird species to which the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*) does not apply that belong to biological families of migratory birds covered under any of the migratory bird conventions with Great Britain (for Canada), Mexico, Russia, or Japan.'' The MBTRA of 2004 requires us to publish this list for public comment.

This notice is strictly informational. It merely lists some of the bird species to which the MBTA does not apply. The presence or absence of a species on this list has no legal effect. This list does not change the protections that any of these species might receive under such agreements as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (T.I.A.S. 8249), the Endangered Species Act (16 U.S.C. 1531–1544, 87 Stat. 275), or the Wild Bird Conservation Act (16 U.S.C. 4901–4916, 106 Stat. 2224). Regulations implementing the MBTA are found in Parts 10, 20, and 21 of 50 CFR. The list of migratory birds covered by the MBTA is located at 50 CFR 10.13.

What Criteria Did We Use To Identify Bird Species Not Protected by the MBTA?

In accordance with the language of the MBTRA, each of the species enumerated below meet the following four criteria:

(1) It belongs to a family of birds covered by the MBTA by virtue of that family's inclusion in any of the migratory bird conventions with Canada, Mexico, Russia, or Japan. The Canadian and Mexican treaties list the families of birds that are protected. In the Russian treaty, the specific species covered are listed in an Appendix in which the species are arranged by family. Article VIII of the Russian treaty grants us the authority to use our discretion to protect additional species that belong to the same family as a species listed in the Appendix. The treaty with Japan lists covered species in an Annex without reference to families, and contains no provision that would allow treaty parties to unilaterally add additional species.

(2) There is credible documented evidence that it has occurred at least once in an unconfined state in the United States or its territories.

(3) All of its known occurrences in the United States can be confidently attributed solely to intentional or unintentional human-assisted introductions to the wild. An intentional introduction is one that was purposeful-for example, the person(s) or institution(s) involved intended for it to happen. An unintentional introduction is one that was unforeseen or

unintended-for example, the establishment of self-sustaining populations following repeated escapes from captive facilities. Self-sustaining populations are able to maintain their viability from one generation to the next through natural reproduction without the introduction of additional individuals. In this context, we consider landscape changes caused by agriculture and other forms of human development to be natural ecological processes. These activities may make the environment more amenable for some species that did not historically occur in the United States or its territories and allow them to expand their ranges and colonize these jurisdictions. In the absence of direct human intervention, these new arrivals (*e.g.*, cattle egrets) are considered to be native.

(4) There is no credible evidence of its natural occurrence in the United States unaided by direct or indirect human assistance. The native range and known migratory movements (if any) of the species combine to make such occurrence in the United States extremely unlikely, both historically and in the future. Migratory bird species with credible evidence of natural occurrence anywhere in the United States or its territories, even if introduced elsewhere within these jurisdictions, are listed in 50 CFR 10.13.

What Is the Status of Bird Species Not Protected by the MBTA?

Each species meeting the criteria discussed in the previous section—and thus qualifying as a nonnative, human-assisted species—can be grouped into one or more of the following eight status categories according to the circumstances surrounding its reported occurrence(s) in the United States or its territories. These categories are merely informational and descriptive in nature and have no bearing on determining whether or not a species is nonnative:

(1) Self-sustaining and free-living breeding populations currently exist as a consequence of intentional or unintentional introductions.

(2) Self-sustaining and free-living populations were at one time thought to be established as a consequence of intentional or unintentional introductions, but it is now extirpated (*i.e.*, no longer exists) as a breeding species. Recurring escapes of this species from captive facilities remain a possibility.

(3) It has been introduced and possibly established in the wild (*i.e.*, breeding documented), but some uncertainty remains as to whether self-sustaining populations have been permanently established.

(4) Individuals frequently escape from captive facilities such as zoos, farms, parks, and private collections, where they are common, and may be found in an unconfined state virtually anywhere in the country, but not known to breed in the wild.

(5) Individuals are housed in captive facilities, but escapes are rare, as judged by the low frequency with which they are reported in the wild. Most of these species are represented by five or fewer documented reports of occurrence in the wild, but future escapes are likely.

(6) It was intentionally introduced with the goal of establishing self-sustaining populations, but the release(s) ultimately failed and it no longer occurs in the country. Future introductions are possible.

(7) It is imported by private citizens for use in recreational falconry or bird control at airports, with individual free-flying birds known to escape from their handlers with some regularity.

(8) It has occurred as a result of intentional or unintentional human assistance, but all such occurrences pre-date enactment of MBTA protection for the family to which it belongs. Although not currently known to occur, future introductions are possible.

What About the Mute Swan?

The Fish and Wildlife Service has traditionally excluded nonnative species from the list of migratory birds (50 CFR 10.13) protected by the MBTA. Among the nonnative species listed above, the mute swan was the only species that the Service treated as being protected by the MBTA prior to passage of the MBTRA. In December 2001, the United States Court of Appeals for the District of Columbia Circuit ruled that the Canadian and Mexican conventions appeared to apply to mute swans and invalidated the Service's list of species covered by the MBTA to the extent that it excluded mute swans (*Hill* v. *Norton*, 275 F.3d 98 (D.C. Cir. 2001)). In December 2003, the mute swan was the major focus of discussion by the seven panel members who presented testimony at a congressional oversight field hearing on exotic bird species and the MBTA conducted by the House Committee on Resources (2003). The major sponsor of the MBTRA succinctly outlined the benefits of excluding nonnative species, including mute swans, from protection of the MBTA (Gilchrest 2004). In separate committee reports, the U.S. House of Representatives (2004) and the U.S. Senate (2004) clearly expressed their views that the mute swan was nonnative and therefore anticipated that the MBTRA would clarify that the mute swan would not be protected by the MBTA. In fact, Congress's view on the nonnative status of the mute swan is strongly supported by the evidence and the consensus of scientific opinion (American Ornithologists' Union 1931, 1957, 1983, 1998; Ciaranca *et al.* 1997; Johnsgard 1975; Kortright 1942; Long 1981; Palmer 1976; Scott and Wildlife Trust 1972; Sibley and Monroe 1990; Wilmore 1974).

For example, there is no mention of mute swans in the extensive popular and scientific literature on North American birds until 1915, and that is a reference (Job 1915) to successful breeding of the species in captivity in the United States. Forbush (1916) provided the first report of unconfined mute swans in the United States, noting that ''many reports of swans seen near Boston followed soon after the escape of European mute swans from the Boston park system.'' All existing populations of the mute swan in North America are derived from introduced stocks that were released or escaped at different localities and in different years and eventually established feral populations.

North Atlantic: Bump's (1941) reference to the presence of mute swans in New York State ''prior to 1900'' almost certainly applied to captive or restrained (*i.e.*, wing-clipped or pinioned) birds imported to ''private estates'' on Long Island and along the lower Hudson River (contra Long 1981). Bull (1974) provides more details on the establishment of ''wild'' populations, noting that birds were ''introduced in 1910 into southeastern New York in the lower Hudson [River] valley * * * and in 1912 on the south shore of Long Island.'' These introductions involved a total of 216 birds in 1910 and 328 birds in 1912 (Long 1981). An unrestrained feral flock in the lower Hudson River had grown to 26 individuals by 1920 or 1921 (Crosby 1922, Cooke and Knappen 1941). From this nucleus, birds gradually colonized surrounding States in the North Atlantic, with breeding first reported in New Jersey in 1932 (Urner 1932), Rhode Island in 1948 (Willey and Halla 1972), Connecticut in the late 1950's to 1960's (Zeranski and Baptist 1990, Bevier 1994), Massachusetts prior to 1965 (Veit and Petersen 1993), and New Hampshire in 1968 (Foss 1994).

Mid-Atlantic: While mute swans were reported in Maryland as early as 1954, the resident breeding population in the Maryland portion of the Chesapeake Bay has been traced directly to the escape of three males and two females into Eastern Bay from waterfront estates along the Miles River in Talbot County during a storm in March 1962 (Reese 1969, 1975; Robbins 1996). Mute swans

were first reported in Virginia beginning in 1955, mostly as captive birds in waterfowl collections, although some were probably released into the wild. A feral breeding population was not thought to be present until the late 1960's or early 1970's (Kain 1987). The origin of the small Delaware population, where birds were first noted in 1954 and nesting in 1965 (Hess *et al.* 2000) is unclear: it could represent birds that moved south from the North Atlantic, north from the Chesapeake Bay, or an independent introduction.

Great Lakes: In Michigan, a northern flock of mute swans was established following an introduction near East Jordan, Charlevoix County, in 1919; this was followed by the establishment of a southern flock derived mostly from introductions in Kalamazoo and Oakland counties (Brewer *et al.* 1991). Elsewhere in the Great Lakes region, successful nesting of feral mute swans—most likely representing birds dispersing from the sizeable Michigan flocks—was first documented in Indiana in the 1970's (Keller *et al.* 1986, Castrale *et al.* 1998), in Wisconsin in 1975 (Robbins 1991), in Ohio in 1987 (Peterjohn and Rice 1991), and in Illinois since at least 1986 (Kleen 1998).

Pacific Northwest: This is the least well-established and stable of the four principle mute swan population centers in the United States. Mute swans have escaped or been introduced to the wild in Oregon on multiple occasions. Breeding was first noted in the 1920's in Lincoln County (Gilligan *et al.* 1994, Marshall *et al.* 2003), with occasional breeding noted at other localities through the present. In Washington, a small but growing number of birds thought to represent dispersal from the introduced British Columbia population has been established in the Puget Sound lowlands (J. Buchanan, Washington Department of Fish and Wildlife, pers. comm.).

In the past, advocates of Federal protection for the mute swan have taken the position that the mute swan is in fact native to the United States. In support of this view, they have presented three pieces of evidence: (1) Alleged fossil remains, (2) purported descriptions and depictions in historical literature such as Hariott's (1590) ''A briefe and true report of the new found land of Virginia'' of mute swans in the Chesapeake Bay in the 1500's, and (3) a Currier & Ives print dated 1872 and entitled ''The haunts of the wild swan: Carroll Island, Chesapeake Bay'' that purportedly depicts mute swans.

The Fossil Evidence: Avian paleontologists have identified fossil remains of at least three species of swans in North America: *Cygnus buccinator* (the trumpeter swan), *Cygnus columbianus* (the tundra swan), and *Cygnus paloregonus* (the purported ancestor of the mute swan). These fossil remains were found in geological deposits in Idaho and Oregon (Shufeldt 1913, Brodkorb 1964, Wetmore 1959) dating to the Pleistocene epoch, a period extending from 11,000 to 1.8 million years ago. Trumpeter and tundra swans survive as members of the modern North American avifauna while *paloregonus* became extinct. Whatever the relationship of *paloregonus* to modern-day swans—and Ciaranca *et al.* (1997) have suggested that in some physical features it more closely resembled the mute swan than either the trumpeter or the tundra—it differed significantly enough for authorities to describe it as a distinct species. Even if there was (and there isn't) clear and indisputable evidence that *paloregonus* was synonymous with *olor,* thus possibly representing an early incursion of a population of *Cygnus olor* into North America that subsequently became extinct, that evidence would not obviate the fact that all current populations of the mute swan in North America are derived from introduced stocks that were released or escaped and eventually established feral populations. Therefore, new section 703(b)(2)(B) precludes the mute swan from being considered a native species.

Historical Illustrations: Seven of the 23 illustrations in Harriot's (1590) report on the region now known as Pamlico Sound, North Carolina, depict waterfowl (ducks, geese, or swans) in the background, either in flight or on the water. Only one of the plates depicts anything remotely resembling a swan, and it cannot be assigned with confidence to a particular species. The only text reference to swans is the statement that ''in winter great store of swannes and geese'' provided an abundant source of food, suggesting that the swans depicted are more likely tundra swans, a common winter inhabitant of the region. Similarly, little credence can be placed in the supposed depiction of mute swans in a Currier & Ives print. Illustrators and publishers of the late 1900th century frequently portrayed fanciful depictions of birds that bore little resemblance to reality. Commercial artwork of the period often pictured the species with which recent European immigrants had been familiar in their native land. Nonnative birds were often inserted in the foreground or background of American landscapes. We place much greater significance in the fact that neither Alexander Wilson (1808–1814) nor John James Audubon (1827–1839)—the two most renowned and respected American wildlife artists and naturalists of the 19th century in America—depicted or described the mute swan in their seminal works on the birds of North America.

What Are the Bird Species Not Protected by the MBTA?

We have tried to make the following list as comprehensive as possible by including all non-native, human-assisted species that belong to any of the families referred to in the treaties and whose occurrence(s) in the United States and its territories have been documented in the scientific literature. It is not, however, an exhaustive list of all the non-native species that could potentially appear in the United States or its territories as a result of human assistance. New species of non-native birds are being reported annually in the United States, and it is impossible to predict which species might appear in the near future.

The 113 species on this draft list are arranged by family according to the American Ornithologists' Union (1998, as amended by Banks *et al.* 2003). Within families, species are arranged alphabetically by scientific name. Common and scientific names follow Monroe and Sibley (1993). For each species, we indicate—for informational purposes only—its status as an introduced species in the United States or its territories (indicated by numbers corresponding to the eight status categories described above):

Family ANATIDAE

Aix galericulata, Mandarin Duck (3, 4)
Alopochen aegyptiacus, Egyptian Goose (4)
Anas hottentota, Hottentot Teal (5)
Anas luzonica, Philippine Duck (5)
Anser anser, Graylag Goose (4)
Anser anser anser, Domestic Goose (4)
Anser cygnoides, Swan Goose (4)
Anser indicus, Bar-headed Goose (4)
Branta ruficollis, Red-breasted Goose (4)
Callonetta leucophrys, Ringed Teal (4)
Chenonetta jubata, Maned Duck (6)
Coscoroba coscoroba, Coscoroba Swan (5)
Cygnus atratus, Black Swan (4)
Cygnus melanocoryphus, Black-necked Swan (5)
Cygnus olor, Mute Swan (1, 3, 4)
Dendrocygna viduata, White-faced Whistling-Duck (5)
Neochen jubata, Orinoco Goose (5)
Netta peposaca, Rosy-billed Pochard (5)
Netta rufina, Red-crested Pochard (4)
Tadorna ferruginea, Ruddy Shelduck (4)
Tadorna tadorna, Common Shelduck (4)

Family PELECANIDAE

Pelecanus onocroatalis, Great White Pelican (5)

Family PHALACROCORACIDAE

Phalacrocorax gaimardi, Red-legged Cormorant (8)

Family CICONIIDAE

Ciconia abdimii, Abdim's Stork (5)
Ciconia ciconia, White Stork (5)
Ciconia episcopus, Woolly-necked Stork (5)
Ephippiorhynchus asiaticus, Black-necked Stork (5)

Family CATHARTIDAE

Sarcoramphus papa, King Vulture (5)

Family PHOENICOPTERIDAE

Phoenicopterus chilensis, Chilean Flamingo (4)
Phoenicopterus minor, Lesser Flamingo (5)

Family ACCIPITRIDAE

Buteo polyosoma, Red-backed Hawk (5)
Buteogallus urubitinga, Great Black-Hawk (5)
Gyps sp., Griffon-type Old World vulture (5)

Family FALCONIDAE

Falco biarmicus, Lanner Falcon (7)
Falco cherrug, Saker Falcon (7)
Falco pelegrinoides, Barbary Falcon (7)

Family RALLIDAE

Aramides cajanea, Gray-necked Wood-Rail (5)

Family GRUIIDAE

Balearica pavonina, Black Crowned-Crane (5)
Balearica regulorum, Gray Crowned-Crane (5)
Grus antigone, Sarus Crane (5)

Family CHARADRIIDAE

Vanellus chilensis, Southern Lapwing (5)

Family LARIDAE

Larus novaehollandiae, Silver Gull (5)

Family COLUMBIDAE

Caloenas nicobarica, Nicobar Pigeon (6)
Chalcophaps indica, Emerald Dove (6)
Columba livia, Rock Pigeon (1, 4)
Columba palumbus, Common Wood-Pigeon (6)
Gallicolumba luzonica, Luzon Bleeding-heart (6)
Geopelia cuneata, Diamond Dove (5)
Geopelia humeralis, Bar-shouldered Dove (6)
Geopelia striata, Zebra Dove (1)
Geophaps lophotes, Crested Pigeon (6)
Geophaps plumifera, Spinifex Pigeon (6)
Geophaps smithii, Partridge Pigeon (6)
Leucosarcia melanoleuca, Wonga Pigeon (6)
Phaps chalcoptera, Common Bronzewing (6)
Starnoenas cyanocephala, Blue-headed Quail-Dove (6)
Streptopelia bitorquata, Island Collared-Dove (1, 6)
Streptopelia chinensis, Spotted Dove (1, 3)
Streptopelia decaocto, Eurasian Collared-Dove (1, 3)
Streptopelia risoria, Ringed Turtle-Dove (1, 2, 4)

Family STRIGIDAE

Pulsatrix perspicillata, Spectacled Owl (5)

Family TROCHILIDAE

Anthracothorax nigricollis, Black-throated Mango (8)

Family CORVIDAE

Callocitta colliei, Black-throated Magpie-Jay (5)
Corvus corone, Carrion Crow (5)
Corvus splendens, House Crow (5)
Cyanocorax caeruleus, Azure Jay (5)
Cyanocorax sanblasianus, San Blas Jay (8)
Garrulus glandarius, Eurasian Jay (5)
Urocissa erythrorhyncha, Blue Magpie (6)

Family ALAUDIDAE

Alauda japonica, Japanese Skylark (6)
Lullula arborea, Wood Lark (8)
Melanocorypha calandra, Calandra Lark (5)
Melanocorypha mongolica, Mongolian Lark (8)

Family PARIDAE

Parus caeruleus, Blue Tit (5)
Parus major, Great Tit (5, 8)
Parus varius, Varied Tit (2)

Family CINCLIDAE

Cinclus cinclus, White-throated Dipper (8)

Family SYLVIIDAE

Cettia diphone, Japanese Bush-Warbler (1)
Sylvia atricapilla, Blackcap (8)

Family TURDIDAE

Copsychus malbaricus, White-rumped Shama (1)
Copsychus saularis, Oriental Magpie-Robin (6)
Erithacus rubecula, European Robin (8)
Luscinia akahige, Japanese Robin (8)
Luscinia komadori, Ryukyu Robin (8)
Luscinia megarhynchos, European Nightingale (8)
Turdus philomelos, Song Thrush (8)

Family PRUNELLIDAE

Prunella modularis, Dunnock (8)

Family THRAUPIDAE

Piranga rubriceps, Red-hooded Tanager (8)
Thraupis episcopus, Blue-gray Tanager (2)

Family EMBERIZIDAE

Emberiza citrinella, Yellowhammer (8)
Gubernatrix cristata, Yellow Cardinal (6)
Loxigilla violacea, Greater Antillean Bullfinch (5)
Melopyrrha nigra, Cuban Bullfinch (5)
Paroaria capitata, Yellow-billed Cardinal (1)
Paroaria coronata, Red-crested Cardinal (1)
Paroaria dominicana, Red-cowled Cardinal (6)
Paroaria gularis, Red-capped Cardinal (6)
Sicalis flaveola, Saffron Finch (1, 5)
Tiaris canora, Cuban Grassquit (5)

Family CARDINALIDAE

Passerina leclacherii, Orange-breasted Bunting (5)

Family ICTERIDAE

Gymnostinops montezuma, Montezuma Oropendola (5)
Icterus icterus, Troupial. (1, 5)
Icterus pectoralis, Spot-breasted Oriole (1)
Leistes militaris, Red-breasted Blackbird (6)

Family FRINGILLIDAE

Carduelis cannabina, Eurasian Linnet (5, 8)
Carduelis carduelis, European Goldfinch (2, 4)
Carduelis chloris, European Greenfinch (5, 8)
Carduelis cucullata, Red Siskin (1)
Carduelis magellanica, Hooded Siskin (8)
Loxia pysopsittacus, Parrot Crossbill (8)
Serinus canaria, Common Canary (1, 4)
Serinus leucopygius, White-rumped Seedeater (6)
Serinus mozambicus, Yellow-fronted Canary (1)

The MBTA also does not apply to many other bird species, including (1) nonnative species that have not been introduced into the U.S. or its territories, and (2) species (native or nonnative) that belong to the families not referred to in any of the four treaties underlying the MBTA. The second category includes the Cracidae (chachalacas), Phasianidae (grouse, ptarmigan, and turkeys), Odontophoridae (New World quail), Burhinidae (thick-knees), Glareolidae

(pratincoles), Pteroclididae (sandgrouse), Psittacidae (parrots), Todidae (todies), Dicruridae (drongos), Meliphagidae (honeyeaters), Monarchidae (monarchs), Pycnonotidae (bulbuls), Sylviinae (Old World warblers, except as listed in Russian treaty), Muscicapidae (Old World flycatchers, except as listed in Russian treaty), Timaliidae (wrentits), Zosteropidae (white-eyes), Sturnidae (starlings, except as listed in Japanese treaty), Coerebidae (bananaquits), Drepanidinae (Hawaiian honeycreepers), Passeridae (Old World sparrows, including house or English sparrow), Ploceidae (weavers), and Estrildidae (estrildid finches), as well as numerous other families not represented in the United States or its territories.

Author

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Other Sources

A list of other sources used to compile this list is available upon request from any of the **ADDRESSES** listed above.

Public Comments Invited

We invite interested parties to submit written comments or suggestions regarding the draft list of bird species to which the MBTA does not apply by any one of the means identified in the **ADDRESSES** section. Duplicate submissions are discouraged. The complete file for this notice will be available for public inspection during normal business hours, by appointment, at the location identified in the **ADDRESSES** section.

E-mail comments should be submitted as an ASCII file with Nonnative Birds in the subject line. Avoid the use of special characters and any form of encryption.

While all comments will be considered, we encourage commentators to focus on the following questions:

(1) Do the four criteria used to identify bird species to which the MBTA does not apply accurately reflect the language and intention of the MBTRA? If not, what changes would you recommend?

(2) Have we included any species that doesn't meet each of the four criteria? Please be specific, and provide as much detail as possible.

(3) Have we omitted any species that meets each of the four criteria?

(4) Have we accurately depicted the introduced status of each species?

Following review and consideration of the comments, we will publish a final list in the **Federal Register**.

Dated: December 23, 2004.

Steve Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 05–55 Filed 1–3–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–964–1410–HY–P; AA–6710–A, AA–6710–B, AA–6710–A2, AA–6710–B2, ALA–2]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act, will be issued to Unga Corporation, for lands in Tps. 57 and 58 S., R. 74 W., SM; Tps. 56 and 57 S., R. 75 W., SM; Tps. 57 and 58 S., R. 76 W., SM; located in the vicinity of Unga, Alaska, containing 14,565.96 acres. Notice of the decision will also be published four times in the *Dutch Harbor Fisherman.*

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until February 3, 2005, to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7599.

FOR FURTHER INFORMAION CONTACT: Renee Fencl by phone at (907) 271–5067, or by e-mail at *Renee_Fencl@ak.blm.gov.*

Renee Fencl,

Land Law Examiner, Branch of Preparation & Resolution.

[FR Doc. 05–11 Filed 1–3–05; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–1320–EL, WYW151134]

Notice of Competitive Coal Lease Sale Reoffer, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of competitive coal lease sale reoffer.

SUMMARY: Notice is hereby given that certain coal resources in the West Roundup Tract described below in Campbell County, WY, will be reoffered for competitive lease by sealed bid in accordance with the provisions of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 *et seq.*).

DATES: The lease sale reoffer will be held at 10 a.m., on Wednesday, February 16, 2005. Sealed bids must be submitted on or before 4 p.m., on Tuesday, February 15, 2005.

ADDRESSES: The lease sale reoffer will be held in the First Floor Conference Room (Room 107), of the Bureau of Land Management (BLM) Wyoming State Office, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, WY 82003. Sealed bids must be submitted to the Cashier, BLM Wyoming State Office, at the address given above.

FOR FURTHER INFORMATION CONTACT: Mavis Love, Land Law Examiner, or Robert Janssen, Coal Coordinator, at 307–775–6258, and 307–775–6206, respectively.

SUPPLEMENTARY INFORMATION: This coal lease sale is being held in response to a lease by application (LBA) filed by Triton Coal Company, LLC of Gillette, WY. The West Roundup Tract was previously offered on October 27, 2004, and the one bid received at that sale was rejected because it did not meet the BLM's estimate of fair market value. The coal resources to be offered consist of all reserves recoverable by surface mining methods in the following-described lands located southeast of Wright, Wyoming, in southeastern Campbell County approximately 7 miles east of State Highway 59 and 5 miles south of State Highway 450:

T. 42 N., R. 70 W., 6th PM, Wyoming
Sec. 4: Lots 17, 18;
Sec. 5: Lots 17–20;
Sec. 6: Lots 8–23;
Sec. 7: Lots 5–14;
Sec. 8: Lots 1–12;
Sec. 9: Lots 1–8, 11–14;
T. 43 N., R. 70 W., 6th P.M, Wyoming
Sec. 31: Lots 13–20;
T. 42 N., R. 71 W., 6th P.M, Wyoming
Sec. 1: Lots 5, 6, 11–14, 19, 20.
Containing 2,812.51 acres, more or less.

The tract is crossed by the Reno County Road and by the rail spur to the North Rochelle Mine and is adjacent to Federal coal leases held by the North Rochelle Mine to the east and the Black Thunder Mine to the north, and to State of Wyoming coal leases to the northwest and southeast. The northwest State lease is controlled by the Black Thunder Mine while the southeast State lease is controlled by the North Antelope/Rochelle Mine. The tract is also adjacent to additional unleased Federal coal to the south and west.

All of the acreage offered has been determined to be suitable for mining except lands under the existing rail loop and plant facilities serving the North Rochelle Mine. These areas are protected from premature development by a USDA-Forest Service special use permit, which has determined that these areas are unsuitable for mining. However, these areas can be made suitable for mining by removing these features and using temporary loadout facilities farther west at the end of mine life. Other features, such as the county road, can be moved to permit coal recovery. In addition, numerous oil and/or gas wells have been drilled on the tract. The estimate of the bonus value of the coal lease will include consideration of the future production from these wells. An economic analysis of this future income stream will determine whether a well is bought out and plugged prior to mining or re-established after mining is completed. A small portion of the surface estate of the tract is controlled by the North Rochelle Mine but most of the surface estate is controlled by the United States and the Black Thunder Mine.

The tract contains surface mineable coal reserves in the Wyodak seam currently being recovered in the adjacent, existing mines. On the tract, the Wyodak is generally a thick seam with one thin upper split and two thin lower splits. The lower splits are not continuous over the LBA tract, but are often merged into the main seam. The upper split is generally present, but is often too thin to recover. The main seam ranges from about 53–79 feet thick, while the splits range from about 0–16 feet thick for the upper one and from about 0–8 and 0–5 feet thick for each of the lower two, respectively, where they occur. The overburden depths range from about 185–465 feet thick on the LBA. The interburden between the upper split and the main seam is from 0–30 feet, while the lower splits are from 0–13 feet from the main seam and from 0–7 feet from each other.

The tract contains an estimated 327,186,000 tons of mineable coal. This estimate of mineable reserves includes the main seam and splits mentioned above but does not include any tonnage from localized seams or splits containing less than 5 feet of coal. The tract includes approximately 76,355,000 tons of mineable coal under the rail spur and plant facilities serving the North Rochelle Mine, which can be mined at the end of mine life. It does not include either the State of Wyoming coal in the northwest, which is expected to be recovered by the Black Thunder Mine, or the State of Wyoming coal in the southeast, which is not expected to be recovered at this time. The total mineable stripping ratio (BCY/Ton) of the coal is about 4.3:1. Potential bidders for the LBA should consider the recovery rate expected from thick seam and multiple seam mining.

The West Roundup LBA coal is ranked as subbituminous C. The overall average quality on an as-received basis is 8790 BTU/lb with about 0.2% sulfur and 1.6% sodium in the ash. These quality averages place the coal reserves near the high end of the range of coal quality currently being mined in the Wyoming portion of the Powder River Basin.

The tract will be leased to the qualified bidder of the highest cash amount provided that the high bid meets or exceeds the BLM's estimate of the fair market value of the tract. The minimum bid for the tract is $100 per acre or fraction thereof. No bid that is less than $100 per acre, or fraction thereof, will be considered. The bids should be sent by certified mail, return receipt requested, or be hand delivered. The Cashier will issue a receipt for each hand-delivered bid. Bids received after 4 p.m., on Tuesday, February 15, 2005, will not be considered. The minimum bid is not intended to represent fair market value. The fair market value of the tract will be determined by the Authorized Officer after the sale. The lease issued as a result of this offering will provide for payment of an annual rental of $3.00 per acre, or fraction thereof, and of a royalty payment to the United States of 12.5 percent of the value of coal produced by strip or auger mining methods and 8 percent of the value of the coal produced by underground mining methods. The value of the coal will be determined in accordance with 30 CFR 206.250.

Bidding instructions for the tract offered and the terms and conditions of the proposed coal lease are available from the BLM Wyoming State Office at the addresses above. Case file documents, WYW151134, are available for inspection at the BLM Wyoming State Office.

Phillip C. Perlewitz,

Acting Deputy State Director, Minerals and Lands.

[FR Doc. 05–9 Filed 1–3–05; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID–200–1120–PH]

Notice of February Resource Advisory Council Meeting To Be Held in Twin Falls District, ID

SUMMARY: This notice announces the intent to hold a Resource Advisory Council (RAC) meeting for in the Twin Falls District of Idaho on Wednesday, February 9, 2005. The meeting will be held in the Oak Room at the Red Lion Canyon Springs Hotel, 1357 Blue Lakes Boulevard, in Twin Falls, Idaho.

SUPPLEMENTARY INFORMATION: The Twin Falls District Resource Advisory Council consists of the standard fifteen members residing throughout south central Idaho. The February meeting will be the second meeting for the new group, formed after Idaho's BLM Districts separated from three to four in October of 2004. Meeting agenda items will include updates on planning efforts, including the Craters of the Moon Management Plan and Fire Management Direction Amendment; Shoshone/Bannock tribal perspectives; energy development within the Burley

and Shoshone Field Offices in the Twin Falls District; sage grouse status and statewide plan; and the wild horse program in the Jarbidge Field Office.

FOR FURTHER INFORMATION CONTACT: Sky Buffat, Twin Falls District, Idaho, 378 Falls Avenue, Twin Falls, Idaho 83301, (208) 732–7307.

Dated: December 20, 2004.

Howard Hedrick,

Twin Falls District Manager.

[FR Doc. 05–7 Filed 1–3–05; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–922–05–1310–FI; COC66815]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease COC66815

AGENCY: Bureau of Land Management; Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Pursuant to the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), a petition for reinstatement of oil and gas lease COC66815 for lands in Rio Blanco County, Colorado, was timely filed and was accompanied by all the required rentals accruing from the date of termination.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Beverly A. Derringer, Chief, Fluid Minerals Adjudication, at 303–239–3765.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $5.00 per acre, or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $155 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease COC66815 effective May 1, 2004, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Dated: November 19, 2004.

Beverly A. Derringer,

Chief, Fluid Minerals Adjudication.

[FR Doc. 05–12 Filed 1–3–05; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UTU78300]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with Title IV of the Federal Oil and Gas Royalty Management Act (Pub. L. 97–451), a petition for reinstatement of oil and gas lease UTU78300 for lands in Grand County, Utah, was timely filed and required rentals accruing from June 1, 2004, the date of termination, have been paid.

FOR FURTHER INFORMATION CONTACT: Teresa Catlin, Acting Chief, Branch of Fluid Minerals at (801) 539–4122.

SUPPLEMENTARY INFORMATION: The lessee has agreed to new lease terms for rentals and royalties at rates of $5 per acre and 16⅔ percent, respectively. The $500 administrative fee for the lease has been paid and the lessee has reimbursed the Bureau of Land Management for the cost of publishing this notice.

Having met all the requirements for reinstatement of the lease as set out in section 31(d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate lease UTU78300, effective June 1, 2004, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Teresa Catlin,

Acting Chief, Branch of Fluid Minerals.

[FR Doc. 05–10 Filed 1–3–05; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM–030–1430–EU; NMNM 100778]

Recreation and Public Purposes (R&PP) Act Classification; Lease and Conveyance of Public Land in Sierra County, NM

AGENCY: Bureau of Land Management (BLM), Interior.

ACTION: Notice of realty action.

SUMMARY: This action informs the public that BLM has examined and found suitable approximately 5 acres of public land in Sierra County, New Mexico for lease or conveyance to the City of Elephant Butte under the provisions of the Recreation and Public Purposes (R&PP) Act.

DATES: Comments regarding the proposed lease/conveyance or classification must be submitted on or before February 18, 2005.

ADDRESSES: Comments should be sent to the BLM, Las Cruces Field Office, 1800 Marquess, Las Cruces, New Mexico 88005.

FOR FURTHER INFORMATION CONTACT: Lorraine Salas, Realty Specialist at the above address or by telephone at (505) 525–4388.

SUPPLEMENTARY INFORMATION: The following described public land in Sierra County, New Mexico has been examined and found suitable for classification for lease or conveyance to the City of Elephant Butte under the provisions of the R&PP Act; as amended (43 U.S.C. 869 *et seq.*). The land is hereby classified for use as a city operations center. In accordance with Section 7 of the Taylor Grazing Act, 43 U.S.C. 315f and Executive Order No. 6910, the described land is hereby classified suitable for lease or conveyance.

New Mexico Principal Meridian

T. 13 S., R. 4 W., NMPM

Sec. 10, lot 1

Containing 5 acres, more or less.

This action will make the land, which is not needed for Federal purposes and is identified for disposal in the White Sands Resource Management Plan, available to support community expansion. Lease or conveyance of the land for recreational or public purpose use would be in the public interest.

Detailed information concerning this action is available for review at the BLM, Las Cruces Field Office, 1800 Marquess, Las Cruces, New Mexico.

Lease or conveyance will be subject to the following terms, conditions, and reservations.

1. Provisions of the R&PP Act and to all applicable regulations of the Secretary of the Interior.

2. All valid existing rights documented on the official public land records at the time of lease/patent issuance.

3. All minerals shall be reserved to the United States, together with the right to prospect for, mine, and remove the minerals.

4. Any other reservations that the authorized officer determines

appropriate to ensure public access and proper management of Federal lands and interests therein. Upon publication of this notice in the **Federal Register,** the land will be segregated from all forms of appropriation under the public land laws, including the general mining laws, except for lease or conveyance under the R&PP Act and leasing under the mineral leasing laws. On or before February 18, 2005, interested persons may submit comments regarding the proposed lease/conveyance or classification of the land to the BLM Las Cruces Field Manager. Any adverse comments will be reviewed by the State Director. In the absence of any adverse comments, the classification will become effective March 7, 2005.

Classification Comments: Interested parties may submit comments involving the suitability of the land for community expansion. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

Application Comments: Interested parties may submit comments regarding the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability of the land for community expansion.

Dated: November 5, 2004.

Tim L. Sanders,

Acting Field Manager, Las Cruces.

[FR Doc. 05–8 Filed 1–3–05; 8:45 am]

BILLING CODE 4310–VC–P

DEPARTMENT OF THE INTERIOR

National Park Service

Draft Environmental Impact Statement, Non-Native Deer Management Plan Point Reyes National Seashore; Marin County, CA; Notice of Availability

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (Pub. L. 91–190, as amended), and the Council on Environmental Quality Regulations (40 CFR part 1500–1508), the National Park Service (NPS), Department of the Interior, has prepared a Draft Environmental Impact Statement identifying and evaluating five alternatives for a Non-Native Deer Management Plan for Point Reyes National Seashore administered lands. Potential impacts, and appropriate mitigations, are assessed for each alternative. When approved, the plan will guide, for the next 15 years, non-native deer management actions on lands administered by Point Reyes National Seashore. The Non-Native Deer Management Plan and Draft Environmental Impact Statement documents the analyses of four action alternatives, and a ''no action'' alternative. Five other preliminary alternatives were considered but rejected because they did not achieve the objectives of the non-native deer management plan or were infeasible.

Planning Background: Axis deer (Axis axis) are native to India and fallow deer (Dama dama) are native to Asia Minor and the Mediterranean region. Axis and fallow deer were introduced to the Point Reyes area in the 1940s and 1950s, before establishment of the Seashore. Between 1976 and 1994, NPS rangers removed more than 2,000 non-native deer. In 1994, cullling was discontinued. Since then, non-native deer have not been actively managed and numbers and range have increased to, or surpassed, pre-control levels. Seashore staff estimates current numbers of axis and fallow deer to be approximately 250 and 860, respectively.

The purpose of the Non-Native Deer Management Plan (NNDMP) is to define management prescriptions for non-native deer. Both the park's General Management Plan (GMP) and Resource Management Plan (RMP), identify goals for management of these exotic species. The park's 1999 RMP indicates ''Regardless of potential competition and disease issues, the presence of these non-native deer compromises the ecological integrity of the Seashore and the attempts to reestablish the native cervid fauna comprising tule elk and black-tailed deer'' and notes that three scientific panels comprised of federal, state, and university researchers and managers recommended the removal of non-native deer to promote restoration of native deer and elk. The objectives of the plan are:

- To correct past and ongoing disturbances to Seashore ecosystems from introduced non-native ungulates and thereby to contribute substantially to the restoration of naturally functioning native ecosystems.
- To minimize long-term impacts, in terms of reduced staff time and resources, to resource protection programs at the Seashore, incurred by continued monitoring and management of non-native ungulates.
- To prevent spread of populations of both species of non-native deer beyond Seashore and GGNRA boundaries.
- To reduce impacts of non-native ungulates through direct consumption of forage, transmission of disease to livestock and damage to fencing to agricultural permittees within pastoral areas.

The primary problems associated with the presence of these nonnative deer are their interference with native species and native ecosystems; conflicts with the laws, regulations and NPS policies regarding restoration of natural conditions and native species; and the impacts on ranchers in the park, on park operations, budget. In addition there is the potential for each of these impacts to increase as deer populations expand beyond park boundaries. The objectives of the planning effort are to solve these problems.

The planning area for the NNDMP includes NPS lands located approximately 40 miles northwest of San Francisco in Marin County, California. These lands include the 70,046-acre Point Reyes National Seashore, comprised primarily of beaches, coastal headlands, extensive freshwater and estuarine wetlands, marine terraces, and forests; as well as 18,000 acres of the Northern District of Golden Gate National Recreation Area (GGNRA), primarily supporting annual grasslands, coastal scrub, and Douglas-fir and coast redwood forests. Thirty-five percent, or 32,000 acres, of Seashore lands are managed as wilderness.

Proposed Non-Native Deer Management Plan: Alternative E is the agency-preferred alternative in the Draft Environmental Impact Statement (EIS). Under this alternative (Removal of All Non-Native Deer by a Combination of Agency Removal and Fertility control -Sterilants or Yearly Contraception), all axis and fallow deer inhabiting the Seashore and the GGNRA lands administered by the Seashore would be eradicated by approximately 2020 through lethal removal and fertility control. Culling would be conducted by NPS staff specifically trained in wildlife sharpshooting. The contraceptive program would incorporate the latest contraceptive technologies to safely prevent reproduction, for as long as possible, and with minimal treatments per animal. Because no long-acting ''sterilant'' has been approved for use in wildlife by the Food and Drug Administration, studies on safe and efficacious use of a candidate drug would have to be conducted at PRNS before it could be used for management and population control. Population models of Seashore fallow deer indicate that under this alternative, if the contraceptives used were effective in

blocking fertility for at least 4 years, eradication could be accomplished with fewer fallow deer lethally removed. Because the effectiveness of long-term contraceptives on axis deer is unknown, similar models have not been developed for this species. Studies on sterilant efficacy and deer population response to treatment will be used adaptively to guide the non-native deer management program. The goal will be to maximize benefits to natural resources and minimize safety risks to NPS staff, while striving to reduce numbers of animals killed.

Alternatives To Proposed Plan: The NNMP / Draft EIS analyzes four alternatives besides the preferred alternative. Alternatives E and D (Removal of All Non-Native Deer by Agency Removal) are both identified in the Draft EIS as the ''environmentally preferred'' alternatives and are considered equally likely to best protect the biological and physical environment of the project area. Both would result in eradication of non-native deer within 15 years and consequently would result in complete removal of all adverse impacts caused by non-native deer to wildlife, vegetation, soils, special status species and water resources.

Alternative A—No Action. This alternative represents the current non-native deer management program. It would perpetuate the non-native deer management practices undertaken since 1994, when ranger culling was discontinued. No actions to control the size of non-native deer populations would be taken. In order to ensure protection of native species and ecosystems, continued monitoring for at least 15 years would be an integral part of this alternative as well as all other alternatives considered.

Alternative B—Control of Non-Native Deer at Pre-Determined Levels by Agency Removal. Alternative B would focus on the use of lethal control to reduce the size of non-native deer populations. Culling would be conducted by NPS staff specifically trained in wildlife sharpshooting. Non-native deer populations would be maintained at a level of 350 for each species (700 total axis and fallow deer). Because fallow deer concentrations are currently higher than this, and axis deer populations are lower than this target, the focus of initial reductions would be on fallow deer. This target population level was chosen because of its history, and for management reasons. However, the number would be re-evaluated by resource managers regularly and could be changed based on results of ongoing monitoring programs. Efforts would be made to reach target (reduced) levels in 15 years and to ensure continued presence of both species in the Seashore. Because fallow deer currently exceed 350 animals, and axis deer have historically done so, any chosen population control method would need to be used in perpetuity to maintain each species at this population size. Because the management time frame is very long (theoretically lasting forever), the total numbers of deer lethally removed could be very high.

Alternative C—Control of Non-Native Deer at Pre-Determined Levels by Agency Removal and Fertility Control. As in Alternative B, non-native deer populations would be maintained at a level of 350 for each species (700 total axis and fallow deer), but through a combination of lethal removals and fertility control. This target population level was chosen because of its history, and for management reasons. However, the number would be re-evaluated by resource managers regularly and could be changed based on results of ongoing monitoring programs. Culling would be conducted by NPS staff specifically trained in wildlife sharpshooting. The contraceptive program would incorporate the latest contraceptive technologies to safely prevent reproduction, for as long as possible, and with minimal treatments per animal. Because no long-acting ''sterilant'' has been approved for use in wildlife by the Food and Drug Administration, studies on safe and efficacious use of a candidate drug would have to be conducted at PRNS before it could be used for management and population control. Population models of Seashore fallow deer indicate that under Alternative C, if the contraceptive used were effective in blocking fertility in does for at least 4 years, population control could be accomplished with fewer fallow deer lethally removed. Because the effectiveness of long-term contraceptives on axis deer is unknown, similar models have not been developed for this species. Studies on sterilant efficacy and deer population response to treatment would be used adaptively to guide the non-native deer management program in maximizing benefits to natural resources and in minimizing safety risks to NPS staff, while striving to reduce numbers of animals killed.

Because fallow deer numbers are currently higher than 350, and axis deer populations are lower than this target, the focus of initial reductions would be on fallow deer. Efforts would be made to reach target (reduced) levels in 15 years. Because the goal of this alternative will be to control axis and fallow deer at a specified level and not to eradicate them from PRNS, annual culling and fertility control would continue indefinitely. Because the management time frame is very long (theoretically lasting forever), the total numbers of deer removed and treated with contraceptives could also be very high under this alternative.

Alternative D—Removal of All Non-Native Deer by Agency Personnel. In Alternative D, all axis and fallow deer inhabiting the Seashore and the GGNRA lands administered by the Seashore would be eradicated through lethal removal (shooting) by 2020. Culling would be conducted by NPS staff specifically trained in wildlife sharpshooting. The management actions included in this alternative would continue until both species were extirpated, with a goal of full removal in no more than 15 years. This time frame minimizes the total number of deer removed (a longer period of removal would mean more fawns are born and more total deer are killed) and is reasonable from a cost and logistics standpoint. Because of their current large numbers (~250 axis deer and ~860 fallow deer), it is expected that total removal of both species would require a minimum of 13 years. Monitoring during program implementation would be done to assess program success and to guide adjustments in the location, intensity and logistics of removal.

Actions Common to All Alternatives—In order to ensure protection of native species and ecosystems and to assess success of any management program, continued monitoring for at least 15 years would be an integral part of any Alternative Chosen. All actions which involve direct management of individual animals, ranging from aerial surveillance to live capture and lethal removal, would be conducted in a manner which minimizes stress, pain and suffering to every extent possible. All actions occurring in designated Wilderness, from monitoring to active deer management, would be consistent with the ''minimum requirement'' concept.

Scoping Summary: On April 10, 2002, a ''Notice of Scoping for Non-Native Deer Management Plan at Point Reyes National Seashore'' was published in the **Federal Register** (v67, n69, pp 17446–17447). Through public scoping and internal analysis by the Seashore's interdisciplinary NNDMP/EIS team, it was determined that an Environmental Impact Statement, rather than an Environmental Assessment, should be prepared. As mandated by NEPA, an EIS was chosen because data was deemed insufficient to decide whether the project had potential to be controversial

because of disagreement over possible environmental effects. In addition to consulting NPS resource specialists, within and outside the Seashore, park managers consulted federal, state and local agencies about management issues of concern.

The beginning of public scoping was announced on May 4, 2002, at a public meeting of the Point Reyes National Seashore Citizens Advisory Commission with a presentation on the NNDMP planning process. In this meeting, input on non-native deer management issues of concern and range of alternatives was solicited from the public. The public meeting featured a short presentation by the Seashore wildlife biologist on the environmental planning process, background on non-native deer, and issues of importance to park management. Background informational handouts were provided. Members of the Citizen's Advisory Committee for Point Reyes National Seashore and Golden Gates National Recreation Area were given the opportunity to ask questions of park staff. Five individuals spoke at the public meeting. A sign-up sheet at the public meeting provided an opportunity for members of the public to be included on a mailing list for upcoming information on the management plan in development.

Public comments were accepted in letter or email form from May 4, 2002 until July 5, 2002. All those who sent written comments during the scoping period and included a return mailing address were also put on the mailing list. An acknowledgment of the Seashore's receipt of written comments, in postcard form, was also sent to those who wrote letters. A similar e-mail message was sent back to those who emailed comments. A total of 32 written comments were received by the close of the public comment period. The major themes communicated by the public during the May 4, 2002 meeting and the subsequent scoping period encompassed a range, from a desire to retain non-native deer in the park or to use non-lethal deer control techniques, to concern about impacts to natural resources from non-native deer and a desire to eliminate all non-native deer from the Seashore.

Commenting on the Draft EIS: The purpose of the management plan is to define management prescriptions for non-native deer. A public workshop on the proposed NNDMP will be held during late winter 2005 at the Point Reyes National Seashore Red Barn meeting (confirmed date and other workshop details will be advertised by direct mailing to 210 individuals and organizations) and a notice placed in the local newspapers. All interested individuals, organizations, and agencies will be encouraged to provide comments, suggestions, and relevant information (earlier scoping comments need not be resubmitted); written comments must be postmarked not later than 60 days following publication in the **Federal Register** by EPA of their notice of filing of the availability of the Draft EIS (as soon as this date can be confirmed it will be announced on the park's website, and included in the workshop mailing). Questions at this time regarding the NNDMP planning process or work shop should be addressed to the Superintendent either by mail (see address below) or by telephone at (415) 663–8522. Please note that names and addresses of people who comment become part of the public record. If individuals commenting request that their name and/or address be withheld from public disclosure, it will be honored to the extent allowable by law. Such requests must be stated prominently in the beginning of the comments. There also may be circumstances wherein the NPS withholds from the record a respondent's identity, as allowable by law. As always: the NPS will make available to public inspection all submissions from organizations or businesses and from persons identifying themselves as representatives or officials of organizations and businesses; and, anonymous comments may not be considered.

ADDRESSES: Copies of the Draft EIS may be obtained from the Superintendent, Point Reyes National Seashore, Point Reyes, CA 94956, Attn: NNDMP, or by e-mail request to: *Ann_Nelson@nps.gov* (in the subject line, type: NNDMP). The document will be sent directly to those who have requested it, and also posted on the Internet at the park's Web page (*http://www.nps.gov/pore/pphtml/documents.html.*); and both the printed document and digital version on compact disk will be available at the park headquarters and local libraries.

Decision: Following careful analysis of public and agency comment on the Draft EIS, it is anticipated at this time that the final EIS would be available in fall of 2005. As a delegated EIS, the official responsible for the final decision is the Regional Director, Pacific West Region. A Record of Decision would not be signed sooner than 30 days following release of the Final EIS; notice of the decision will be posted in the **Federal Register** and announced in local and regional newspapers. Following approval of the Non-Native Deer Management Plan, the official responsible for implementation will be the Superintendent, Point Reyes National Seashore.

Dated: December 17, 2004.

Jonathan B. Jarvis,

Regional Director, Pacific West Region.

[FR Doc. 05–48 Filed 1–3–05; 8:45 am]

BILLING CODE 4312–FW–P

DEPARTMENT OF THE INTERIOR

National Park Service

Draft Merced Wild and Scenic River Revised Comprehensive Management Plan and Supplemental Environmental Impact Statement, Yosemite National Park, Tuolumne, Mariposa, and Madera Counties, CA; Notice of Availability

Summary—Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969 (Pub. L. 91–190, as amended), the Council of Environmental Quality regulations (40 CFR Part 1500), and the Wild and Scenic Rivers Act (as amended, 16 U.S.C. 1271), the National Park Service, Department of the Interior, has prepared the Draft Merced Wild and Scenic River Revised Comprehensive Management Plan and Supplemental Environmental Impact Statement (Draft Revised Merced River Plan/SEIS). It is intended to amend and supplement the Merced Wild and Scenic River Comprehensive Management Plan and Final Environmental Impact Statement (Merced River Plan/FEIS) released in June 2000. The Draft Revised Merced River Plan/SEIS identifies and evaluates four alternatives for guiding management of the Merced Wild and Scenic River in Yosemite National Park. When approved, the plan will serve as a template for all future decisions relating to recreation and land use within Yosemite's 81-mile Merced River corridor. The primary goals of the plan are to ensure the free-flowing condition of the river, along with providing long-term protection and enhancement of what the Wild and Scenic Rivers Act calls the river's ''Outstandingly Remarkable Values''—the unique qualities that make the river worthy of special protection.

Purpose and Need for Federal Action—The Merced River Plan is the official document for guiding future management of the main stem and South Fork of the Merced Wild and Scenic River within the jurisdiction of Yosemite National Park. In August 2000, the Merced River Plan/FEIS was approved and signed in a Record of Decision (subsequently revised in November 2000). Shortly after the

Record of Decision was signed, the plan became the subject of a lengthy litigation process. In April 2004, the U.S. Court of Appeals for the Ninth Circuit directed the National Park Service (NPS) to prepare a ''new or revised'' comprehensive management plan that addresses two deficiencies identified in the Court's October 27, 2003 opinion (*Friends of Yosemite Valley* v. *Norton,* 348 F.3d 789, 803 9th Cir. 2003). The Court ruled that: (1) The revised plan must implement a user capacity program that presents specific measurable limits on use, and (2) the revised plan must reassess the river corridor boundary in the El Portal Administrative Site based on the location of Outstandingly Remarkable Values. The purpose of the programmatic guidance identified herein is to revise and supplement the Merced River Plan/FEIS and the park's 1980 General Management Plan. This supplemental environmental impact statement represents NPS compliance with the National Environmental Policy Act, as well as parallel compliance with the Wild and Scenic Rivers Act (as amended, 16 U.S.C. 1271) and National Historic Preservation Act.

Proposed Plan and Alternatives—As the proposed Revised Merced River Plan, Alternative 2 (agency preferred alternative) would include all of the elements of the No Action Alternative, with the addition of implementing the Visitor Experience Resource Protection (VERP) user capacity component, along with interim limits on some park facilities; the El Portal segment boundary would be redrawn based on the location of the Outstandingly Remarkable Values identified within a quarter-mile of the river. In addition to this proposed plan, the Draft Revised Merced River Plan/SEIS identifies and analyzes three other alternatives: Alternative 1—No Action; Alternative 3—Quotas by Segment with VERP; and Alternative 4—Quotas by Management Zone with VERP. Alternative 2 has also been deemed to be the ''environmentally preferred'' alternative.

The No Action Alternative (Alternative 1) represents a baseline on which to compare the three action alternatives. Under this alternative, the Merced River Plan—as signed in the 2000 Record of Decision (and subsequent revision)—would continue to guide management in the river corridor. Application of its management elements (boundaries, classifications, Outstandingly Remarkable Values, management zoning, River Protection Overlay, Section 7 determination process) would continue as presented in the plan. However, implementation of the Visitor Experience Resource Protection (VERP) framework would not be in place and the park would continue managing user capacity under existing programs and policies outlined in the February 2004 User Capacity Program for the Merced Wild and Scenic River Corridor. This program includes continuation of the current wilderness management program and existing Trailhead Quota System. This alternative would implement the narrow boundary for the El Portal segment as described in the selected alternative of the Merced River Plan/FEIS (100-year floodplain or River Protection Overlay [whichever is greater] along with adjacent wetlands).

Alternative 3 would also include all of the elements from the No Action alternative, in addition to a VERP user capacity component (as described in Alternative 2) along with a maximum daily quota for each river segment and an annual visitation cap; the El Portal segment would have the maximum quarter-mile boundary.

Alternative 4 would contain the elements of No Action in addition to a VERP user capacity component (as described in Alternative 2) along with quotas for each river management zone and an annual visitation cap; the El Portal segment boundary would be drawn according to the location of Outstandingly Remarkable Values.

Scoping History—On July 27, 2004, a Notice of Intent to prepare an environmental impact statement was published in the **Federal Register** initiating a 30-day scoping period—in response to public comment, this scoping period was extended to September 10, 2004. During scoping, a series of public meetings were held. A letter from the Superintendent was sent to over 8,000 interested members of the public on the park's Planning Mailing list, encouraging them to submit ideas, issues, and concerns relating to the scope of this planning effort. In addition, the scoping period and associated public meetings were publicized via regional media, on the park's Web site, through e-mailed notices on the park's electronic newsletter, and on various state-wide online bulletin boards. As a result of outreach, over 100 letters, faxes, and emails were received and considered during the development of this Draft Revised Merced River Plan/SEIS. All written scoping comments, as well as oral comments at public meetings, can be viewed on the park's Web site (*http://www.nps.gov/yose/planning*). A scoping report is also available.

Comments—Upon its release, the Draft Revised Merced River Plan/SEIS will be mailed directly to those who requested the document in response to a December 2004 direct mail and e-mailed solicitation. While the public will be encouraged to view the document on the park's Web site (*http://www.nps.gov/yose/planning*), it will be made available in a printed version, as well as on CD ROM. Copies will be available at park headquarters and the main Visitor Center in Yosemite Valley, the Administrative Complex in El Portal, and at local and regional libraries throughout California.

Written comments must be submitted in writing and postmarked no later than 60 days after the Environmental Protection Agency publishes the notice of filing of the Draft Revised Merced River Plan/SEIS in the **Federal Register** (anticipated to occur in mid-January, 2005; as soon as this date is confirmed it will be announced on the park's Web site). All comments should be addressed to the Superintendent, ATTN: Draft Revised Merced River Plan/SEIS, P.O. Box 577, Yosemite National Park, CA 95389. Also, comments can be e-mailed to *yose_planning@nps.gov* or faxed to (209) 379–1294. All comments received will be available for public review in the Yosemite Research Library and also may be available on the park's Web site. To request a printed copy or CD ROM, refer to the information above or phone (209) 379–1365.

Individuals submitting comments may request that their name and/or address be withheld from public disclosure, and such requests will be honored to the extent allowable by law. Requests must be stated prominently in the beginning of comments. There also may be circumstances wherein the NPS will withhold a respondent's identity as allowable by law. As always, the National Park Service will make available to public inspection all submissions from organizations or businesses and from persons identifying themselves as representatives or officials of organizations and businesses. Anonymous comments will not be considered.

Public Meetings—In order to facilitate public review and comment on the Draft Revised Merced River Plan/SEIS, the NPS intends to host public meetings in the following California towns and cities: San Francisco, Sacramento, Groveland, Merced, Mammoth, Los Angeles, Fresno, Oakhurst, Mariposa, El Portal, and Yosemite Valley. Meeting dates will be dependent on the publication of this notice in the **Federal Register**, and will occur after the first 15 days of the comment period and no later than 15 days prior to the comment period closing. A schedule of dates,

locations, and times will be announced via a mailing to the park's Planning Mailing List, a news release, through the park's electronic newsletter, and postings on the park's Web site (*http://www.nps.gov/yose/planning*) and other statewide online bulletin boards.

Participants are encouraged to review the document prior to attending a meeting. Yosemite National Park management and planning team members will attend all sessions to present the Draft Revised Merced River Plan/SEIS, to receive oral and written comments, and to answer questions. All meeting locations will be accessible for disabled persons and a sign language interpreter may be available upon request with prior notice (contact the park as noted above under ''Comments'').

Decision Process—Depending on the degree of public interest and response from other agencies and organizations, at this time it is anticipated that the Final Merced Wild and Scenic River Revised Comprehensive Management Plan and Supplemental Environmental Impact Statement (Final Merced River Plan/SEIS) will be completed during June 2005; availability of the document will be duly noted in the **Federal Register**. Subsequently, notice of an approved Record of Decision would be published in the **Federal Register** not sooner than 30 days after the final document is distributed. This is expected to occur in mid-August 2005. As a delegated EIS, the official responsible for the decision is the Regional Director, Pacific West Region, National Park Service; the official responsible for implementation is the Superintendent, Yosemite National Park.

Dated: December 14, 2004.

Jonathan B. Jarvis,

Regional Director, Pacific West Region.

[FR Doc. 05–47 Filed 1–3–05; 8:45 am]

BILLING CODE 4312–FY–P

DEPARTMENT OF THE INTERIOR

National Park Service

Cape Cod National Seashore, South Wellfleet, MA; Cape Code National Seashore Advisory Commission; Two Hundred Fifty-First Notice of Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770, 5 U.S.C. App 1, Section 10), that a meeting of the Cape Code National Seashore Advisory Commission will be held on February 14, 2005.

The Commission was reestablished pursuant to Pub. L. 87–126 as amended by Pub. L. 105–280. The purpose of the Commission is to consult with the Secretary of the Interior, or his designee, with respect to matters relating to the development of Cape Cod National Seashore, and with respect to carrying out the provisions of sections 4 and 5 of the Act establishing the Seashore.

The Commission members will meet at 1 p.m. at Headquarters, Marconi Station, Wellfleet, Massachusetts for the regular business meeting to discuss the following:

1. Adoption of Agenda
2. Approval of Minutes of Previous Meeting (December 6, 2004)
3. Reports of Officers
4. Reports of Subcommittees
5. Superintendent's Report
   - Update on Salt Pond Visitor Center Project
   - Update on Highlands Center Project
   - Update on Hunting EIS
   - Update on Dune Shack Issue
   - Update on Proposed Herring River Restoration Project
   - News from Washington
6. Old Business
7. New Business
   - Pleasant Bay Discussion
8. Date and agenda for next meeting
9. Public comment and
10. Adjournment

The meeting is open to the public. It is expected that 15 persons will be able to attend the meeting in addition to Commission members.

Interested persons may make oral/written presentations to the Commission during the business meeting or file written statement. Such requests should be made to the park superintendent at least seven days prior to the meeting. Further information concerning the meeting may be obtained from the Superintendent, Cape Cod National Seashore, 99 Marconi Site Road, Wellfleet, MA 02667.

Dated: December 15, 2004.

Michael B. Murray,

Acting Superintendent.

[FR Doc. 05–45 Filed 1–3–05; 8:45 am]

BILLING CODE 4312–52–M

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before December 11, 2004. Pursuant to section 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St., NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by January 19, 2005.

Carol D. Shull,

Keeper of the National Register of Historic Places.

ALABAMA

Baldwin County

Foley Downtown Historic District, Parts of Alston, N & S McZenzie, AL 98, E & W Laurel, Myrtle, Rose, and W. Orange, Foley, 04001496

Butler County

Greenville Downtown Historic District (Boundary Increase), (Greenville MRA), Roughly Adams, Bolling, Caldwell, Church, Commerce, Conecuh, Few and Walnut Sts., Greenville, 04001497

ARKANSAS

Ashley County

Greenview Cafe, 3rd Ave. and Arkansas St., Crossett, 04001507

Benton County

Illinois River Bridge, (Historic Bridges of Arkansas MPS), Cty Rd. 196 (Kincheloe Rd.) approx. 0.25 S of old AR 68, Pedro, 04001503

Railroad Cottage, 208 N. Rust, Gentry, 04001509

Springfield to Fayetteville Road—Cross Hollow Segment, (Cherokee Trail of Tears MPS), Benton Cty Rd. 83 through Cross Hollow, Lowell, 04001511

Springfield to Fayetteville Road—Brightwater Segment, (Cherokee Trail of Tears MPS), N Old Wire Rd./Benton Cty Rd. 67, S of U.S. 62, Brightwater, 04001513

Boone County

Evans—Kirby House, 611 S. Pine St., Harrison, 04001505

Clark County

Peake High School, 1600 Caddo St., Arkadelphia, 04001499

Clay County

County Home Cemetery, 3010 Heritage Park Rd., Piggott, 04001495

Craighead County

Mercantile Bank Building, 249 S. Main St., Jonesboro, 04001506

Desha County

Lewis, Jay, House, 12 Fairview Dr., McGehee, 04001501

Grant County

Byrd, Samuel D., Sr., Homestead, 15966 AR 270 W, Poyen, 04001494

Jefferson County

Brown, Floyd B., House, 1401 S. Georgia St., Pine Bluff, 04001493

Lafayette County

Camp White Sulphur Springs Confederate Cemetery, (Civil War Commemorative Sculpture MPS), Luckwood Rd. about one blk N of AR 54, Sulphur Springs, 04001512

Lafayette County Training School, 1046 Berry St., Stamps, 04001500

Miller County

Ahern, Patrick J., House, 403 Laurel St., Texarkana, 04001508

Pope County

Pottsville Commercial Historic District, 155, 160, 162 and 164 E. Ash St., Pottsville, 04001510

Pulaski County

Huie, George D.D., Grocery Store Building, 1400 N. Pine St., North Little Rock, 04001504

Palarm Bayou Pioneer Cemetery, Lot 13 Bin the Mountain Crest Subdivision, NE of AR 365, Morgan, 04001491

St. Peter's Rock Baptist Church, 1401 W 18th St., Little Rock, 04001492

USS RAZORBACK (SS–394), North bank of the Arkansas River in vic. of I–30 Bridge, North Little Rock, 04001502

Sharp County

Walker, Thomas, House, (Hardy, Arkansas MPS), 201 N. Spring St., Hardy, 04001490

Washington County

Noll, Willis, House, 531 N. Sequoyah Dr., Fayetteville, 04001498

ILLINOIS

Cook County

Georgian Hotel, 422 Davis St., Evanston, 04001534

KANSAS

Doniphan County

Brenner Vineyards Historic District, SW of jct. of Mineral Point and 95th Rds., Doniphan, 04001514

LOUISIANA

Iberia Parish

Hewes House, 1617 W. Main St., Jeanerette, 04001515

Natchitoches Parish

St. Matthew High School, 2552 LA 119, Melrose, 04001516

MISSOURI

Boone County

Central Dairy Building, (Columbia MRA), 1104–1106 East Broadway, Columbia, 04001519

Buchanan County

Burnside—Sandusky Gothic House, 720 S. 10th St., St. Joseph, 04001518

Cooper County

Blackwater Commercial Historic District, 100 Blk. of Main St., except for 118, 120 and 122 Main St., Blackwater, 04001520

NEVADA

Clark County

St. Thomas Memorial Cemetery, Magnasite Rd. off Moapa Valley Blvd., Overton, 04001529

NEW MEXICO

Santa Fe County

Fairview Cemetery, 1134 Cerrillos Rd., Santa Fe, 04001517

NEW YORK

New York County

American Thread Building, 260 W. Broadway, New York, 04001532

Ivey Delph Apartments, 17–19 Hamilton Terrace, New York, 04001531

Richmond County

Reformed Church on Staten Island, 54 Port Richmond Ave., Staten Island, 04001533

NORTH CAROLINA

Forsyth County

Waughtown—Belview Historic District, Roughly bounded by Dacian, Waughtown St, Bellwauwood, Sprague, Ernest, Goldfloss, and Gilbreath Dr., Winston-Salem, 04001521

West Salem Historic District, Roughly bounded by Business 40, Poplar, Salem Ave., Walnut, Shober, Hutton Sts, Granville Dr. and Beaumont St., Winston-Salem, 04001524

Guilford County

Foust, Daniel P., House, 439 Brightwood Church Rd., Whitsett, 04001522

Mecklenburg County

East Avenue Tabernacle Associated Reformed Presbyterian Church, 927 Elizabeth St., Charlotte, 04001523

Rozzell, Edward M., House, (Rural Mecklenburg County MPS), 11647 Rozzelles Ferry Rd., Charlotte, 04001530

Pitt County

Harris, Spencer, House, 1287 NC 121, Falkland, 04001527

Sampson County

Faison, William E., House, NC 50 at jct. with NC 1757 (10901 Suttontown Rd.), Giddensville, 04001526

Scotland County

Central School, 303 McRae St., Laurinburg, 04001525

VIRGINIA

Campbell County

Pioneer Theater—Auditorium, 100 S. Virginia St., Reno, 04001528

Craig County

Huffman House, Address Restricted, Newport, 04001546

Fauquier County

Yew Hill—Robert Ashby's Tavern—Shacklett's Tavern, 10030 John Marshall Hwy., Delaplane, 04001535

Goochland County

Mount Bernard Complex, VA 6, 2371 River Rd. W, Maidens, 04001537

Harrisonburg Independent city

Harrisonburg Downtown Historic District, Main St. and adj. areas bet. Kratzer Ave., and Grace St., Harrisonburg, 04001536

King And Queen County

Dixon, 402 Limehouse Rd., Shacklefords, 04001539

King George County

Rokeby, 5447 Kings Hwy, King George, 04001544

Loudoun County

Mt. Olive Methodist Episcopal Church, 20460 Gleedsville Rd., Leesburg, 04001542

Northampton County

Eastville Mercantile, 16429 Courthouse Rd., Eastville, 04001540

Powhatan County

Elmington, 3277 Maidens Rd., Powhatan, 04001538

Radford Independent City

West Radford Commercial Historic District, 100, 200 and 300 blks of W. Main St., Radford (Independent City), 04001541

Russell County

Jessees Mill, VA 645, 2.5 mi. N of VA 71, Cleveland, 04001543

Virginia Beach Independent City

Ferry Farm Plantation, 4136 Cheswick Ln., Virginia Beach (Independent City), 04001545

WISCONSIN

Milwaukee County

APPOMATTOX (Shipwreck), Off Atwater Beach, Shorewood, 04001547

WYOMING

Converse County

Commerce Block, Fourth and Birch Sts., Glenrock, 04001548

On August 16, 2004, the following property was removed from the National Register of Historic Places; and determined eligible for the National Register of Historic Places:

NORTH CAROLINA

Watauga County

Valle Crucis Historic District, along NC 194 and SR 1112 (Broadstone Rd.), Valle Crucis, 04000586

[FR Doc. 05–93 Filed 1–3–05; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

National Park Service

Proposed Exchange of Federal Lands for Privately Owned Lands at Olympic National Park

AGENCY: National Park Service, Interior.

ACTION: Notice of proposed land exchange.

SUMMARY: The federally-owned land described below, which was acquired by the National Park Service, has been determined to be suitable for disposal by exchange. The authority for this exchange is the Act of July 15, 1968 (16 U.S.C. 460 *l*–22(b)) and the Act of June 29, 1938 (16 U.S.C. 251), as amended.

The selected Federal land is within the boundary of Olympic National Park (ONP), along the North Shore Road of the Quinault area. This land has been surveyed to evaluate potential consequences of a land exchange. Those surveys have determined that there will not be any effect on threatened, endangered, or rare species; and there will not be any effect on historical, cultural, or archeological resources. These reports are available upon request.

Fee ownership of the federally-owned property to be exchanged: ONP Tract No. 44–140 is a 0.44 +/− acre parcel of land acquired by the United States of America by deed recorded 12/21/1999, Grays Harbor County Auditor No. 1999–12210050.

Conveyance of the land by the United States of America will be by Quitclaim Deed and include certain land use restrictions to prohibit inappropriate use and development.

In exchange for the lands identified in Paragraph I, the United States of America will acquire a 0.26 +/− acre parcel of land, currently owned by Mr. Thomas LaForest, lying within the boundary of ONP (ONP Tract No. 36–122), also along the North Shore Road of the Quinault area. The private lands are being acquired in fee simple with no reservations, subject only to rights of way and easements of record. Acquisition of the private land will eliminate the risk of inappropriate development along the main roadway through this portion of the park. The acquisition will also provide consistent management with the adjacent park administered lands that currently surround the private land. The exchange will allow for private garage use at a more suitable location that already has this existing structure. This action will ensure minimal adverse impacts to visitor services, natural resources, and the scenic values in ONP.

The value of the proposed properties to be exchanged shall be determined by current fair market value appraisals. Those values shall be equalized by payment of cash, as circumstances require. There is no anticipated increase in maintenance or operational costs as a result of the exchange.

FOR FURTHER INFORMATION CONTACT: Detailed information concerning this exchange, such as precise legal descriptions, maps, and environmental documentation, is available from: Superintendent, Olympic National Park, 600 Park Avenue, Port Angeles, Washington 98362–9798; telephone (360) 565–3111.

For a period of 45 calendar days from the date of this notice, interested parties may submit written comments to the above address. Adverse comments will be evaluated and this action may be modified or vacated accordingly. In the absence of any action to modify or vacate, this realty action will become the final determination of the Department of Interior.

Dated: November 2, 2004.

Jonathan B. Jarvis,

Regional Director, Pacific West Region.

[FR Doc. 05–44 Filed 1–3–05; 8:45 am]

BILLING CODE 4312–KY–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–528]

Certain Foam Masking Tape; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 24, 2004, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of 3M Company, 3M Innovative Properties Company, both of St. Paul, Minnesota, and Jean Silvestre of Hamoir, Belgium. An amended complaint was filed on December 13, 2004. The amended complaint alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain foam masking tape by reason of infringement of claims 1–4, 7–10, 13, 16–21 and 23–24 of U.S. Patent No. 4,996,092, and claims 1, 3, 4, 6–8, 10–11, 13, 14 and 16 of U.S. Patent No. 5,260,097. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue a permanent exclusion order and permanent cease and desist orders.

ADDRESSES: The amended complaint and its exhibits, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: Steven R. Pedersen, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202–205–2781.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2004).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 22, 2004, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain foam masking tape by reason of infringement of one or more of claims 1–4, 7–10, 13, 16–21 and 23–24 of U.S. Patent No. 4,996,092, or claims 1, 3, 4, 6–8, 10–11, 13, 14 and 16 of U.S. Patent No. 5,260,097, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which

this notice of investigation shall be served:

(a) The complainants are—3M Company, 3M Corporate Headquarters, 3M Center, St. Paul, Minnesota 55144; 3M Innovative Properties Company, 3M Corporate Headquarters, 3M Center, St. Paul, Minnesota 55144; Mr. Jean Silvestre, Grand Enclos 2, 4180 Hamoir, Belgium;

(b) The respondents are the following companies alleged to be in violation of section 337, and are the parties upon which the complaint is to be served: Boss Auto Import, S.A., Avenida del Valles, 28, 08440 Cardedeu, Barcelona, Spain; Chemicar USA, Inc., 670 New York Street, Memphis, Tennessee 38104; EMM America, Inc., 349 Owl Street, Campton, New Hampshire 03223; E.M.M. International B.V., Marsweg 59, 8013 PE Zwolle, Netherlands; Indasa, S.A., Zona Industrial de Aveiro, Lote 46, P.O. Box 3005, 3801–903, Aveiro, Portugal; Indasa U.S.A., Inc., 9 Falstrom Court, Passaic, New Jersey 07055; Intertape Polymer Corporation, 3647 Cortez Road West, Bradenton, Florida; IPG Administrative Services, Inc., 3647 Cortez Road West, Bradenton, Florida 34210; Intertape Polymer Group, Inc., 110 E. Montee de Liesse, Montreal, Quebec, Canada, H4T 1N4; Saint-Gobain Abrasifs (France), Rue de L'Ambassadeur, BP8, 78702 Conflans-Saint-Honorine, France; Saint-Gobain Abrasives, Inc., 1 New Bond Street, Worcester, Massachusetts 01606; Transtar Autobody Technologies, Inc., 2040 Heiserman Drive, Brighton, Michigan 48114; Vosschemie GmbH, Esinger Steinweg 50, D–25436 Uetersen, Germany.

(c) Steven R. Pedersen, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436, who shall be the Commission investigative attorney, party to this investigation; and

(3) For the investigation so instituted, the Honorable Charles E. Bullock is designated as the presiding administrative law judge.

A response to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such response will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting the response to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter a final determination containing such findings, and may result in the issuance of a limited exclusion order or cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 28, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–36 Filed 1–3–05; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1089 (Preliminary)]

Certain Orange Juice From Brazil

AGENCY: United States International Trade Commission.

ACTION: Institution of antidumping investigation and scheduling of a preliminary phase investigation.

SUMMARY: The Commission hereby gives notice of the institution of an investigation and commencement of preliminary phase antidumping investigation No. 731–TA–1089 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) (the Act) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Brazil of certain orange juice,[1] provided for in subheadings 2009.11.00, 2009.12.25, 2009.12.45, and 2009.19.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value. Unless the Department of Commerce extends the time for initiation pursuant to section 732(c)(1)(B) of the Act (19 U.S.C. 1673a(c)(1)(B)), the Commission must reach a preliminary determination in antidumping investigations in 45 days, or in this case by February 10, 2005. The Commission's views are due at Commerce within five business days thereafter, or by February 17, 2005.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

EFFECTIVE DATE: December 27, 2004.

FOR FURTHER INFORMATION CONTACT: Elizabeth Haines (202) 205–3200), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—This investigation is being instituted in response to a petition filed on December 27, 2004, on behalf of Florida Citrus Mutual, Lakeland, FL; A. Duda & Sons (d/b/a Citrus Belle) Ovieda, FL; Citrus World, Inc., Lake Wales, FL; Peace River Citrus Products, Inc., Arcadia, FL; and Southern Garden Citrus Processing Corp. (d/b/a Southern Gardens), Clewiston, FL.

Participation in the investigation and public service list.—Persons (other than petitioners) wishing to participate in the investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under

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[1] The imported product subject to this investigation is certain orange juice for transport and/or manufacturing, produced in two different forms: (1) Frozen orange juice in a highly concentrated form, referred to as frozen concentrated orange juice for further manufacturing (''FCOJM''); and (2) pasteurized single-strength orange juice which has not been concentrated, referred to as not-from-concentrate orange juice. Excluded from the scope of the investigation are: (1) Imports of reconstituted orange juice and frozen orange juice for retail and (2) imports of FCOJM from Brazilian manufacturers/exporters covered by the existing antidumping duty order on frozen concentrated orange juice from Brazil.

investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this investigation available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigation under the APO issued in the investigation, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Commission's Director of Operations has scheduled a conference in connection with this investigation for 9:30 a.m. on January 19, 2005, at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC. Parties wishing to participate in the conference should contact Betsy Haines (202) 205–3200 not later than January 14, 2005, to arrange for their appearance. Parties in support of the imposition of antidumping duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before January 24, 2005, a written brief containing information and arguments pertinent to the subject matter of the investigation. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This investigation is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: December 18, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–37 Filed 1–3–05; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated July 28, 2004 and published in the **Federal Register** on August 10, 2004, (69 FR 48521), Applied Science Labs, Inc., A Division of Alltech Associates Inc., 2701 Carolean Industrial Drive, State College, Pennsylvania 16801, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the following basic classes of controlled substance:

Drug	Schedule
Heroin (9200)	I
Cocaine (9041)	II
Codeine (9050)	II
Meperidine (9230)	II
Methadone (9250)	II
Morphine (9300)	II

The company plans to import the listed controlled substances for the manufacture of reference standards.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Applied Science Labs, Inc. to import the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Applied Science Labs, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–58 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to Section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on October 28, 2004, Cambrex Charles City, Inc., 1205 11th Street, Charles City, Iowa 50616, made application by renewal and on October 13, 2004 by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed:

Drug	Schedule
Amphetamine (1100)	II
Methylphenidate (1724)	II
Dextropropoxyphene (9273)	II
Fentanyl (9801)	II

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: **Federal Register** Representative, Office of Liaison and Policy (ODLR) and must be filed no later than March 7, 2005.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–72 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under 21 U.S.C. 952(a)(2)(B) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on October 28, 2004, Cambrex Charles City, Inc., 1205 11th Street, Charles City, Iowa 50616, made application by renewal to the Drug Enforcement Administration (DEA) for registration as an importer of Phenylacetone (8501), a basic class of controlled substance listed in Schedule II.

The company plans to import the phenylacetone to manufacture amphetamine for distribution to its customers.

Any manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections or requests for hearing may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative, Office of Liaison and Policy (ODLR) and must be filed no later than February 3, 2005.

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1301.34(b), (c), (d), (e) and (f). As noted in a previous notice published in the Federal Register on September 23, 1975, (40 FR 43745–46), all applicants for registration to import a basic class of any controlled substances in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1301.34(b), (c), (d), (e) and (f) are satisfied.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–73 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated July 21, 2004, and published in the **Federal Register** on August 10, 2004, (69 FR 48521–48522), Cayman Chemical Company, 1180 East Ellsworth Road, Ann Arbor, Michigan 48108, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I

The company plans to manufacture small quantities of marihuana derivatives for research purposes.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Cayman Chemical Company to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Cayman Chemical Company to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–68 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated June 28, 2004, and published in the **Federal Register** on July 13, 2004, (69 FR 42067–42068), Cedarburg Pharmaceuticals, Inc., 870 Badger Circle, Grafton, Wisconsin 53024, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Tetrahydrocannabinols (7370)	I
Dihydromorphine (9145)	I
Hydromorphone (9150)	II
Fentanyl (9801)	II

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Cedarburg Pharmaceuticals, Inc. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Cedarburg Pharmaceuticals, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–66 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to Section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on September 22, 2004 and October 29, 2004, Cedarburg Pharmaceuticals, Inc., 870 Badger Circle, Grafton, Wisconsin 53024, made application by letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in Schedule II.

Drug	Schedule
Dihydrocodeine (9120)	II
Remifentanil (9739)	II
Sufentanil (9740)	II

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: Federal Register Representative, Office of Liaison and Policy (ODLR) and must be filed no later than March 7, 2005.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–76 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in Schedule I or II and prior to issuing a regulation under 21 U.S.C. 952(a)(2)(B) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on July 7, 2004, Chattem Chemicals Inc., 3801 St Elmo Avenue, Building 18, Chattanooga, Tennessee 37409, made application by renewal to the Drug Enforcement Administration (DEA) for registration as an importer of the basic classes of controlled substances listed below:

Drug	Schedule
N-Ethylamphetamine (1475)	I
2,5-Dimethoxyamphetamine (7396)	I
4-Methoxyamphetamine (7411)	I
Difenoxin (9168)	I
Methamphetamine (1105)	II
Raw Opium (9600)	II
Concentrate of Poppy Straw (9670).	II

The company plans to import small quantities of the listed controlled substances for the manufacture of analytical reference standards.

Any manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances may file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections or requests for hearing may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA **Federal Register** Representative, Office of Liaison and Policy (ODLR) and must be filed no later than February 3, 2005.

This procedure is to be conducted simultaneously with and independent of the procedures described in 21 CFR 1301.34(b), (c), (d), (e) and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745–46), all applicants for registration to import a basic class of any controlled substances in Schedule I or II are and will continue to be required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1301.34(b), (c), (d), (e) and (f) are satisfied.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration,

[FR Doc. 05–75 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated July 21, 2004, and published in the **Federal Register** on August 10, 2004, (69 FR 48522), Dade Behring Inc., Route 896 Corporate Boulevard, Building 100, Attention: RA/QA, Post Office Box 6101, Newark, Delaware 19714, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances:

Drug	Schedule
Tetrahydrocannabionols (7370)	I
Ecgonine (9180)	II
Morphine (9300)	II

The company plans to produce the listed controlled substances in bulk to be used in the manufacture of reagents and drug calibrator/controls for DEA exempt products.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Dade Behring Inc. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Dade Behring Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–65 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to 21 CFR 1301.33(a), title 21 of the Code of Federal Regulations (CFR), this is notice that on September 2, 2004, Eli-Elsohly Laboratories, Inc., Mahmoud A. Elsohly Ph.D., 5 Industrial Park Drive, Oxford, Mississippi 38655, made application by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of Thebaine (9333), a basic class of controlled substance listed in Schedule II.

The company plans to manufacture the listed controlled substance in bulk for use in analysis and drug test standards.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA **Federal Register** Representative, Office of Liaison and Policy (ODLR) and must be filed no later than March 7, 2005.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–74 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

Notice dated July 28, 2004 and published in the **Federal Register** on August 10, 2004, (69 FR 48522), Hospira, Inc., 1776 North Centennial Drive, McPherson, Kansas 67460–1247, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Remifentanil (9739), a basic class of controlled substance listed in Schedule II.

The company plans to import the listed controlled substance for use in dosage unit manufacturing.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Hospira, Inc. to import the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Hospira, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–60 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to Section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on October 1, 2004, Houba, Inc., PO Box 190, 16235 State Road 17, Culver, Indiana 46511, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in Schedule II; and by letter dated October 1, 2004, to modify its name to Acura Pharmaceutical Technologies, Inc., and change the address by removing the P.O. Box 190.

Drug	Schedule
Oxycodone (9143)	II
Hydrocodone (9193)	II

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA **Federal Register** Representative, Office of Liaison and Policy (ODLR) and must be filed no later than March 7, 2005.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–77 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated July 23, 2004 and published in the **Federal Register** on August 10, 2004, (69 FR 48522–48523), JFC Technologies, LLC, 100 West Main Street, PO Box 669, Bound Brook, New Jersey 08805, made application by letter to the Drug Enforcement Administration (DEA) to be registered as an importer of Meperidine-Intermediate-B (9233), a basic class of controlled substance listed in Schedule II.

The company plans to import the listed controlled substance for the production of other controlled substances for distribution to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of JFC Technologies, LLC to import the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated JFC Technologies, LLC to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of

the basic class of controlled substance listed.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–61 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated July 23, 2004, and published in the **Federal Register** on August 10, 2004, (69 FR 48523), JFC Technologies, LLC, 100 West Main Street, Bound Brook, New Jersey 08805, made application by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of Diphenozylate (9170), a basic class of controlled substance listed in Schedule II.

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of JFC Technologies, LLC to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated JFC Technologies, LLC to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–64 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated July 8, 2004, and published in the **Federal Register** on July 20, 2004, (69 FR 43436), Johnson Matthey Inc., Custom Pharmaceuticals Department, 2003 Nolte Drive, West Deptford, New Jersey 08066, made application by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of Dihydromorphine (9145), a basic class of controlled substance in Schedule I.

The company plans to manufacture Dihydromorphine for internal use in production of other controlled substances for distribution to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Johnson Matthey Inc. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Johnson Matthey Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–63 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to 21 CFR 1301.33(a), title 21 of the Code of Federal Regulations (CFR), this is notice that on October 4, 2004, Noramco Inc., 1440 Olympic Drive, Athens, Georgia 30601, made application by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of Dihydrocodeine (9120), a basic class of controlled substance listed in Schedule II.

The company plans to manufacture the listed controlled substance in bulk for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative, Office of Liaison and Policy (ODLR) and must be filed no later than (60 days from publication).

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–52 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to 21 CFR 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on October 4, 2004, Noramco Inc., Division of Ortho-McNeil, Inc., 500 Old Swedes Landing Road, Wilmington, Delaware 19801, made application by renewal and by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of Dihydrocodeine (9120), a basic class of controlled substance listed in Schedule II.

The company plans to manufacture the listed controlled substance in bulk for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative, Office

of Liaison and Policy (ODLR) and must be filed no later than March 7, 2005.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–70 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to Section 1301.33(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on November 16, 2004, Organichem Corporation, 33 Riverside Avenue, Rensselaer, New York 12144, made application by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of Hydrocodone (9193) and Fentanyl (9180), a basic class of controlled substances in Schedule II.

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: Federal Register Representative, Office of Liaison and Policy (ODLR) and must be filed no later than March 7, 2005.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–69 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to 21 CFR 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on September 2, 2004, Organix Inc., 240 Salem Street, Woburn, Massachusetts 01801, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of Codeine (9041), a basic class of controlled substance listed in Schedule II.

The company plans to manufacture small quantities of the listed controlled substance for use in drug abuse detection kits.

Any other such applicant and any person who is presently registered with DEA to manufacture such a substance may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA **Federal Register** Representative, Office of Liaison and Policy (ODLR) and must be filed no later than March 7, 2005.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–67 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated July 21, 2004, and published in the **Federal Register** on August 10, 2004, (69 FR 48525), Syva Company, Dade Behring Inc., Regulatory Affairs Dept. 1–310, 20400 Mariani Avenue, Cupertino, California 95014, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed below, and by letter dated July 6, 2004, to modify its name to Dade Behring, Inc.

Drug	Schedule
Tetrahydrocannabionols (7370)	I
Ecgonine (9180)	II
Morphine (9300)	II

The company plans to produce the listed controlled substances in bulk to be used in the manufacture of reagents and drug calibrator/controls for DEA exempt products.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Syva Company, Dade Behring Inc. to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Syva Company, Dade Behring Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–62 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated September 16, 2004 and published in the **Federal Register** on September 30, 2004, (69 FR 58548), Tocris Cookson, Inc., 16144 Westwoods Business Park, Ellisville, Missouri 63021–4500, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Tetrahydrocannabinols (7370), a basic class of controlled substance listed in Schedule I.

The company plans to import small quantities of the listed substance for research purposes.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Tocris Cookson, Inc. to import the basic classes of controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Tocris Cookson, Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the

company's background and history. Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: December 21, 2004.

William J. Walker,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 05–59 Filed 1–3–05; 8:45 am]

BILLING CODE 4410–09–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–312]

Sacramento Municipal Utility District; Rancho Seco Nuclear Generating Station; Partial Exemption from Requirements of 10 CFR 50.719(c); 10 CFR Part 50, Appendix A; 10 CFR Part 50, Appendix B

1.0 Background

Sacramento Municipal Utility District (SMUD) is the licensee and holder of Facility Operating License No. DPR–54 for the Rancho Seco Nuclear Generating Station (Rancho Seco), a permanently shutdown decommissioning nuclear plant. Although permanently shutdown, this facility is still subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC).

The Sacramento Municipal Utility District (SMUD) shut down Rancho Seco Nuclear Generating Station permanently on June 7, 1989, after approximately 15 years of operation. On August 29, 1989, SMUD formally informed the NRC that the plant was shut down permanently. On May 20, 1991, SMUD submitted the Rancho Seco decommissioning plan and on March 20, 1995, the NRC issued an Order approving the decommissioning plan and authorizing the decommissioning of Rancho Seco.

SMUD began actively decommissioning Rancho Seco in February 1997, and completed the transfer of all of the spent nuclear fuel to the 10 CFR Part 72 licensed Independent Spent Fuel Storage Installation (ISFSI) on August 21, 2002. Accordingly, the only quality-related structures, systems, or components (SSCs) at the Rancho Seco 10 CFR Part 50 licensed site are the radioactive sources used to calibrate the instrumentation used to measure radioactivity in gaseous and liquid effluents.

Plant dismantlement is substantially (approximately 80%) complete and most of the SSCs that were safety-related or important-to-safety have been removed from the plant and shipped for disposal. The pressurizer was shipped to Envirocare for disposal in April 2004, removal of the steam generators is in progress with both steam generators scheduled to be shipped to Envirocare by spring 2005 (one by the end of 2004 and the second in spring 2005), and activities in preparation for the reactor vessel internals segmentation are underway and mobilization of the segmentation contractor is scheduled to begin in early 2005.

On September 2, 2004, SMUD filed a request for NRC approval of a partial exemption from the recordkeeping requirements of 10 CFR 50.71(c); 10 CFR 50, Appendix A; and 10 CFR 50, Appendix B.

2.0 Request/Action

Pursuant to the requirements of 10 CFR 50.71(d)(2) and 10 CFR 50.12, SMUD requested partial exemption to the recordkeeping requirements of 10 CFR 50.71(c); 10 CFR Part 50, Appendix A; CFR Part 50, Appendix B. This exemption request was characterized as ''partial'' because the exemption would apply only to the disposal of hardcopies of records, prior to termination of the Rancho Seco license, that: (1) Are associated with the operation, design, fabrication, erection, and testing of structures, systems, and components (SSCs) that are no longer quality-related or important to safety or have been removed from the plant for disposal; and (2) require storage in their original hard copy format due to practical and feasibility limitations associated with transferring them to microfilm or microfiche.

Most of these records are for SSCs that have been removed from Rancho Seco and disposed of off-site. Disposal of these records will not adversely impact the ability to meet other NRC regulatory requirements for the retention of records [*e.g.*, 10 CFR 50.54(a), (p), (q), and (bb); 10 CFR 50.59(d); 10 CFR 50.75(g); *etc.*]. These regulatory requirements ensure that records from operation and decommissioning activities are maintained for safe decommissioning, spent nuclear fuel storage, completion and verification of final site survey, and license termination.

3.0 Discussion

NRC licensees are required to maintain their records according to the NRC regulatory recordkeeping requirements. Pursuant to the requirements of 10 CFR 50.12, ''Specific Exemptions,'' and 10 CFR 50.71(d)(2), SMUD filed a request for a partial exemption from the NRC regulatory recordkeeping requirements contained in 10 CFR 50.71(c), 10 CFR 50, Appendix A, and 10 CFR 50, Appendix B. The NRC recordkeeping requirements at issue in SMUD's request for exemption are as follows.

> 10 CFR 50.71, ''Maintenance of records, making of reports,'' subpart (c) states: Records that are required by the regulations in this part, by license condition, or by technical specifications, must be retained for the period specified by the appropriate regulation, license condition, or technical specification. If a retention period is not otherwise specified, these records must be retained until the Commission terminates the facility license.

10 CFR 50, Appendix A, ''General Design Criteria for Nuclear Power Plants,'' establishes the necessary design, fabrication, construction, testing, and performance requirements for structures, systems, and components important to safety; that is, structures, systems, and components that provide reasonable assurance that the facility can be operated without undue risk to the health and safety of the public. Specifically, SMUD requests an exemption from Criterion 1, ''Quality standards and records,'' which states in part:

> Appropriate records of the design, fabrication, erection, and testing of structures, systems, and components important to safety shall be maintained by or under the control of the nuclear power unit licensee throughout the life of the unit.''

10 CFR 50, Appendix B, ''Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants,'' establishes quality assurance requirements for the design, construction, and operation of structures, systems, and components that prevent or mitigate the consequences of postulated accidents that could cause undue risk to the health and safety of the public. Specifically, SMUD requests an exemption from Criterion XVII, ''Quality Assurance Records,'' which states:

> Sufficient records shall be maintained to furnish evidence of activities affecting quality. The records shall include at least the following: Operating logs and the results of reviews, inspections, tests, audits, monitoring of work performance, and materials analyses. The records shall also include closely-related data such as qualifications of personnel, procedures, and equipment. Inspection and test records shall, as a minimum, identify the inspector or data recorder, the type of observation, the results, the acceptability, and the action taken in connection with any deficiencies noted. Records shall be identifiable and retrievable.

Consistent with applicable regulatory requirements, the applicant shall establish requirements concerning record retention, such as duration, location, and assigned responsibility.

Exemption Requirements

As stated in 10 CFR 50.12, ''[t]he Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of the regulations of this part.'' In order to permit specific exemptions from the requirements of this part the criteria of 10 CFR 50.12(a)(1) and the requirements of 10 CFR 50.12(a)(2) must be met.

10 CFR 50(a)(1) requires three criteria to be met before an exemption can be granted: first, the exemptions must be authorized by law; second, the exemption must not present an undue risk to the public health and safety; and third, it must be consistent with the common defense and security. In addition, for the Commission to consider granting an exemption from the requirements of Part 50, special circumstances as required by 10 CFR 50.12(a)(2) must be present. The special circumstance at issue in the present request for exemption is 50.12(a)(2)(ii) which states, ''[a]pplication 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 application of the three criteria in 50.12(a)(1) and the requirement of special circumstances in 50.12(a)(2) are addressed below.

Specific Exemption Is Authorized by Law

The partial exemption from the recordkeeping requirements of 10 CFR 50.71(c); 10 CFR Part 50, Appendix A; and 10 CFR Part 50, Appendix B, as requested for the hard copy records described above is authorized by law. Specifically, 10 CFR 50.71(d)(2) allows for the granting of specific exemptions to the record retention requirements specified in the regulations.

NRC regulation 10 CFR 50.71(d)(2) states, in part:

the retention period specified in the regulations in this part for such records shall apply unless the Commission, pursuant to § 50.12 of this part, has granted a specific exemption from the record retention requirements specified in the regulations in this part.

Based on 10 CFR 50.71(d)(2), since the specific exemption requirements of 10 CFR 50.12 are satisfied as described below, the exemption from the recordkeeping requirements of 10 CFR 50.71(c); 10 CFR Part 50, Appendix A; and 10 CFR Part 50, Appendix B is authorized by law.

Specific Exemption Will Not Present an Undue Risk to the Public Health and Safety

With all of the spent nuclear fuel transferred to the Rancho Seco ISFSI, there is insufficient radioactive material remaining on the Rancho Seco 10 CFR Part 50 licensed site to pose any significant potential risk to the public health and safety under any credible event scenario. This provides additional assurance that the partial exemption for the specified hard copy records will not present any reasonable possibility of undue risk to the public health and safety.

In two letters dated February 5, 2002, the NRC granted Amendment Nos. 129 and 130 to the Rancho Seco Operating License (Possession Only). These amendments deleted definitions, LCOs, surveillance requirements, and administrative requirements from the 10 CFR Part 50 Technical Specifications on the basis that all of the spent nuclear fuel was transferred to the Rancho Seco ISFSI. In a letter dated October 10, 2002, the NRC issued an exemption from 10 CFR Part 50 security requirements and Amendment No. 131 to the Rancho Seco Operating License to reflect this security exemption. Hence, the NRC has already concurred with the conclusion that granting regulatory exemptions will have no reasonable possibility of presenting any undue risk to the public health and safety.

The partial exemption from the recordkeeping requirements of 10 CFR 50.71(c); 10 CFR Part 50, Appendix A; and 10 CFR Part 50, Appendix B, for the hard copy records described above is administrative in nature and will have no impact on any remaining decommissioning activities or on radiological effluents. The exemption will merely advance the schedule for destruction of the specified hard copy records. Considering the content of these records, the elimination of these records on an advanced timetable will have no reasonable possibility of presenting any undue risk to the public health and safety.

Specific Exemption Consistent With the Common Defense and Security

The partial exemption from the recordkeeping requirements of 10 CFR 50.71(c); 10 CFR Part 50, Appendix A; and 10 CFR Part 50, Appendix B, for the types of hard copy records described above is consistent with the common defense and security as defined in the Atomic Energy Act (42 U.S.C. 2014, Definitions) and in 10 CFR 50.2 ''Definitions.'' The partial exemption requested does not impact remaining decommissioning activities and does not involve information or activities that could potentially impact the common defense and security of the United States.

Rather, the exemption requested is administrative in nature and would merely advance the current schedule for destruction of the specified hard copy records. Considering the content of these records, the elimination of these records on an advanced timetable has no reasonable possibility of having any impact on national defense or security. Therefore, the partial exemption from the recordkeeping requirements of 10 CFR 50.71(c); 10 CFR Part 50, Appendix A; and 10 CFR Part 50, Appendix B, for the types of hard copy records described above is consistent with the common defense and security.

Special Circumstances

The current status of Rancho Seco facility, 80% dismantled and all irradiated fuel transferred to the ISFSI, constitutes special circumstances which will allow the NRC to consider granting the partial exemption requested. Consistent with 10 CFR 50.12(a)(2)(ii), applying the recordkeeping requirements of 10 CFR 50.71(c), 10 CFR Part 50, Appendix A, and 10 CFR Part 50, Appendix B to the continued storage of the hard copy records described previously is not necessary to achieve the underlying purpose of the rules.

The underlying purpose of the subject recordkeeping regulations is to ensure that the NRC staff has access to information that, in the event of an accident, incident, or condition that could impact public health and safety, would assist in the recovery from such an event and could also help prevent future events or conditions that could adversely impact public health and safety. Additionally, the NRC staff would access the records as part of the normal inspection process related to the subject SSCs.

Given the current status of Rancho Seco decommissioning, the records that would be subject to early destruction would not provide the NRC with information that would be pertinent or useful. The types of records that would fall under the exemption would include hard copy radiographs, vendor equipment technical manuals, and recorder charts associated with operating nuclear power plant SSCs that had been classified as important to safety during power operations, but that are no longer classified as important to safety, are no longer operational, or have

removed from the Rancho Seco site for disposal.

With the majority of the primary and secondary systems removed for disposal, the Rancho Seco site no longer houses ''a nuclear power reactor and associated equipment necessary for electric power generation.'' Thus, with respect to the underlying intent of the recordkeeping rules cited above, Rancho Seco is not able to generate electricity and is no longer a nuclear power unit as defined in 10 CFR Part 50, Appendix A.

In addition, with all the spent nuclear fuel having been transferred to the ISFSI, there is not sufficient radioactive material inventory remaining on the 10 CFR Part 50 licensed site to pose any significant potential risk to the public health and safety. Thus, there are no longer any ''structures, systems, and components required to provide reasonable assurance the facility can be operated without undue risk to the health and safety of the public.'' This provides additional assurance that, with respect to the underlying intent of the recordkeeping rules, Rancho Seco is no longer a nuclear power unit as defined in 10 CFR Part 50, Appendix A.

Based on the above, application of the subject recordkeeping requirements to the Rancho Seco hard copy records specified above is not required to achieve the underlying purpose of the rule. Thus, special circumstances are present which the NRC may consider, pursuant to 10 CFR 50.12(a)(2)(ii), to grant the requested exemption.

4.0 Conclusion

The staff agrees that 10 CFR 50.71(d)(2) allows the Commission to grant specific exemptions to the record retention requirements specified in regulations provided the requirements of 10 CFR 50.12 are satisfied.

The staff agrees that the requested partial exemption from the recordkeeping requirements of 10 CFR 50.71(c); 10 CFR Part 50, Appendix A; 10 CFR Part 50, Appendix B, will not present an undue risk to the public health and safety. The destruction of the identified hard copy records will not impact remaining decommissioning activities; plant operations, configuration, and/or radiological effluents; operational and/or installed SSCs that are quality-related or important to safety; or nuclear security.

The staff agrees that the destruction of the identified hard copy records is administrative in nature and does not involve information or activities that could potentially impact the common defense and security of the United States.

The staff agrees that the purpose for the recordkeeping regulations is to ensure that the NRC Staff has access to information that, in the event of any accident, incident, or condition that could impact public health and safety, would assist in the protection of public health and safety during recovery from the given accident, incident, or condition, and also could help prevent future events or conditions adversely impacting public health and safety. Further, since most of the Rancho Seco SSCs that were safety-related or important-to-safety have been removed from the plant and shipped for disposal, the staff agrees that the records identified in the partial exemption would not provide the NRC with useful information during an investigation of an accident or incident.

Therefore, the Commission grants SMUD the requested partial exemption to the recordkeeping requirements of 10 CFR 50.71(c); 10 CFR Part 50, Appendix A; 10 CFR Part 50, Appendix B, as described in the September 2, 2004, letter.

Pursuant to 10 CFR Part 51, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment as documented in **Federal Register** (69 FR 67371, Nov. 17, 2004).

This exemption is effective upon issuance.

Dated at Rockville, Maryland this 23rd day of December, 2004.

For the Nuclear Regulatory Commission.

Daniel M. Gillen,

Deputy Director, Decommissioning Directorate, Division of Waste Management and Environmental Protection, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 05–23 Filed 1–3–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–30]

Maine Yankee Atomic Power Company, Maine Yankee Independent Spent Fuel Storage Installation, Issuance of Environmental Assessment and Finding of No Significant Impact

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of exemptions to Maine Yankee Atomic Power Company (the licensee), pursuant to title 10 of the Code of Federal Regulations (10 CFR) 72.7, from specific provisions of 10 CFR 72.212(a)(2), 72.212(b)(2)(i), 72.212(b)(7), and 72.214. The licensee is storing spent nuclear fuel under the general licensing provisions of 10 CFR part 72 in the NAC–UMS® Universal Storage System at an independent spent fuel storage installation (ISFSI) located at the Maine Yankee Atomic Power Station in Wiscasset, Maine. The requested exemptions would allow the licensee to deviate from requirements of the NAC–UMS® Certificate of Compliance (CoC) No. 1015, Amendment 2, Appendix A, Technical Specifications for the NAC–UMS® System, Section A 5.1, Training Program, and Section A 5.5, Radioactive Effluent Control Program. Specifically, the exemptions would relieve the licensee from the requirements to: (1) Develop training modules under its systematic approach to training (SAT) that include comprehensive instructions for the operation and maintenance of the ISFSI, except for the NAC–UMS® Universal Storage System; and (2) submit an annual report pursuant to 10 CFR 72.44(d)(3).

II. Environmental Assessment (EA)

Identification of Proposed Action: The proposed action is to exempt the licensee from regulatory requirements to develop certain training and submit an annual report. By letter dated February 25, 2004, as supplemented June 8, 2004, the licensee requested exemptions from certain regulatory requirements of 10 CFR 72.212(a)(2), 72.212(b)(2)(i), 72.212(b)(7), and 72.214 which require a general licensee to store spent fuel in an NRC-certified spent fuel storage cask under the terms and conditions set forth in the CoC. The proposed exemptions would allow the licensee to deviate from the requirements in CoC No. 1015, Amendment 2, Appendix A, Technical Specifications for the NAC–UMS® System, Section A 5.1, Training Program, and Section A 5.5, Radioactive Effluent Control Program.

CoC No. 1015, Amendment 2, Appendix A, Technical Specifications for the NAC–UMS System, Section A 5.1, Training Program, requires that a training program for the NAC–UMS® Universal Storage System be developed under the general licensee's SAT. Further, the training modules must include comprehensive instructions for the operation and maintenance of both the NAC–UMS® Universal Storage System and the ISFSI. In addition, CoC No. 1015, Amendment 2, Appendix A, Technical Specifications for the NAC–UMS System, Section A 5.5, Radioactive Effluent Control Program, Item c. requires an annual report to be submitted pursuant to 10 CFR 72.44(d)(3). By exempting the licensee

from the requirements of 10 CFR 72.212(a), 72.212(b)(2)(i), 72.212(b)(7), and 72.214 for this request, the licensee will not be required to either develop training modules that include comprehensive instructions for the operation and maintenance of the ISFSI or submit an annual report pursuant to 10 CFR 72.44(d)(3).

The proposed action before the NRC is whether to grant these exemptions under the provisions of 10 CFR 72.7.

Need for the Proposed Action: The NRC has determined that the requirements of CoC No. 1015, Amendment 2, Appendix A, Technical Specifications for the NAC–UMS® System, Section A 5.1, Training Program, and Section A 5.5, Radioactive Effluent Control Program impose regulatory obligations, with associated costs, that do not provide a commensurate increase in safety. Granting the requested exemptions will allow the licensee not to have to: (1) Develop training modules under the SAT that include comprehensive instructions for the operation and maintenance of the ISFSI, except for the NAC–UMS® Universal Storage System; or (2) submit an annual report pursuant to 10 CFR 72.44(d)(3). Thus, the licensee will not incur the costs associated with these activities.

Environmental Impacts of the Proposed Action: The NRC has reviewed the exemption requests submitted by the licensee and determined that not requiring the licensee to: (1) Develop training modules under its SAT that include comprehensive instructions for the operation and maintenance of the ISFSI, except for the NAC–UMS® Universal Storage System; and (2) submit an annual report pursuant to 10 CFR 72.44(d)(3) are administrative changes, and would have no significant impacts to the environment.

Further, NRC has evaluated the impact to public safety that would result from granting the requested exemptions. NRC determined that requiring the licensee to develop training modules under its SAT for the operation and maintenance of ISFSI structures, systems, and components considered not-important-to-safety would not provide a commensurate increase in public safety associated with the costs. Therefore, allowing the licensee to develop these modules separately from its SAT does not impact public safety. Also, NRC has determined that not requiring the licensee to submit an annual report specifying principal radionuclides released to the environment in liquid and in gaseous effluents does not impact public safety because the NAC–UMS® Universal Storage System is a sealed and leak-tight spent fuel storage system. Thus, there should be no releases to the environment of either liquid or gaseous effluents from normal operation of the NAC–UMS® Universal Storage System.

The proposed action would not increase the probability or consequences of accidents, no changes would be made to the types of effluents that may be released offsite, and there would be no increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action. Additionally the proposed action would have no significant non-radiological impacts.

Alternative to the Proposed Action: The alternative to the proposed action would be to deny approval of these exemptions. Denial of these exemption requests would have the same environmental impact as the proposed action.

Agencies and Persons Consulted: The NRC prepared this EA. No other sources were used. NRC, by letter dated August 10, 2004, provided a draft of this EA to the Honorable Charles Pray, State Nuclear Safety Advisor for the State of Maine for review. The State of Maine by letter dated November 15, 2004, did not indicate it had any environmental concerns related to granting the proposed exemptions. However, the State of Maine did provide the following comment:

> In that, the State of Maine has no objection to the NRC granting the exemption for the current existing licensure period as long as the current outstanding statutory obligations of the United States government are met in all of its responsibility in reference to [the] MYAPC facility, and that no extensions of the current twenty-year licensure of the ISFSI is approved. Any extension granted by the NRC beyond that date will [alter] the State's approval on this and other related matters and will require a need for ongoing assessment by the State of Maine of safety benefits to the citizens of Maine beyond its original and current licensed mission. The State would be required to fully [assess] as to how best [to] protect the citizens of the State from further federal lapses of obligations.

The staff has reviewed the State of Maine's comment and determined that neither exemption is coupled with extending the period of the Maine Yankee's general license for its ISFSI beyond the twenty-year period of its use of the NAC–UMS® Universal Storage System. Certificate of Compliance No. 1015 will be eligible for renewal at the expiration of this period and, if application for reapproval is made, the State of Maine will have an opportunity to comment on such application at that time.

Further, The NRC has determined that a consultation under Section 7 of the Endangered Species Act is not required because the proposed action will not affect listed species or critical habitats. The NRC has also determined that the proposed action is not a type of activity having the potential to cause effects on historic properties. Therefore, no consultation is required under Section 106 of the National Historic Preservation Act.

Conclusions: The NRC has concluded that the proposed action of granting these exemptions and not requiring the licensee to develop certain training or submit an annual report will not significantly impact the quality of the human environment and does not warrant the preparation of an environmental impact statement. Accordingly, it has been determined that a Finding of No Significant Impact is appropriate.

III. Finding of No Significant Impact

The environmental impacts of the proposed action have been reviewed in accordance with the requirements set forth in 10 CFR part 51. Based upon the foregoing EA, the NRC finds that the proposed action of granting exemptions from the specific provisions of 10 CFR 72.212(a), 72.212(b)(2)(i), 72.212(b)(7), and 72.214 and not requiring the licensee to: (1) Develop training modules under its SAT that include comprehensive instructions for the operation and maintenance of the ISFSI, except for the NAC–UMS® Universal Storage System; and (2) submit an annual report pursuant to 10 CFR 72.44(d)(3), will not significantly impact the quality of the human environment. Accordingly, the NRC has determined that an environmental impact statement for these proposed exemptions is not warranted.

The request for exemption was docketed under 10 CFR part 72, Docket 72–30. Please note that on October 25, 2004, the NRC suspended public access to the Agencywide Documents Access and Management System (ADAMS), and initiated an additional security review of publicly available documents to ensure that potentially sensitive information is removed from the ADAMS database accessible through the NRC's Web site. Interested members of the public should check the NRC's Web pages for updates on the availability of documents through ADAMS.

When public access to ADAMS is restored the documents related to this action, including the application for the exemptions and supporting

documentation, will be available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site you can access the NRC's ADAMS, which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are: For the request for exemptions dated February 25, 2004, the ADAMS accession number is ML040620577, and for the supplement dated June 8, 2004, the ADAMS accession number is ML041690143.

When public access to ADAMS is resumed and you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's Public Document Room (PDR) Reference staff at 1–800–397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov.* Also, after resumption of public access to ADAMS, these documents may also be viewed electronically on the public computers located at the NRC's PDR, O1F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated in Rockville, Maryland, this 13th of December, 2004.

For the Nuclear Regulatory Commission.

Stewart W. Brown,

Sr. Project Manager, Spent Fuel Project Office, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 05–24 Filed 1–3–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act; Meetings

DATES: Weeks of January 3, 10, 17, 24, 31, February 7, 2005.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of January 3, 2005

Wednesday, January 5, 2005

2 p.m. Affirmative Session (Public Meeting) (Tentative)

a. Private Fuel Storage (Independent Spent Fuel Storage Installation); Docket No. 72–22–ISFSI (Tentative)

b. Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2); Unpublished Board Order (Dec. 17, 2004). (Tentative)

Week of January 10, 2005—Tentative

Tuesday, January 11, 2005

9:30 a.m. Discussion of Security Issues (Closed—Ex. 1 & 9)

Wednesday, January 12, 2005

9:30 a.m. Discussion of Security Issues (Closed—Ex. 1 & 9)

Week of January 17, 2005—Tentative

There are no meetings scheduled for the Week of January 17, 2005.

Week of January 24, 2004—Tentative

Monday, January 24, 2005

9:30 a.m. Discussion of Security Issues (Closed—Ex. 1)

1:30 p.m. Discussion of Security Issues (Closed—Ex. 1, 2, 3, & 4)

Tuesday, January 25, 2005

9:30 a.m. Discussion of Security Issues (Closed—Ex. 1

Week of January 31, 2005—Tentative

Thursday, February 3, 2005

9:30 a.m. Briefing on Human Capital Initiatives (Closed—Ex. 2) (Tentative)

Week of February 7, 2005—Tentative

There are no meetings scheduled for the Week of February 7, 2005.

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Dave Gamberoni, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://nrc.gov/what-we-do/policy-making/schedule.html.*

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify the NRC's Disability Program Coordinator, August Spector, at 301–415–7080, TDD: 301–4152100, or by e-mail at *aks@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (201–415–1969). It addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: December 28, 2004.

Dave Gamberoni,

Office of the Secretary.

[FR Doc. 04–28753 Filed 12–30–04; 9:23 am]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from December 10, 2004, through December 22, 2004. The last biweekly notice was published on December 21, 2004 (69 FR 76486).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this

proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the basis for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff; (3) E-mail addressed to the Office of the Secretary,

U.S. Nuclear Regulatory Commission, *HearingDocket@nrc.gov;* or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to (301) 415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. A copy of the request for hearing and petition for leave to intervene should also be sent to the attorney for the licensee.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(I)–(viii).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

Calvert Cliffs Nuclear Power Plant, Inc., Docket Nos. 50–317 and 50–318, Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, Calvert County, Maryland

Date of amendment request: July 20, 2004.

Description of amendment request: The proposed administrative amendment corrects references in Technical Specification (TS) 5.6.7 and in TS Table 3.3.10–1, and deletes reference to hydrogen analyzers which were removed from the TSs by Amendment Nos. 262 and 239, for Unit Nos. 1 and 2, respectively, on March 2, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Would not involve a significant increase in the probability or consequences of an accident previously evaluated.

Amendment Nos. 262 and 239 were approved and issued by the Nuclear Regulatory Commission (NRC) on March 2, 2004. These amendments removed the requirements for the containment hydrogen recombiners and the hydrogen analyzers as equipment required to control hydrogen in the Containment. The amendments required the hydrogen analyzers to be retained as non-safety-related equipment to record hydrogen concentrations in beyond design-basis accidents. The request to remove hydrogen control from the design basis included a mark-up of proposed Technical Specification changes. However, related changes to Technical Specification Table 3.3.10–1, Technical Specification 5.6.7, and Technical Specification 3.8.1 were not included in the markup. Therefore, we are requesting an administrative change to correct this oversight.

Since the justification for these changes has been approved in Calvert Cliffs Amendment Nos. 262 and 239, there is no technical or safety issue associated with this request.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Would not create the possibility of a new or different [kind] of accident from any accident previously evaluated.

The proposed administrative amendment corrects references in a Technical Specification table and in a Technical Specification, and deletes reference to hydrogen analyzers. Since the justification for these changes has been approved in Calvert Cliffs Amendment Nos. 262 and 239, there is no technical or safety issue associated with this request. This request does not involve a change in the operation of the plant, and no new accident initiation mechanism is created by the proposed change, nor does the change involve a physical alteration of the plant.

Therefore, the proposed change does not create the possibility of a new or different [kind] of accident from any accident previously evaluated.

3. Would not involve a significant reduction in a margin of safety.

Amendment Nos. 262 and 239 were approved and issued by the Nuclear Regulatory Commission (NRC) on March 2, 2004. These amendments removed the requirements for the containment hydrogen recombiners and the hydrogen analyzers as equipment required to control hydrogen in the Containment. The amendments required the hydrogen analyzers to be retained as non-safety-related equipment to record hydrogen concentrations in beyond design-basis accidents. The request to remove hydrogen control from the design basis included a mark-up of proposed Technical Specification changes. However, related changes to Technical Specification Table 3.3.10–1, Technical Specification 5.6.7, and Technical Specification 3.8.1 were not included in the markup. Therefore, we are requesting an administrative change to correct this oversight.

Because the hydrogen analyzers were removed from the Technical Specifications by Amendment Nos. 262 and 239, no margin of safety is impacted by the proposed administrative changes.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: James M. Petro, Jr., Esquire, Counsel, Constellation Energy Group, Inc., 750 East Pratt Street, 5th floor, Baltimore, MD 21202.

NRC Section Chief: Richard J. Laufer.

Calvert Cliffs Nuclear Power Plant, Inc., Docket Nos. 50–317 and 50–318, Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, Calvert County, Maryland

Date of amendment request: August 3, 2004.

Description of amendment request: The proposed amendment would extend the surveillance requirement (SR) 3.3.3.1 test interval for reactor trip circuit breakers from 31 to 92 days and impose a staggered test interval consistent with SR 3.3.3.2.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Would not involve a significant increase in the probability or consequences of an accident previously evaluated.

The reactor trip circuit breakers (RTCB) are part of the Reactor Protective System (RPS). The RPS initiates a reactor trip to protect against violating the core specified acceptable fuel design limits and reactor coolant pressure boundary integrity during anticipated operational occurrences. By opening the RTCBs to trip the reactor, the RPS also assists the engineered safety features systems in mitigating accidents. All of the accident analyses that call for a reactor trip assume that the RTCBs operate and interrupt power to the control element drive mechanisms. The proposed testing interval will result in less wear on the RTCBs and, thereby, increase breaker reliability.

The RTCBs are accident mitigators and do not affect the probability of an accident.

Topical Report CE NPSD–951–A shows only one failure up to 1993 in the plants studied. Calvert Cliffs' surveillance records show no failures from 1994 to 2003. This data demonstrates that the consequences of an accident will not be significantly

increased by extending the surveillance interval and imposing a staggered test interval.

Therefore, extending the surveillance interval and imposing a staggered test interval does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Would not create the possibility of a new or different [kind] of accident from any accident previously evaluated.

There is no change in plant equipment or operation related to this license amendment request. The RTCBs are accident mitigators and extending the surveillance interval and imposing a staggered test interval does not adversely affect their operation.

Therefore, the proposed amendment does not create the possibility of a new or different [kind] of accident from any accident previously evaluated.

3. Would not involve a significant reduction in [a] margin of safety.

The margin of safety in this case is the reliance on the RTCBs to open on a signal from the RPS. Extending the surveillance frequency and imposing a staggered test interval results in a test every six weeks as opposed to the current monthly test. The new interval will result in less wear on the RTCBs, thereby improving the margin of safety.

Therefore, extending the surveillance interval and imposing a staggered test interval will not involve a significant reduction in [a] margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: James M. Petro, Jr., Esquire, Counsel, Constellation Energy Group, Inc., 750 East Pratt Street, 5th floor, Baltimore, MD 21202.

NRC Section Chief: Richard J. Laufer.

Entergy Gulf States, Inc., and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana

Date of amendment request: December 17, 2004.

Description of amendment request: The proposed change will revise the Technical Specification (TS) requirements for direct current (DC) sources. The current TS only includes Action Statements for an inoperable DC Power subsystem. The proposed change will add a new Action Statement to TS 3.8.4, ''DC Sources—Operating,'' to specifically address an inoperable battery charger.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The class 1E direct current (DC) electrical power system including the associated battery chargers are not initiators to any accident sequence analyzed in the Updated Safety Analysis Report (USAR). Operation in accordance with the proposed Technical Specification (TS) ensures that the DC system is capable of performing its function described in the USAR. While power to the non class 1E charger will be lost after a Design Basis Accident (DBA), the Division 1 and 2 batteries have the ability to supply all DBA loads and all other standby loads not automatically tripped on a LOCA [Loss of Coolant Accident] signal for 4 hours and have sufficient capacity to restore normal AC [alternating current] and DC power with the charger inoperable. The actions required to restore the power to the non-class 1E charger are included in the procedures for Station Blackout requiring the use of a non class 1E diesel generator. They allow the impacted DC battery and DC bus to be restored to perform its required function as described in the USAR.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes do not involve a physical change to the plant. No new equipment is being introduced, and installed equipment is not being operated in a new or different manner. There are no setpoints, at which protective or mitigative actions are initiated, affected by this change. These changes will not alter the manner in which equipment operation is initiated, nor will the function demands on credited equipment be changed. Any alterations in procedures will continue to assure that the plant remains within analyzed limits, and no change is being made to the procedures relied upon to respond to an off normal event as described in the USAR. As such, no new failures modes are being introduced.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The margin of safety is established through equipment design, operating parameters, and the setpoints at which automatic actions are initiated. The proposed changes are acceptable because the operability of the safety related DC systems are unaffected and there is no detrimental impact on any equipment design parameter. The plant will still be capable of operating within assumed conditions. Operations in accordance with the proposed TS ensures that the DC system is capable of performing its function as described in the USAR; therefore, the support of the DC system to the plant response to analyzed events will continue to provide the margins of safety assumed by the analysis. In addition, the DC system is within the scope of 10 CFR 50.65, ''Requirements for monitoring the effectiveness of maintenance at nuclear power plants,'' which will ensure the control of maintenance activities associated with the DC system. This provides sufficient management control of the requirements that assure the batteries are maintained in a highly reliable condition. The non-class 1E battery charger is the same model and has the same ratings as the installed Division 1 and 2 class 1E battery chargers (*i.e.*, same input loading and ampere current capability), and was purchased to Class 1E requirements. In addition, the backup battery charger can be powered from an onsite power source (Station Blackout (SBO) diesel generator) should it be required.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mark Wetterhahn, Esq., Winston & Strawn, 1400 L Street, NW., Washington, DC 20005.

NRC Section Chief: Michael K. Webb, Acting.

FirstEnergy Nuclear Operating Company, Docket No. 50–440, Perry Nuclear Power Plant, Unit 1, Lake County, Ohio

Date of amendment request: August 31, 2004.

Description of amendment request: The proposed amendment would modify the existing Technical Specification (TS) 3.4.1, ''Recirculation Loops Operating,'' associated with single recirculation loop operation by incorporating limits for the linear heat generation rate (LHGR) fuel thermal limit into the limiting condition of operation (LCO). Currently, TS 3.4.1 only contains thermal limits for the minimum critical power ratio and the average planar LHGR. Thermal limits associated with the two recirculation operations are contained in TS 3.2.1, ''Average Planar Linear Heat Generation Rate (APLHGR),'' TS 3.2.2, ''Minimum Critical Power Ratio (MCPR),'' and TS 3.2.3, ''Linear Heat Generation Rate (LHGR).'' The proposed TS change will reflect a consistency with the existing two recirculation loop LCOs by including the same three thermal limits into the single recirculation loop LCO.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR Section 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The LHGR is a measure of the heat generation rate of a fuel rod in a fuel assembly at any axial location. Limits on the LHGR are specified to ensure that fuel design limits are not exceeded anywhere in the core during normal operation, including anticipated operational occurrences (AOOs). Additionally, the LHGR limits provide assurance the fuel peak cladding temperature (PCT) during a Loss Of Coolant Accident (LOCA) will not exceed the requirements of 10 CFR 50.46.

The PNPP [Perry Nuclear Power Plant] Core Monitor previously automatically modified the ''composite'' LOCA/Thermal-Mechanical MAPLHGR [minimum average planar linear heat generation rate] limits for single recirculation loop operation. As a result, the LHGR limit was adjusted for single recirculation loop operation by application of the single recirculation loop operation MAPLHGR multiplier to the ''composite'' MAPLHGR limits. The proposed TS change establishes a TS requirement for LHGR limits to be modified, as specified in the Core Operating Limits Report, during single recirculation loop operation. This TS requirement provides assurance that the fuel design limits will remain satisfied during the time the plant may be in single recirculation loop operation.

There are no physical modifications being made to any plant system or component, including the fuel.

The manual versus automatic adjustment of the LHGR limits when in single reactor loop operation is considered a change in the implementation of a core monitoring function. However, since the LHGR limits that will be applied to the core are consistent with the NRC-approved fuel design and LOCA methodologies in use at PNPP, this change in monitoring implementation is not considered significant.

Therefore, since no significant changes are being made to the plant or its operation, the probability or the consequences of an accident have not increased over those previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

There are no physical modifications being made to any plant system or component, including the fuel. The manual versus automatic adjustment of the LHGR limits when in single reactor loop operation is considered a change in the implementation of a core monitoring function. However, since the LHGR limits that will be applied to the core are consistent with the NRC-approved fuel design and LOCA methodologies in use at PNPP, this change in monitoring implementation is not considered significant. The proposed TS change provides assurance that the LHGR limits will be adjusted if the plant enters a condition of single recirculation loop operation, thereby ensuring the fuel design limits remain satisfied.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

There are no physical modifications being made to any plant system or component, including the fuel. The manual versus automatic adjustment of the LHGR limits when in single reactor loop operation is considered a change in the implementation of a core monitoring function. However, since the LHGR limits that will be applied to the core are consistent with the NRC-approved fuel design and LOCA methodologies in use at PNPP, this change in monitoring implementation is not considered significant. The proposed TS change provides assurance that the LHGR limits will be adjusted if the plant enters a condition of single recirculation loop operation, thereby ensuring the fuel design limits remain satisfied.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mary E. O'Reilly, Attorney, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.

NRC Section Chief: Gene Y. Suh.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: October 25, 2004.

Description of amendment request: The proposed amendment would revise the required channels per trip system for several instrument functions contained in technical specification tables 3.3.6.1–1 (Primary Containment Isolation Instrumentation), 3.3.6.2–1 (Secondary Containment Isolation Instrumentation), and 3.3.7.1–1 (Control Room Emergency Filter System Instrumentation).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Revising the Required Channels Per Trip System to conform with the Cooper Nuclear Station (CNS) design basis resolves an inconsistency that will not result in any changes to instrumentation configuration, operating practices, or means of testing. Thus, these changes are administrative and have no associated effects on the probability or consequences of previously evaluated accidents.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes represent administrative changes to the Technical Specification controls over the affected instrumentation. Thus, the changes will not create new event initiators or alter plant response to postulated plant events.

3. Do the proposed changes involve a significant reduction in the margin of safety?

Response: No.

The proposed changes have no effect on the manner in which the affected instruments are configured, operated, or tested. Similarly, there is no relaxation in the application of Technical Specifications to inoperable channels. Thus these proposed changes will not result in a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. John R. McPhail, Nebraska Public Power District, Post Office Box 499, Columbus, NE 68602–0499.

NRC Acting Section Chief: Michael K. Webb.

Pacific Gas and Electric Company, Docket Nos. 50–275 and 50–323, Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2, San Luis Obispo County, California

Date of amendment requests: September 23, 2004.

Description of amendment requests: The proposed amendments would revise Technical Specification (TS) 3.8.3, ''Diesel Fuel Oil, Lube Oil, Starting Air, and Turbocharger Air Assist,'' to increase the required amount of stored diesel fuel to support use of low-sulfur fuel oil required by the California Air Resources Board (CARB).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards

consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change revises the minimum amount of stored diesel fuel. The change is required to support the use of California Air Resources Board (CARB) fuel oil and ultra-low sulfur (ULS) fuel oil that is replacing the existing Environmental Protection Agency (EPA) red dyed fuel oil currently used at Diablo Canyon Power Plant (DCPP). Technical Specification (TS) 3.8.3, ''Diesel Fuel Oil, Lube Oil, Starting Air, and Turbocharger Air Assist,'' requires, as a minimum, a supply of diesel fuel sufficient to support 7-days operation of the diesel generators (DGs) to power the minimum engineered safety feature (ESF) systems required to mitigate a design basis loss-of-coolant accident (LOCA) in one unit and those minimum required systems for a concurrent non-LOCA safe shutdown in the remaining unit (both units initially in Mode 1 operation). TS 3.8.3 Condition A requires storage levels to be restored to within limits within 48 hours if they fall below the 7-day minimum, but remain above minimum limits for a 6-day supply. TS 3.8.3 also provides for tank cleaning on a 10-year frequency. During tank cleaning, TS 3.8.3 requires maintaining at least a 4-day supply.

Because CARB and ULS fuel oils have a lower heat content than EPA fuel, it was necessary to recalculate the amount of fuel required to supply necessary loads for the required 7-day, 6-day, and 4-day time periods addressed in TS 3.8.3.

The DGs and associated support systems, such as the fuel oil storage and transfer systems, are designed to mitigate accidents, and are not accident initiators. Revising the minimum volumes of stored fuel in the storage tanks will not result in any increase in the probability of any accident previously evaluated.

Following implementation of this proposed change, there will be no change in the ability of the DGs to supply post-accident loads for 7 days, or 6 days if in TS 3.8.3 Condition A, or 4 days during tank cleaning. This is identical to the current requirements. Therefore, this change will not result in a significant increase in the consequences of any accident previously evaluated.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Following implementation of this change, the DGs will still be able to power the minimum ESF systems required to mitigate a design basis LOCA in one unit and those minimum required systems for a concurrent non-LOCA safe shutdown in the remaining unit (both units initially in Mode 1 operation). The current 7-day, 6-day, and 4-day fuel supply requirements will be maintained. The DGs and associated fuel oil storage systems are not accident initiators, but are designed to mitigate accidents.

Therefore, the proposed change does not create the possibility of a new or different accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

Following implementation of this change, the DGs will still have sufficient fuel oil supply to power the minimum ESF systems required to mitigate a design basis LOCA in one unit and those minimum required systems for a concurrent non-LOCA safe shutdown in the remaining unit (both units initially in Mode 1 operation). When fuel inventory is below that required to support 7 days of operation, the required actions depend on whether or not a 6-day supply is available, or a 4-day supply is available during tank cleaning. The proposed storage limits will maintain these 7-day, 6-day, and 4-day fuel supply requirements, including current margins, following the change to CARB and ULS fuel oils.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Attorney for licensee: Richard F. Locke, Esq., Pacific Gas and Electric Company, P.O. Box 7442, San Francisco, California 94120.

NRC Section Chief: Robert A. Gramm.

Pacific Gas and Electric Company, Docket Nos. 50–275 and 50–323, Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2, San Luis Obispo County, California

Date of amendment requests: October 29, 2004.

Description of amendment requests: The proposed amendments would revise the technical specifications (TS) requirements for handling of irradiated fuel in the containment and fuel building, and certain specifications related to performing core alterations. These changes are based on analysis of the postulated fuel handling and core alteration accidents and transients for the Diablo Canyon Power Plant, Units 1 and 2. The proposed amendment is consistent with the NRC-approved Industry/Technical Specification Task Force (TSTF) Standard Technical Specifications Change Traveler TSTF–51, Revision 2, ''Revise containment requirements during handling irradiated fuel and core alterations.'' In addition, editorial corrections to TS 3.1.7, ''Rod Position Indication''; TS 3.3.1, ''Reactor Trip System (RTS) Instrumentation''; TS 3.4.16, ''RCS Specific Activity''; TS 3.7.3, ''Main Feedwater Isolation Valves (MFIVs), Main Feedwater Regulating Valves (MFRVs), MFRV Bypass Valves and Main Feedwater Pump (MFWP) Turbine Stop Valves''; and TS 3.7.13, ''Fuel Handling Building Ventilation System (FHBVS),'' are proposed.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated. The proposed change involves changes to accident mitigation system requirements. These systems are related to controlling the release of radioactivity to the environment and are not considered to be accident initiators for any previously analyzed accident. The proposed changes do not involve physical modifications to plant equipment, and do not change the operational methods or procedures used for moving irradiated fuel assemblies. As such, there are no accident initiators affected by the proposed amendment. Therefore, the proposed change does not impact the probability of postulated accidents.

Consistent with the previously approved design basis analysis, the reanalysis of the containment fuel handling accident (FHA) concludes that radiological consequences of the accident at the Exclusion Area Boundary and the Low Population Zone Boundary are unchanged and remain well within the 10 CFR 100.11 limits, as defined by acceptance criteria in NUREG 0800, Section 15.7.4, and within the limits of general design criteria (GDC) 19 of 10 CFR 50, Appendix A. However, per this reanalysis, the calculated 30-day doses in the control room increased from 11.56 rem to 22.31 rem thyroid and from 0.00717 rem to 0.00757 rem whole body. Although these calculated doses increased they remain well within the acceptable limits of GDC 19 of 10 CFR 50, Appendix A, for the control room, which is 30 rem thyroid and 5 rem whole body. As a result, the increase in the doses is not considered to be a significant increase.

The results of the core alteration events, other than a FHA, remain unchanged from the original design basis, which showed that these events do not result in fuel cladding integrity damage or radioactive releases. Therefore, the proposed changes do not significantly increase the consequences of any previously evaluated accident.

In addition, the editorial corrections have no affect on the associated components, structures or systems, and their operation or design bases.

Based on the above, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change affects a previously evaluated accident (*i.e.*, FHA). However, the proposed change does not introduce any new modes of plant operation and does not involve physical modifications to the plant. The proposed change does not change how design basis accidents were postulated nor does the proposed change initiate a new kind of accident or failure mode with a unique set of conditions.

In addition, the editorial corrections have no affect on associated components, structures or systems, and their operation or design bases.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed change imposes controls to ensure that during performance of activities that represent situations where radioactive releases are postulated, the radiological consequences are at or below the established licensing limit. Safety margins and analytical conservatisms have been evaluated and are understood. Substantial conservatism is retained to ensure that the analysis adequately bounds all postulated event scenarios. Specifically, the margin of safety for a FHA is the difference between the 10 CFR 100.11 limits and the licensing limit defined by the NUREG–0800, Section 15.7.4. The licensing limit is defined by the NUREG as being ''well within'' the 10 CFR 100.11 limits, with ''well within'' defined as 25 percent of the 10 CFR 100 limits of the FHA. Excess margin is the difference between the postulated doses and the corresponding licensing limit.

The proposed applicability requirements continue to ensure that the whole-body, thyroid and total effective dose equivalent (TEDE) doses at the exclusion area and low population zone boundaries are at or below the corresponding licensing limit for both the FHA inside containment and in the fuel handling building. In addition, control room doses for both FHAs meet GDC 19 criterion. Although the control room doses as a result of the FHA inside containment reanalysis are somewhat higher then previously approved, they still remain well below the GDC–19 limits, therefore, the proposed change does not involve a significant reduction in a margin of safety.

The margin of safety for core alteration events other than the FHA remains the same as the original licensing analyses, since the proposed change does not impact the TS requirements for systems needed to prevent or mitigate such core alteration events.

In addition, the editorial corrections have no affect on associated equipment, components, structures or systems, and their operation or margin of safety.Therefore, the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Attorney for licensee: Richard F. Locke, Esq., Pacific Gas and Electric Company, P.O. Box 7442, San Francisco, California 94120.

NRC Section Chief: Robert A. Gramm.

PPL Susquehanna, LLC, Docket No. 50–388, Susquehanna Steam Electric Station, Unit 2, Luzerne County, Pennsylvania

Date of amendment request: September 8, 2004.

Description of amendment request: The proposed amendment would change the Unit 2 Technical Specifications (TSs) by revising the Unit 2 Cycle 13 (U2C13) Minimum Critical Power Ratio (MCPR) Safety Limits in Section 2.1.1.2 and the references listed in Section 5.6.5.b.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No

The proposed change to the MCPR Safety Limits does not directly or indirectly affect any plant system, equipment, component, or change the processes used to operate the plant. Further, the U2C13 MCPR Safety Limits are generated using NRC approved methodology and meet the applicable acceptance criteria. In addition, the effects of channel bow were conservatively addressed by increasing the amount of channel bow assumed in the MCPR SL calculation. Thus, this proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Prior to the startup of U2C13, licensing analyses are performed (using NRC approved methodology referenced in Technical Specification Section 5.6.5.b) to determine changes in the critical power ratio as a result of anticipated operational occurrences. These results are added to the MCPR Safety Limit values proposed herein to generate the MCPR operating limits in the U2C13 COLR [core operating limits report]. These limits could be different from those specified in the U2C12 COLR. The COLR operating limits thus assure that the MCPR Safety Limit will not be exceeded during normal operation or anticipated operational occurrences. Postulated accidents are also analyzed to confirm NRC acceptance criteria are met.

The changes to the references in Section 5.6.5.b were made to properly reflect the NRC approved methodology used to generate the U2C13 core operating limits. The use of this approved methodology does not increase the probability or consequences of an accident previously evaluated.

Therefore, this proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No

The change to the MCPR Safety Limits does not directly or indirectly affect any plant system, equipment, or component and therefore does not affect the failure modes of any of these systems. Thus, the proposed changes do not create the possibility of a previously unevaluated operator or a new single failure.

The changes to the references in Section 5.6.5.b were made to properly reflect the NRC approved methodology used to generate the U2C13 core operating limits. The use of this approved methodology does not create the possibility of a new or different kind of accident.

Therefore, this proposed amendment does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

Since the proposed changes do not alter any plant system, equipment, component, or the processes used to operate the plant, the proposed change will not jeopardize or degrade the function or operation of any plant system or component governed by Technical Specifications. The proposed MCPR Safety Limits do not involve a significant reduction in the margin of safety as currently defined in the Bases of the applicable Technical Specification sections, because the MCPR Safety Limits calculated for U2C13 preserve the required margin of safety.

The changes to the references in Section 5.6.5.b were made to properly reflect the NRC approved methodology used to generate the U2C13 core operating limits. This approved methodology is used to demonstrate that all applicable criteria are met, thus, demonstrating that there is no reduction in the margin of safety.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Bryan A. Snapp, Esquire, Assoc. General Counsel, PPL Services Corporation, 2 North Ninth St., GENTW3, Allentown, PA 18101–1179.

NRC Section Chief: Richard J. Laufer.

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50–321 and 50–366, Edwin I. Hatch Nuclear Plant, Units 1 and 2, Appling County, Georgia

Date of amendment request: August 23, 2004.

Description of amendment request: The proposed amendments would revise the Surveillance Requirements for Technical Specifications 3.6.1.3, ''Primary Containment Isolation Valves,'' for Hatch Units 1 and 2. The proposed amendments would substitute the requirement for valve seat replacement with a requirement to perform an Appendix J leakage rate test on the valves. Conforming revisions to the Technical Specification Bases B 3.6.1.3, ''Primary Containment Isolation Valves'' are also included.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposal would change the Technical Specifications Surveillance Requirement for containment purge valves with resilient seats. The proposed change does not involve a significant increase in the probability or consequence of an accident previously evaluated because the extensive industry operating experience derived from test results has demonstrated that the resilient seat material does not experience aging degradation and cause containment isolation valves to leak. Thus, the valves will perform as assumed in the accident analyses and therefore, this change does not involve a significant increase in the consequences of an accident previously evaluated. Further, these valves are not accident initiators, and therefore, this change does not involve a significant increase in the probability of occurrence of a previously evaluated event.

2. The proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

The proposal would change the Technical Specifications Surveillance Requirement for containment purge valves with resilient seats. The proposed change does not involve physical alteration of the plant (no new or different type of equipment will be installed nor changes in methods governing normal plant operation). In particular, it does not require the valves to function in any manner other than that which is currently required. Thus, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in the margin of safety.

The proposal would change the Technical Specifications Surveillance Requirement for containment purge valves with resilient seats. The proposed change does not involve a significant reduction in margin of safety because it has no effect on any safety analysis bases or assumptions. It does not change the leakage acceptance criteria. Sufficient data has been collected to demonstrate that resilient seats do not experience aging degradation. Deleting the seat replacement requirement will not reduce the margin of safety provided by Technical Specifications.

For the above reasons, the margin of safety is not reduced by this proposed Technical Specifications change.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ernest L. Blake, Jr., Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Section Chief: John A. Nakoski.

Tennessee Valley Authority, Docket No. 50–390, Watts Bar Nuclear Plant (WBN), Unit 1, Rhea County, Tennessee

Date of amendment request: December 9, 2004.

Description of amendment request: The proposed amendment would revise the Watts Bar Updated Final Safety Analysis Report to include an alternate methodology for concrete reinforcement bar splicing. The change in methodology applies to restoration of the concrete Shield Building dome as part of the upcoming steam generator replacement project. The alternate methodology uses a Bar-Lock mechanical splice in lieu of the Cadweld splice used for the original design and construction of the plant.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

No changes in event classification, as discussed in the UFSAR [Updated Final Safety Analysis Report] Chapter 15, will occur due to use of the Bar-Lock couplers.

The restoration of the temporary concrete construction openings in the Shield Building will utilize Bar-Lock couplers to splice new rebar to the existing rebar. The Shield Building structure limits the release of radioactivity following an accident and protects the systems, structures, and components inside containment from external events. The accidents of interest are those that rely on the Shield Building to limit the release of radioactivity to the environment, and those that result from some external events. The design of the Shield Building is such that it is not postulated to fail and initiate an accident described in the UFSAR.

The Bar-Lock coupler qualification tests detailed in Topical Report 24370–TR–C–001–A demonstrate that the Bar-Lock coupler meets the ASME [American Society of Mechanical Engineers] strength requirements and is, therefore, acceptable for use in nuclear safety-related applications. Based on these test results, it is concluded that use of the Bar-Lock couplers in restoring the temporary concrete construction openings will not reduce the structural capability of the repaired structure. The Shield Building will continue to perform its design function as described in the WBN UFSAR.

Therefore, the proposed use of the Bar-Lock couplers will not significantly increase the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The design of the Shield Building is such that it is not postulated to fail and initiate an accident described in the UFSAR. The Bar-Lock couplers are passive devices and as such will not initiate or cause an accident.

The restoration of the temporary concrete construction openings in the Shield Building will utilize Bar-Lock couplers to splice new rebar to the existing rebar. The Bar-Lock coupler qualification tests detailed in Topical Report 24370–TR–C–001–A demonstrate that the Bar-Lock coupler meets the ASME strength requirements and is, therefore, acceptable for use in nuclear safety-related applications. Based on these test results, it is concluded that use of the Bar-Lock couplers in restoring the temporary concrete construction openings will not reduce the structural capability of the Shield Building. The Shield Building will, therefore, continue to perform its design functions as described in the WBN UFSAR.

Therefore, the possibility of a new or different accident situation occurring as a result of this condition is not created.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

As indicated in the WBN UFSAR, the structural design of the reinforced concrete Shield Building is in compliance with the proposed ACI–ASME [American Concrete Institute—American Society of Mechanical Engineers] (ACI–359) Code for Concrete Reactor Vessels and Containment, Article CC–3000, as issued for trial use, April 1973, for the loading combinations defined in UFSAR Table 3.8.1–1. Allowable stresses are based on this code with the exception of allowable tangential shear stresses in walls

where the ACI 318–71 code is used. The reinforcing steel conforms to the requirements of American Society for Testing Maintenance (ASTM) A 615, Grade 60. The WBN UFSAR states that reinforcing bars were lap spliced and Cadwelded in accordance with ACI 318–7 requirements for strength design.

The restoration of the temporary concrete construction openings in the Shield Building will utilize Bar-Lock couplers to splice new rebar to the existing rebar. The restoration of the construction openings, including use of the Bar-Lock couplers, will conform to the requirements of ACI–359 (April 1973) and ACI 318. Therefore, following completion of the modification, the Shield Building will continue to comply with ACI–359 (April 1973) and ACI 318 requirements.

In addition to conforming to ACI–359 (April 1973) and ACI 318 requirements, the Bar-Lock coupler qualification tests detailed in Topical Report 24370–TR–C–001–A demonstrate that the Bar-Lock coupler meets the ASME strength requirements.

Therefore, a significant reduction in the margin to safety is not created by this modification.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET 11A, Knoxville, Tennessee 37902.

NRC Section Chief: Michael L. Marshall, Jr.

Union Electric Company, Docket No. 50–483, Callaway Plant, Unit 1, Callaway County, Missouri

Date of amendment request: October 27, 2004.

Description of amendment request: The requested change will delete Technical Specification (TS) 5.6.1, ''Occupational Radiation Exposure Report,'' and TS 5.6.4, ''Monthly Operating Reports.'' The Table of Contents will also be revised to reflect the deletions.

The NRC staff issued a notice of availability of a model no significant hazards consideration (NSHC) determination for referencing in license amendment applications in the **Federal Register** on June 23, 2004 (69 FR 35067). The licensee affirmed the applicability of the model NSHC determination in its application dated October 27, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change eliminates the Technical Specifications (TSs) reporting requirements to provide a monthly operating letter report of shutdown experience and operating statistics if the equivalent data is submitted using an industry electronic database. It also eliminates the TS reporting requirement for an annual occupational radiation exposure report, which provides information beyond that specified in NRC regulations. The proposed change involves no changes to plant systems or accident analyses. As such, the change is administrative in nature and does not affect initiators of analyzed events or assumed mitigation of accidents or transients. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve a physical alteration of the plant, add any new equipment, or require any existing equipment to be operated in a manner different from the present design. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

This is an administrative change to reporting requirements of plant operating information and occupational radiation exposure data, and has no effect on plant equipment, operating practices or safety analyses assumptions. For these reasons, the proposed change does not involve a significant reduction in the margin of safety.

Based upon the reasoning presented above, the requested change does not involve a significant hazards consideration.

Attorney for licensee: John O'Neill, Esq., Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Section Chief: Robert Gramm.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov.*

Connecticut Yankee Atomic Power Company, Docket No. 50–213, Haddam Neck Plant, Middlesex County, Connecticut

Date of amendment request: January 9, 2004.

Brief description of amendment: The amendment revises Technical Specifications to incorporate Technical Specification Task Force (TSTF) travelers 152, 258, and 308 to reflect changes due to revision of Part 20 of Title 10 of the Code of Federal Regulations, and TSTF 65 to reflect the use of generic titles

Date of issuance: December 17, 2004.

Effective date: The license amendment shall be implemented within 90 days of its effective date.

Amendment No.: 200.

Facility Operating License No. DPR–61: The amendment revises the Technical Specifications.

Date of initial notice in ***Federal Register:*** March 30, 2004 (69 FR 16616).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation Report, dated December 17, 2004.

No significant hazards consideration comments received: No.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation Report, dated December 17, 2004.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–333, James A. FitzPatrick Nuclear Power Plant, Oswego County, New York

Date of application for amendment: June 22, 2004.

Brief description of amendment: The amendment deletes the post-accident monitoring instrumentation requirements to maintain the primary containment hydrogen and oxygen monitors from the Technical Specifications.

Date of issuance: December 8, 2004.

Effective date: As of the date of issuance to be implemented within 60 days.

Amendment No.: 280.

Facility Operating License No. DPR–59: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** August 31, 2004 (69 FR 53103). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 8, 2004.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois

Date of application for amendments: January 31, 2003, and supplemented by letters dated July 7 and November 15, 2004.

Brief description of amendments: The amendments provide new pressure-temperature (P–T) limits for the technical specifications that are valid to 20 effective full power years for each unit. The changes to the P–T curves are based, in part, on the American Society of Mechanical Engineers Code Case –640, ''Alternative Reference Fracture Toughness for Development of P–T Limit Curves Section XI, Division 1,'' which was reviewed and approved by NRC staff for use by the LaSalle County Station in a letter dated November 8, 2000.

Date of issuance: December 10, 2004.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment Nos.: 170, 156.

Facility Operating License Nos. NPF–11 and NPF–18: The amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** April 1, 2003 (68 FR 15759).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 10, 2004.

No significant hazards consideration comments received: No.

Indiana Michigan Power Company, Docket No. 50–315, Donald C. Cook Nuclear Plant, Unit 1, Berrien County, Michigan

Date of application for amendment: June 25, 2004.

Brief description of amendment: The amendment revises the Technical Specifications (TSs) to reduce the temperature at which shutdown and control rod drop tests are performed from greater than or equal to 541 degrees Fahrenheit to greater than or equal to 500 degrees Fahrenheit. Additionally, the amendment makes format changes to improve the TS page appearance.

Date of issuance: December 20, 2004.

Effective date: As of the date of issuance and shall be implemented within 45 days.

Amendment No.: 284.

Facility Operating License No. DPR–58: Amendment revises the Technical Specifications.

Date of initial notice in ***Federal Register:*** August 3, 2004 (69 FR 46585).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 20, 2004.

No significant hazards consideration comments received: No.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: August 25, 2003, as supplemented by letters dated October 31, 2003, and March 9, September 28, and November 5, 2004.

Brief description of amendment: The amendment revises the Technical Specifications (TS) Surveillance Requirement 3.3.2.1.4 and TS Table 3.3.2.1–1 to correct mathematical symbols and use allowable values in the place of analytical limits.

Date of issuance: December 22, 2004.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 208.

Facility Operating License No. DPR–46: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 30, 2003 (68 FR 56344).

The supplemental letters dated October 31, 2003, and March 9, September 28, and November 5, 2004, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 22, 2004.

No significant hazards consideration comments received: No.

Nuclear Management Company, LLC, Docket No. 50–305, Kewaunee Nuclear Power Plant, Kewaunee County, Wisconsin

Date of application for amendment: October 5, 2004.

Brief description of amendment: The amendment deletes technical specification (TS) 6.9.a.2.B (requirement to submit an occupational radiation exposure report), TS 6.9.a.2.C (requirement to report challenges to and failures of pressurizer power operated relief valves and safety valves), and TS 6.9.a.3, ''Monthly Operating Report.''

Date of issuance: December 22, 2004.

Effective date: As of the date of issuance and shall be implemented within 90 days.

Amendment No.: 179.

Facility Operating License No. DPR–43: Amendment revised the TSs.

Date of initial notice in ***Federal Register:*** November 9, 2004 (69 FR 64989).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 22, 2004.

No significant hazards consideration comments received: No.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey

Date of application for amendment: April 27, 2004, as supplemented by letters dated September 9, 2004, and December 2, 2004.

Brief description of amendment: The amendment revised the Safety Limit Minimum Critical Power Ratio values for two recirculation loop and one recirculation loop operation for all fuel types to be used in the core.

Date of issuance: December 22, 2004.

Effective date: As of the date of issuance, to be implemented within 60 days.

Amendment No.: 158.

Facility Operating License No. NPF–57: This amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** June 22, 2004 (69 FR 34704). The September 9, 2004 and December 2, 2004 letters provided clarifying information that did not change the initial proposed no significant hazards consideration determination or expand the application beyond the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 22, 2004.

No significant hazards consideration comments received: No.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey

Date of application for amendment: March 31, 2004, as supplemented by letters dated August 9, 2004, and October 20, 2004.

Brief description of amendment: The amendment created a Technical Specification (TS) for the Oscillation Power Range Monitor system. Additionally, it revised TS 3/4.4.1 to remove Thermal Hydraulic instability-related limiting conditions for operation and required actions.

Date of issuance: December 22, 2004.

Effective date: As of the date of issuance, to be implemented within 60 days.

Amendment No.: 159.

Facility Operating License No. NPF–57: This amendment revised the TSs.

Date of initial notice in ***Federal Register:*** August 3, 2004 (69 FR 46588). The August 9, 2004, and October 20, 2004 letters provided clarifying information that did not change the initial proposed no significant hazards consideration determination or expand the application beyond the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 22, 2004.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 27th day of December 2004.

For the Nuclear Regulatory Commission.

James E. Lyons,

Acting Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 05–2 Filed 1–3–05; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50936; File No. PCAOB–2004–02]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rule and Amendment No. 1 Amending Bylaws

December 27, 2004.

Pursuant to section 107(b) of the Sarbanes-Oxley Act of 2002 (the ''Act''), notice is hereby given that on March 18, 2004, the Public Company Accounting Oversight Board (the ''Board'' or the ''PCAOB'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule amendments described in Items I and II below, which items have been prepared by the Board and are presented here in the form submitted by the Board. On November 12, 2004, the PCAOB filed with the Commission Amendment No. 1 to the proposed rule amendments. The Commission is publishing this notice to solicit comments on the proposed rule amendments, as amended by Amendment No. 1, from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rule

On March 9, 2004, the Board adopted amendments to its bylaws. On October 26, 2004, the Board adopted amendments to the bylaws as adopted on March 9. The portions of its bylaws that the Board has amended through these cumulative adoptions are set out below, with italics indicating the text that is added, and brackets surrounding text that has been deleted, by the amendments adopted by the Board.

Bylaws of the Public Company Accounting Oversight Board[, Inc.]

[A Nonprofit Membership Corporation]

Pursuant to the Provisions of Title I of the Sarbanes-Oxley Act of 2002

Bylaws of the Public Company Accounting Oversight Board[, Inc.]

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Article I

Name

1. The name of the [Corporation] *body corporate* shall be the Public Company Accounting Oversight Board[, Inc] *(the ''Corporation'')*.

Article II

Object

2.*1. Organization.* The Corporation is organized pursuant to, and shall be operated for such purposes as are set forth in, Title I of the Sarbanes-Oxley Act of 2002 (the ''Act'').

2.2. Exempt Organization Purposes. The Corporation is organized exclusively for charitable, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code.

2.3. Exempt Organization Uses of Earnings and Activities. No part of the net earnings of the Corporation shall inure to the benefit of, or be distributable to, members or trustees of the Corporation, if any, or to officers of the Corporation, or other private persons, except that the Corporation shall be authorized and empowered to

pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in the purpose hereof. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of this document, the Corporation shall not carry on any other activities not permitted to be carried on (a) by an organization exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code, or (b) by an organization, contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code, or corresponding section of any future federal tax code.

Article III

Offices

3.1. Principal Office. The principal office of the Corporation shall be in the City of Washington, District of Columbia.

3.2. Other Offices. The Governing Board of the Corporation (*the* ''Governing Board'') may designate other office locations, [outside of] *within or without* the District of Columbia, as the Governing Board may determine are necessary or appropriate to meet the [Corporation's] *Governing Board's* objectives.

3.3. Agent and Office for Service of Process. The Secretary (or Acting Secretary, as applicable) of the Corporation shall serve as the agent of the Corporation upon whom any process, notice or demand required or permitted by law to be served upon the Corporation may be served. The office of the Corporation for purposes of such service of process, notice or demand shall initially be the office located at 1666 K Street, NW, Washington, DC 20006.

Article IV

Governing Board

4.1. Composition. The Governing Board shall consist of those persons appointed thereto by the Securities and Exchange Commission, pursuant to Section 101 of the Act.

4.2. Powers and Duties. The Governing Board shall have such powers and duties as are provided in Title I of the Act.

4.3. Quorum [and Majority]. A majority of the members of the Governing Board shall constitute a quorum.

4.4. Board Action. [An] *Any* act *(i) authorized* [approved] by majority vote of the members of the Governing Board present at a meeting of the *Governing* Board at which a quorum is present, *or (ii) authorized by at least a majority of the Governing Board (other than at a meeting of the Governing Board) in accordance with any other procedure permitted by law,* shall be [the] *an* act *by vote* of the *Governing* Board. If a *Governing* Board member has recused himself or herself from a decision, and a quorum of otherwise qualified *Governing* Board members cannot *reasonably* be assembled in time to meet the exigencies of that particular situation, the recused *Governing* Board member may be counted for quorum purposes only. As used in this section, ''the exigencies of that particular situation'' shall be defined to require circumstances in which the *Governing* Board is required to act within a limited period of time or in which the public interest or the protection of investors otherwise [prevent] *prevents* the deferral of action until a quorum of non-recused *Governing* Board members is available.

4.*5*[4]. Compensation and Expenses. The Governing Board shall set the compensation for its [Members] *members. The Corporation shall pay or reimburse members* [Members] of the Governing Board [shall be reimbursed by the Board] for reasonable expenses incurred in the discharge of their duties.

Article V

Governing Board Meetings

[5.1. General. As soon as practical after the adoption of these bylaws, the Governing Board shall adopt a written policy defining the circumstances under which meetings of the Board will be open to the public (the ''Open Meeting Policy'').]

5.[2]*1.* [Regular Public] *Governing Board* Meetings. The Governing Board shall hold at least one *(1)* public meeting each [month, which meeting shall take place on the first Tuesday of each month (the ''Regular Public Meeting''), or at] *calendar quarter, and* such other [time] *meetings, which may be either public or non-public (in accordance with the Open Meeting Policy of the Governing Board),* as the Chair [shall determine. The Board shall ensure that, under procedures defined in its Open Meeting Policy] *(as defined below) deems necessary or appropriate to further the purposes of the Act. The Governing Board shall ensure that, absent exigent circumstances as determined by the Governing Board*, the public is informed, at least five (5) calendar days in advance, of the time, location, and general topics scheduled for discussion of each [Regular Public Meeting.] *public meeting, and, in the event of such exigent circumstances, shall ensure that notice of a public meeting is provided as soon as practicable.*

[5.3. Special Meetings. The Governing Board may hold additional meetings (''Special Meetings''), which may be public or non-public (in accordance with the Open Meeting Policy) as it deems necessary or appropriate to further the purposes of the Act. The Open Meeting Policy shall set forth procedures for providing the public with reasonable notice of public Special Meetings.]

5.[4]*2.* Telephonic Participation. [The Governing Board] *Provided that all Governing Board members are able to hear each other (and, in the case of public meetings, the public located at the location specified in the meeting notice is able to hear all of the participating members of the Governing Board), the Governing Board* may meet via telephone or teleconference, and any member *thereof* may participate in a meeting by telephone, provided that, in the case of a meeting that is open to the public, at least one *Governing* Board member shall be present at the location specified in the meeting notice.

Article VI

Officers

6.1. General. The [Chair] *Chairman* of the Governing Board *(the ''Chair'')* shall also be the President and Chief Executive Officer of the Corporation. All other Governing Board members shall also be Vice Presidents of the Corporation. *Governing* Board members shall serve as officers of the Corporation without additional compensation.

6.2. Other Officers. The other officers of the Corporation shall include a Secretary, Treasurer, General Counsel, Chief Auditor, Chief Administrative Officer, Director of [Inspections and] Registration *and Inspections*, Director of [Investigations and] Enforcement *and Investigations,* and such other officers as the Governing Board may establish in accordance with such rules of the *Governing* Board as may be adopted for establishing officers.

6.3. Powers of the Chief Executive Officer.

(a) The Chief Executive Officer is responsible for, and has authority over, the management and administration of the Corporation, including

responsibility and authority for the appointment, dismissal, and supervision of personnel (other than *Governing* Board members and personnel employed regularly and full-time within the immediate offices of the *Governing* Board members), the distribution of business among such personnel and among organizational units of the Corporation, the use and expenditure of funds (including the procurement of goods and services), and the development (for *Governing* Board review) of strategic policy initiatives.

(b)(1) In carrying out any of the responsibilities under the provisions of this section 6.3, the Chief Executive Officer shall be governed by the general policies of the Governing Board and by such rules and decisions as the Governing Board may lawfully make.

(2) The appointment by the Chief Executive Officer of the officers of the Corporation designated in and established under section 6.2 shall be subject to the approval of, and made in consultation with, the Governing Board, and the dismissal of the officers of the Corporation designated in and established under section 6.2 shall be made in consultation with the Governing Board, except that when the *Governing* Board determines that the dismissal arises out of a conflict regarding the general policies of the Governing Board, it is also subject to the approval of the Governing Board.

(3) Each Governing Board member has responsibility and authority for the appointment, dismissal, and supervision of personnel employed regularly and full-time within the immediate office of the *Governing* Board member, subject to the Governing Board's overall personnel policies.

(4) The Chief Executive Officer has the responsibility and authority to develop, and present to the *Governing* Board for approval, an annual budget as well as mid-year adjustments, if any. There is reserved to the Governing Board its responsibility and authority with respect to determining the distribution of funds according to major programs and purposes, including those related to salary schedules and other conditions of employment.

(c) Notwithstanding any other provision of these bylaws, however, the Director of the Office of Internal Oversight and Performance Assurance shall report directly to the Governing Board and the Governing Board shall have exclusive authority to hire, fire, and establish the compensation and other terms of employment of the Director.

Article VII

Liability and Indemnification

7.1. No Personal Liability. No contract entered into by or on behalf of the Corporation shall personally obligate any employee, officer, or Governing Board member of the Corporation, including the employee, officer or Governing Board member authorizing such contract or executing same.

7.2. Indemnification.

(a) Unless *and to the extent* otherwise prohibited by law and as *otherwise* provided in *this* Section 7.2[(b)], the Corporation shall indemnify any employee, officer, or Governing Board member, or any former employee, officer, or Governing Board member (*each, a ''Potential Indemnitee''*), against any and all [expenses and] liabilities *(including without limitation judgments, fines, and penalties against such Potential Indemnitee) and reasonable expenses (including without limitation reasonable counsel fees and other reasonable related fees)* actually and necessarily incurred by [him or her,] or imposed on him or her, in connection with *such Potential Indemnitee's defense against* any claim, action, suit, or proceeding (whether actual or threatened, civil, criminal, administrative, or investigative, including appeals)[,] *(each, a ''Proceeding'')* to which he or she may be or is made a party by reason of being or having been such [employee, officer, or Board member.] *a Potential Indemnitee (such liabilities and expenses, collectively, ''Indemnifiable Amounts''). Notwithstanding the foregoing, Indemnifiable Amounts shall include amounts paid in settlement by a Potential Indemnitee only if such amounts are approved by the Governing Board.*

(b) [Notwithstanding section 7.2(a), there] *There* shall be no indemnification in relation to matters as to which the *Governing* Board finds that the [employee, officer, or Board member] *Potential Indemnitee* acted *or omitted to act, in either case* in bad faith, or engaged in willful misconduct in the performance of a duty to the Corporation. *Prior to making any such finding, the Governing Board shall provide the Potential Indemnitee with at least ten (10) business days written notice of its intent to consider the matter, within which time the Potential Indemnitee shall have the right to submit relevant written materials to the Governing Board for its consideration.*

[(c) Amounts paid in indemnification of expenses and liabilities may include, but shall not be limited to, counsel and other related fees; costs and disbursements; and judgments, fines, and penalties against, and amounts paid in settlement by, such employee, officer, or Board member.]

[(d) The Corporation may advance expenses to, or where appropriate may itself, at its expense, undertake the defense of any employee, officer, or Board member; provided, however, that such employee, officer, or Board member shall undertake to repay or to reimburse such expense if it should be ultimately determined that he or she is not entitled to indemnification under this Article.]

(c) In lieu of providing the advancements or indemnification provided for herein, the Corporation may, at its own expense not to be reimbursed by the Potential Indemnitee, undertake the defense of any such Potential Indemnitee, in which case the Governing Board in its discretion may determine whether the Corporation shall reimburse such Potential Indemnitee for any fees and expenses incurred as a result of his or her engagement of separate counsel, whether through advancements or indemnification. The provisions of this subsection 7.2(c) shall not apply to any Proceeding by or in the right of the Corporation.

(d) Except as otherwise provided herein, within fifteen (15) business days after the Corporation's receipt of a request therefore, and of a written undertaking by the Potential Indemnitee to repay or to reimburse all such amounts if it is determined that such Potential Indemnitee is not entitled to indemnification under this Article, the Corporation shall advance Indemnifiable Amounts to a Potential Indemnitee.

(e) The provisions of this Article shall be applicable to [claims, actions, suits, or proceedings] *Proceedings* made or commenced after the adoption hereof, whether arising from acts or omissions to act occurring before or after adoption hereof.

(f) The indemnification *and advancements* provided by this Article shall not be deemed exclusive of any other rights to which [such employee, officer, or Board member] *any Potential Indemnitee* may be entitled under any applicable law.

(g) The indemnification *and advancements* provided by this Article shall not restrict the power of the Governing Board to provide any additional indemnification *and advancements* permitted by law.

(h) As a condition precedent to a Potential Indemnitee's right to be indemnified or receive advancements hereunder, he or she shall (i) give to the Corporation notice in writing directed to

the Secretary of the Corporation (or to such other individual as the Corporation may designate) as soon as practicable of any Proceeding made against such Potential Indemnitee for which indemnity will or could be sought, and (ii) other than in connection with a Proceeding by or in the right of the Corporation, provide the Corporation with such information and cooperation as it may reasonably request.

7.3. Insurance. The Governing Board may purchase insurance on behalf of any [employee, officer, or Governing Board member] *Potential Indemnitee* against any liability which may be asserted against or incurred by him or her [which] *that* arises out of such person's status as [an employee, officer, or Board member] *a Potential Indemnitee* or out of acts taken in such capacity, whether or not the Corporation would have the power to indemnify such person against that liability under law. To the extent that any applicable insurance is available to respond to any [claim] *Proceeding* addressed in this Article, such insurance shall be exhausted before any payment is made pursuant to the *advancement and* indemnification provisions in this Article.

[7.4. Severability. If any part of this Article shall be found in any action, suit, or proceeding to be invalid or ineffective, the validity and effectiveness of the remaining parts shall not be affected.]

Article VIII

Bylaw Amendments and Rules of the *Governing Board* [Corporation]

8.1. Amendments to Bylaws. *Subject to the approval of the U.S. Securities and Exchange Commission as provided in the Act, the* [The] Governing Board may from time to time amend, repeal, or supplement these bylaws.

8.2. Rules. In addition to, and separate from, these bylaws, the Governing Board may adopt such rules of the *Governing Board* [Corporation] as it deems necessary or appropriate to discharge its responsibilities under the Act.

Article IX

Miscellaneous Provisions

9.1. Fiscal Year. The Corporation's fiscal year shall be the calendar year.

9.2. Capital Expenditures. Except as expressly delegated by the Governing Board, no capital expenditure or investment shall be made without the approval of the *Governing* Board.

9.3. Selection of Auditor. The Governing Board shall retain an accounting firm to annually audit the Corporation's financial records, which firm shall not perform any other services, except tax services, for the Corporation.

9.4. Headings. Section and other headings contained herein are for reference purposes only, and are not intended to describe, interpret, define, or limit the scope, extent, or intent of any of the provisions hereof.

9.5. Variation of Terms. All terms and any variations thereof shall be deemed to refer to masculine, feminine, or neuter, singular or plural, as the identity of the respective person or persons may require.

9.6. Severability. If any part of these bylaws shall be found in any action, suit, or proceeding to be invalid or ineffective, the validity and effectiveness of the remaining parts shall not be affected.

* * * * *

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Amendments to Its Bylaws

(a) Purpose

The purpose of the amendments is to clarify existing bylaws provisions, and to cause the bylaws of the PCAOB to address the following internal operational and administrative PCAOB matters in the manner best suited to the organization:

The PCAOB's Status as a Tax-Exempt Organization

The amendments specify that the PCAOB's purposes, activities and uses of earnings comport with the requirements of the Internal Revenue Service for exemption from federal taxation pursuant to Section 501(c)(3) of the Internal Revenue Code.

Agent and Office for Service of Process, Notices and Demands

The amendments identify the office and agent of the PCAOB for purposes of service of process, notices, and demands.

Board Meetings and Action

The amendments modify the prior provisions regarding the frequency, scheduling and notice requirements of public Board meetings. The amendments require the Board to hold at least one public meeting per calendar quarter and, absent exigent circumstances, to ensure that public notice thereof is provided at least five days prior to the meeting. The amendments also address the manner in which the Board may act by vote outside of a Board meeting.

Officer Titles

The amendments clarify the current titles of two of the Board's officers.

Director of the Office of Internal Oversight and Performance Assurance

The Board has established an Office of Internal Oversight and Performance Assurance in order to provide internal examination of the programs and operations of the PCAOB to help ensure the efficiency, integrity and effectiveness of those programs and operations. The amendments specify that the Director of this office reports directly to the Board, and that the Board has the exclusive authority to hire, fire and establish the compensation and other terms of employment of this Director.

Indemnification

The amendments condense portions of the indemnification provisions of the prior bylaws and include substantive modifications. These substantive modifications clarify (i) the types of costs and expenses for which the PCAOB will provide indemnification; (ii) the manner in which the Board may determine whether indemnification is to be provided; (iii) the right of the Board to undertake an individual's defense in lieu of payment of indemnification; (iv) the availability of payment of indemnifiable amounts in advance of the final disposition of a proceeding; and (v) basic conditions a potential indemnitee must satisfy in order to receive payment from the PCAOB.

(b) Statutory Basis

The statutory basis for the proposed amendments to the Bylaws is Title I of the Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed bylaws amendments will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Board's Statement on Comments on the Proposed Rules Received From Members, Participants or Others

Not applicable.

III. Date of Effectiveness of the Proposed Rule 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 Board consents the Commission will:

(a) By order approve such proposed rule; or

(b) Institute proceedings to determine whether the proposed rule 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 is consistent with the requirements of Title I of the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/pcaob.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number PCAOB–2004–02 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number PCAOB–2004–02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/pcaob.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number PCAOB–2004–02 and should be submitted on or before January 25, 2005.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3923 Filed 1–3–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50934; File No. SR–Amex–2004–108]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Odd-Lots in Nasdaq Securities

December 27, 2004.

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 22, 2004, 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 Exchange filed the proposal pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. 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 extend for an additional six-month period ending June 30, 2005, the Exchange's pilot program for odd-lot execution procedures for Nasdaq securities traded on the Exchange pursuant to unlisted trading privileges.

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 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Commission approved, and the Exchange implemented, a pilot program for odd-lot order [5] executions in Nasdaq securities transacted on the Exchange pursuant to unlisted trading privileges. Paragraph (j) of Rule 118 (''Trading in Nasdaq National market Securities'') describes the Exchange's odd-lot execution procedures for Nasdaq securities, and Commentary .05 of Amex Rule 205 (''Manner of Executing Odd-Lot Orders'') references rule 118(j) odd-lot procedures. The pilot program was originally approved on august 2, 2002, for a six-month period, and was reestablished on July 14, 2003, for an additional six-month period ending December 27, 2003.[6] On November 20, 2003, the Commission provided notice of the Exchange's proposed rule change to amend paragraph (j) of Amex Rule 118 and to extend the pilot program through June 27, 2004,[7] and on June 14, 2004, the Commission provided notice of a further extension of the pilot program through December 27, 2004.[8]

Under the Exchange's current pilot program, after the opening of trading in Nasdaq securities, odd-lot market orders and executable odd-lot limit orders are executed at the qualified national best bid or offer [9] at the time the order is

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] An odd-lot order is an order for less than 100 shares.

[6] *See* Securities Exchange Act Release No. 46304 (August 2, 2002) 67 FR 51903 (August 9, 2002) approving SR–Amex–2002–56, and Securities Exchange Act Release No. 48174 (July 14, 2003) 68 FR 43409 (July 22, 2003) (SR–Amex–2003–56).

[7] *See* Securities Exchange Act Release No. 48995 (December 24, 2003) 68 FR 75670 (December 31, 2003) (SR–Amex–2003–102).

[8] *See* Securities Exchange Act Release No. 49855 (June 14, 2004) 69 FR 35399 (June 24, 2004) (SR–Amex–2004–30).

[9] In Amex Rule 118(j), the qualified national best bid and offer are defined as the highest bid and lowest offer, respectively, disseminated (A) by the Exchange or (B) by another market center participating in the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis; provided, however, that the bid and offer in another such market center will be considered in determining the qualified national best bid or offer in a stock only if (i) the quotation conforms to the requirements of Amex Rule 127 (''Minimum Price Variations''), (ii) the quotation does not result in a locked or crossed market, (iii) the market center is not experiencing operational or

received at the trading post or through the Amex Order File. Odd-lot market orders and executable odd-lot limit orders entered before the opening of trading in Nasdaq securities are executed at the price of the first round-lot or part of round-lot transaction on the Exchange. Non-executable limit orders, stop orders, stop limit orders, orders filled after the close and non-regular way trades are executed in accordance with Amex Rule 205 A(2), A(3), A(4), C(1) and C(2), respectively. Orders to buy or sell ''at the close'' are filled at the price of the closing round-lot sale on the Exchange. In a locked market condition, odd-lot market orders and executable odd-lot limit orders are executed at the locked market price. In a crossed market condition, odd-lot market orders are executed at the mean of the bid and offer prices when the displayed national best bid is higher than the displayed national best offer by $.05 or less. When the displayed national best bid is higher than the displayed national best offer by more than $.05, odd-lot market orders are executed when the crossed market condition no longer exists. In addition, in a crossed market condition, executable odd-lot limit orders are executed at the crossed market bid price (in the case of an order to sell) or at the crossed market offer price (in the case of an order to buy). For example, if the bid and offer were $10.10 and $20.00, respectively, an executable odd-lot sell limit order priced at $20.10 or less would be executed at $20.10, and an executable odd-lot buy limit order priced at $20.00 or higher would be executed at $20.00.

The Exchange believes that the existing odd-lot execution procedures have operated efficiently. Furthermore, the Exchange has received no complaints from members or the public regarding odd-lot executions. Therefore, the Exchange seeks an extension to the pilot program for an additional six-month period ending June 30, 2005, which would provide the Exchange with time to asses further enhancements to the odd-lot execution procedures.

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) [11] 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, in 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 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

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

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) Impose any significant burden on competition; and

(iii) Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6) thereunder.[13] 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.

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because acceleration of the operative date will allow the Amex to continue its pilot odd-lot execution procedures applicable to trading in Nasdaq securities without interruption. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.[14] In addition, the Commission requests that the Exchange report any problems complaints from members and the public regarding odd-lot execution procedures applicable to trading Nasdaq securities, and that the Amex submit any proposal to extend, or permanently approve, the pilot at least two months before the expiration of the six-month pilot.

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. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Amex–2004–108 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Amex–2004–108. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web sit (*http://www.sec.gov/rules/sro.shtml*). 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

system problems with respect to the dissemination of quotation information, and (iv) the bid or offer is ''firm,'' that is, members of the market center disseminating the bid or offer are not relieved of their obligations with respect to such bid or offer under paragraph (c)(2) of Amex Rule 11 Ac1–1 pursuant to the ''unusual market'' exception of paragraph (b)(3) of Rule 11 Ac1–1.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). The Commission notes that Amex provided written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change.

[14] For purposes only of waiving the 30-day operative delay of the proposed rule change, the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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 also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submission should refer to File Number SR–Amex–2004–108 and should be submitted on or before January 21, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 05–79 Filed 1–3–05; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50935; File No. SR–CHX–2004–44]

Self-Regulatory Organizations; Chicago Stock Exchange, incorporated; Notice of Filing and Immediate Effectiveness of Extension of Pilot Rule Change Relating to Transactions in Certain Exchange-Traded Funds

December 27, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 22, 2004, the Chicago Stock Exchange, Incorporated (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a request for extension of a pilot rule change as described in items I, II and III below, which items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(6)[4] thereunder, which renders the rule change effective upon filing with the Commission. 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

In its submission, the Exchange requested extension of a pilot rule change to CHX Article XX, Rule 37(a), which governs manual execution of eligible market and marketable limit orders. The pilot rule change, which will remain in effect for an additional 60-day pilot period, permits a CHX specialist, acting in its principal capacity, to manually executive an incoming market or marketable limit order in one of three exchange-traded funds at a price other than the national best bid or offer. The text of the proposed rule change is available at the Office of the Secretary, CHX 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 CHX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in item IV below. The CHX 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

On August 28, 2002, the Commission issued an order granting a *de minimis* exemption (the ''Exemption'') for transactions in certain exchange-traded funds (''Exempt ETFs'')[5] from the trade-through provisions of the Intermarket Trading System (''ITS'') Plan.[6]

According to the CHX, as stated by both Commission staff and commissioners at an open meeting on August 27, 2002, rapid-fire quotations and executions in Exempt ETFs occur consistent throughout the trading day within a range around the NBBO, rendering it extremely difficult, if not impossible, to access liquidity at an exact NBBO price point. Compounding the ''flickering'' noted by the Commission, the Exchange has noted a marked increase in the incidence of locked and crossed markets in Exempt ETFs.

CHX Article XX, Rule 37(a), commonly referred to as the Exchange's ''Best Rule,'' requires that with respect to any market or marketable limit order not executed automatically, a CHX specialist must ''* * * either (a) manually execute such order at a price and size equal to the NBBO price and size at the time the order was received; or (b) act as agent for such order in seeking to obtain the best available price for such order on a marketplace other than the Exchange, using order routing systems where appropriate.''

According to the CHX, given the unique environment in which the ETFs are traded, and the difficulty that CHX represents that its specialists often encounter in accessing NBBO price points, the Exchange's Department of Market Regulation (the ''Department'') believes that its enforcement of the Best Rule must take the ETF trading environment into account when the Department evaluates the execution prices of eligible market and marketable limit orders for Exempt ETFs. The Department believes that in certain instances, execution of an order in an Exempt ETF at a price other than the NBBO may nonetheless be consistent with the specialist's best execution obligation, in light of the unique environment that characterizes trading in Exempt ETFs. The Exchange believes that the current version of the BEST Rule contains sufficient latitude with respect to an order executed by a CHX specialist acting as agent for the order,[7] but does not contemplate any flexibility for specialists acting in their principal capacity.[8] Accordingly, the Exchange proposed a rule change on a pilot basis, which permits a CHX specialist, acting in its principal capacity, to manually execute an incoming market or marketable limit order in an Exempt ETF at a price other than the NBBO.[9] The

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] The three affected Exempt ETFs are the exchange-traded funds tracking the Nasdaq–100 Index (''QQQ''), the Dow Jones Industrial Average (''DIAMONDs'') and the Standard & Poor's 500 Index (''SPDRs''). The Commission notes that the QQQ is now traded on Nasdaq.

[6] *See* Securities Exchange Act Release No. 46428 (August 28, 2002). At present, the Exemption extends to transactions that are ''executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS.''

[7] The Best Rule provision governing manual agency executions obligates the CHX specialist to seek ''* * * the best available price.'' CHX Article XX, Rule 37(a)(2).

[8] The Best Rule provision governing manual principal executions obligates the CHX specialist to execute the order at the ''* * * NBBO price and size at the time the order was received.'' CHX Article XX, Rule 37(a)(2).

[9] The CHX represents that this proposed rule change is closely analogous to the Exchange's previously submitted interpretation regarding execution of resting limit orders in Exempt ETFs. Under the limit order interpretation, CHX

pilot is due to expire on December 24, 2004.[10] Accordingly, the Exchange requests a sixty-day extension of the pilot rule change; the pilot rule text incorporated into this submission does not differ in any respect from the existing pilot rule provisions.

Significantly, the pilot rule change does not excuse a CHX specialist form its best execution obligations with respect to manually-executed orders. Moreover, the pilot proposed rule change only relates to orders that are executed manually, when a CHX specialist' ability to obtain liquidity at an exact NBBO price point is extremely limited. Orders that are executed automatically will continue to be executed by the Exchange's MAX automated execution system at the NBBO in effect at the time the order is received.

2. Statutory Basis

The CHX believes the proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of section 6(b) of the Act.[11] The CHX believes the proposal is consistent with section 6(b)(5) of the Act [12] in that it is designed to promote just and equitable principles of trade, to remove impediments to, and to perfect the mechanism of, a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement of 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 Regarding the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

specialists need not provide execution guarantees for Exempt ETFs, based on trade-throughs by other markets, that CHX specialists typically provide to all other listed issues. *See* Securities Exchange Act Release No. 46557 (September 26, 2002), 67 FR 61941 (October 2, 2002).

[10] *See* Securities Exchange Act Release No. 50590 (October 26, 2004), 69 FR 63419 (November 1, 2004).

[11] 15 U.S.C. 78(f)(b).

[12] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has been field by the Exchange as a ''non-controversial'' rule change pursuant to section 19(b)(3)(A)(i) of the Act [13] and subparagraph (f)(6) of Rule 19b–4 thereunder.[14] Consequently, because the foregoing rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date on which it was filed or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act and Rule 19b–4 thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6) [16] normally does not become operative prior to thirty days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii),[17] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange seeks to have the proposed rule change become operative immediately so that its specialists may continue trading in accordance with the proposed rule change. The Commission, consistent with the protection of investors and the public interest, has determined to make the proposed rule change effective as of the date of this notice.[18] The Commission notes that the execution guarantees provided by the Exchange are made on a voluntary basis by the Exchange, and that a specialist's duty of best execution will in no way be affected by this proposed rule change.

At any time within 60 days of the filing of such 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.

[13] 15 U.S.C. 78s(b)(3)(A)(i).

[14] 17 CFR 240.19b–4(f)(6).

[15] The Commission has waived the requirement that the Exchange provide the Commission with written notice of its intent to file the proposed rule change at least five days prior to the filing date.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] For purposes of only accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation 15 U.S.C. 78(c)(f).

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. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http:www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CHX–2004–44 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–CHX–2004–44. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http:www.sec.gov/rules/sro.shtml*). 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 the filing also will be available for inspection and copying at the principal office of the CHX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–2004–44 and should be submitted on or before January 25, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 05–81 Filed 1–3–05; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50937; File No. SR–ISE–2004–09]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment Nos. 1 and No. 2 by the International Securities Exchange, Inc., Relating to the Listing and Trading of Options on the S&P 1000 Index

December 27, 2004.

I. Introduction

On April 5, 2004, the International Securities Exchange, Inc. (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposal to list and trade options based on one-tenth and one one-hundredth of the value of the Standard & Poor's 1000 Index (''S&P 1000'' or ''Index''). The ISE submitted Amendment Nos. 1 and No. 2 to the proposal on July 16, 2004,[3] and August 2, 2004,[4] respectively. The proposed rule change and Amendment Nos. 1 and No. 2 were published for comment in the **Federal Register** on November 22, 2004.[5] The Commission received no comment letters regarding this proposal. This order approves the proposed rule change, as amended.

II. Description of the Proposal

The ISE proposes to list and trade the following A.M. cash-settled, European-style options: (1) Reduced Value S&P 1000 Options (''Reduced Value S&P 1000 Options'' or ''Reduced Value Index Options'') based on one-tenth of the value of the Index; (2) Micro S&P 1000 Index Options (''Micro S&P 1000 Options'' or ''Micro Index Options'') based on one-hundredth of the value of the Index; (3) long-term Reduced Value Index Options; and (4) long-term Micro Index Options (the Reduced Value Index Options, Micro Index Options, long-term Reduced Value Index Options, and long-term Micro Index Options may be referred to, collectively, as the ''Index Options'').[6]

A brief description of the proposal appears below, the November Release[7] provides a more detailed description of the proposal.

Index Design and Composition

The Index, which was designed and is maintained by Standard & Poor's (''S&P''), is a market capitalization-weighted index that combines the S&P MidCap 400 Index and the S&P SmallCap 600 Index. The MidCap 400 Index is broad-based index designed to measure the performance of the mid-range sector of the U.S. stock market, and the S&P SmallCap 600 is a broad-based index designed to measure the performance of small capitalization U.S. stocks.[8] Becausee the Index is a combination of the S&P MidCap 400 Index and the S&P SmallCap 600 Index, the S&P 1000 does not have its own criteria for selecting Index components. Instead, the selection criteria for the S&P MidCap 400 Index and the S&P SmallCap 600 Index determine the components of the S&P 1000. The S&P 1000 may not contain any component that is a component of the S&P 500 Index.

S&P chooses the components of the S&P MidCap 400 Index and the S&P SmallCap 600 Index on the basis of market capitalization, liquidity, and industry group representation. As of February 18, 2004, the Index's components were listed on the New York Stock Exchange (''NYSE''), Nasdaq, or the American Stock Exchange (''Amex''), and components representing over 98% of the weight of the Index were options eligible.[9] All of the Index components listed on Nasdaq are designated as national market system securities by the National Association of Securities Dealers. As described more fully below, the Index's components are classified in ten market sectors and no single security dominates the Index.

Transition to Float-Adjusted Capitalization Weighting

The S&P 1000 Index currently is a ''full'' market capitalization-weighted index in which the value of the Index is calculated by multiplying, for each component, the total number of shares outstanding by the price per share, adding these values together, and dividing the result by the Index divisor. On March 1, 2004, S&P announced that it would shift its U.S. indexes, including the S&P 1000 to ''float-adjusted'' market capitalization weighting. As a float-adjusted market capitalization weighted index, the value of the Index will be calculated by multiplying, for each component, the number of shares of the component that are available to investors (rather than all of the component's outstanding shares) by the price per share, adding these values together, and dividing the resuult by the Index divisor. As described more fully on S&P's Internet Web site, S&P's float adjustment will exclude from the share available to investors shares held by other publicly traded companies and strategic partners, government agencies, and control groups.[10]

S&P will implement the transition from full market capitalization weighting to float-adjusted market capitalization weighting over an 18-month period. S&P will calculate provisional indexes alongside of the regular indexes so that passive indexers (institutional investors that model their portfolio construction and weighting according to S&P indexes) can control the timing of adjustments. The ISE will not trade options on any provisional index calculated during the transition period, nor does the ISE expect any securities or futures exchange to trade

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated July 15, 2004, and accompanying Form 19b–4 (''Amendment No. 1''). Amendment No. 1 replaced the filing in its entirety.

[4] *See* letter from Michael J. Simon, Senior Vice President and General Counsel, ISE, to Nancy Sanow, Assistant Director, Division, Commission, dated July 28, 2004 (''Amendment No. 2''). Amendment No. 2 made technical changes clarifying the description of the Index and the calculation of the Index settlement value.

[5] *See* Securities Exchange Act Release No. 50674 (November 16, 2003), 69 FR 67974 (''November Release'').

[6] Under ISE Rule 2009(b)(2), ''Long-Term Index Options Series,'' the ISE may list long-term index options that expire from 12 to 60 months from the date of issuance. The Exchange will not list reduced value long-term index options on either of the Reduced Value S&P 1000 Indexes or the Reduced Value Micro S&P 1000 Indexes pursuant to ISE Rule 2009(B)(2)(i). Telephone conversation between Joseph W. Ferraro III, Associate General Counsel, ISE, and Florence Harmon, Senior Special Counsel, Division, Commission, and A. Michael Pierson, Attorney, Division, Commission, on November 16, 2004 (''November 16 Conversation'').

[7] *See supra* note 5.

[8] *See* Exchange Act Release Nos. 48587 (October 2, 2003), 68 FR 58154 (October 8, 2003) (order approving File No. SR–ISE–2003–18) (approving the listing and trading of options on the S&P SmallCap 600 Index) ''S&P SmallCap 600 Order''); and 49696 (May 13, 2004), 69 FR 28962 (May 19, 2004) (order approving File No. SR–ISE–2004–08) (approving the listing and trading of options on the S&P MidCap 400 Index) (''S&P MidCap 400 Order'').

[9] *See infra* note 26 for a description of the options eligibility standards.

[10] *See http://www.freefloat.standardand poors.com.*

products based on any provisional index during the transition period.

In March 2005, the official index series for S&P's U.S. indexes will shift to partial float adjustment, using float adjustment factors that represent half of the total adjustment. In September 2005, the shift to float adjustment will be completed, the official indexes will be fully float-adjusted, and the provisional indexes will be discontinued. S&P will review float adjustment factors annually in September.

During the transition period, S&P will adjust the divisor of each affected index to maintain continuity across the adjustments. As a result of the divisor adjustments, the Index value will maintain continuity immediately following the adjustments in March 2005 and September 2005. Accordingly, the value of Index Options will not change as a direct result of the float adjustment.

The ISE will provide a link on its Internet Web site to the S&P web site page where float adjustment information is displayed.

Index Calculation and Index Maintenance

The values of the Reduced Value S&P 1000 Index and the Micro S&P 1000 Index will each be calculated continuously, using the last sale price for each component stock in the Index, and will be disseminated every 15 second throughout the trading day.[11] S&P will calculate the settlement value for purposes of settling Reduced Value S&P 1000 Options (''Reduced Value Settlement Value'') and Micro S&P 1000 Options (''Micro Settlement Value'') on the basis of opening market prices on the business day prior to the expiration date of the options (''Settlement Day''). The Settlement Day is normally the Friday preceding ''Expiration Saturday.'' [12] The Exchange will disseminate both the Reduced Value Settlement Value and the Micro Settlement Value.[13]

S&P will monitor and maintain S&P 1000. Although the Exchange is not involved in the maintenance of the Index, the Exchange represents that it will monitor the Index on a quarterly basis and will notify staff in the Division, through a proposed rule change filed pursuant to Rule 19b–4,[14] if and when: (i) The number of securities in the Index drops by ⅓rd or more; (ii) 10% or more of the weight of the Index is represented by component securities having a market value of less than $75 million; (iii) less than 80% of the weight of the Index is represented by component securities that are eligible for options trading pursuant to ISE Rule 502, ''Criteria for Underlying Securities;'' (iv) 10% or more of the weight of the Index is represented by component securities trading less than 20,000 shares per day; or (v) the largest component security accounts for more than 15% of the weight of the Index or the largest five components in the aggregate account for more than 50% of the weight of the Index.

The Exchange will notify the Division immediately in the event S&P determines to cease maintaining or calculating the Index or in the event the Index values are no longer widely disseminated every 15 seconds. In the event the Index ceases to be maintained or calculated, or widely disseminated every 15 seconds, the Exchange will not list any additional series for trading and will limit all transactions in Index Options to closing transactions only for the purpose of maintaining a fair and orderly market and protecting investors.[15]

Contract Specifications

The ISE proposes to characterize the Index as a broad-based index as defined in ISE Rule 2001(j).[16] Exchange rules applicable to the trading of options on broad-based indexes, including margin requirements and trading halt procedures, will apply to the trading of Index Options.[17] The Micro S&P 1000 Options will trade independently of and in addition to the Reduced Value S&P 1000 Options, and both products will be subject to the same rules that presently govern the trading of Exchange index options, including, among others, sales practice rules, trading rules, and position and exercise limits.

The ISE proposes to set strike price intervals at 2½ points for certain near-the-money series in near-term expiration months when the Index is below 200, at 5-point intervals for other Index Options series with expirations up to one year, and at 25- to 50-point intervals for longer-term Index Options. For example, if the level of the Reduced Value S&P 1000 is 337.1, the ISE would set strike price intervals at five points for Reduced Value S&P 1000 Options. Because the level of the Micro S&P 1000 would be 33.71, the ISE would set strike price intervals at 2½-points for Micro S&P 1000 Options.

The ISE proposes to list both Reduced Value S&P 1000 Options and Micro S&P 1000 Options in the three consecutive near-term expiration months plus up to three successive expiration months in the March cycle. For example, consecutive expirations of January, February, March, plus June, September, and December expirations would be listed.[18] In addition, long-term Index Options series having up to 60 months to expiration may be traded.[19] The interval between expiration months for Reduced Value S&P 1000 Index Options or Micro S&P 1000 Index Options will not be less than six months.

The Exchange proposes to establish aggregate position limits for Reduced Value S&P 1000 Options at 50,000 Reduced Value S&P 1000 Options contracts on the same side of the market, provided no more than 30,000 of such Reduced Value S&P 1000 Options contracts are in the nearest expiration month series. The Exchange also proposes to establish aggregate position limits for Micro S&P 1000 Options at 500,000 Micro S&P 1000 Options contracts on the same side of the market, provided that no more than 300,000 of the Micro S&P 1000 Options contracts are in the nearest expiration month series. Reduced Value S&P 1000 Options contracts will be aggregated with the Micro S&P 1000 Options contracts, where 10 Micro S&P 1000 Options contracts equal one Reduced Value S&P 1000 Options contract.[20] Positions in long-term Reduced Value S&P 1000 Options and Micro S&P 1000 Options will be aggregated with positions in Reduced Value S&P 1000 Options and Micro S&P 1000 Options that expire in less than 12 months.[21]

[11] The values of the Reduced Value S&P 1000 and the Micro S&P 1000 will be calculated by S&P and disseminated to Reuters. The Exchange will receive those values from Reuters and disseminate them every 15 seconds between the hours of 9:30 a.m. and 4:15 p.m. to the Options Price Reporting Authority and to its members. The Index is published daily in, among other places, The Wall Street Journal and The New York Times, and is available during trading hours from quotation vendors such as Reuters. Telephone conversation between Joseph W. Ferraro III, Associate General Counsel, ISE, and Florence Harmon, Senior Special Counsel, Division, Commission, on November 9, 2004 (''November 9 Conversation'').

[12] For any given expiration month, the Index Options will expire on the third Saturday of the month.

[13] *See supra* Amendment No. 2, note 4.

[14] *See supra* November 9 Conversation, note 11.

[15] *Id.*

[16] ISE Rule 2001(j) defines a ''market index'' or a ''broad-based index'' to mean an index designed to be representative of a stock market as a whole or of a range of companies in unrelated industries.

[17] *See* ISE Rules 2000 through 2012.

[18] *See* ISE Rule 2009(a)(3).

[19] *See* ISE Rule 2009(b)(1).

[20] The same limits that apply to position limits will apply to exercise limits for these products. *See supra* November 16 Conversation, note 6.

[21] Telephone conversation between Joseph W. Ferraro III, Associate General Counsel, ISE, and Yvonne Fraticelli, Special Counsel, Division, Commission, on December 27, 2004.

Surveillance and Capacity

The ISE represents that it has an adequate surveillance program for index options, and that it intends to apply to Index Options the same program procedures that it applies to the ISE's other index options. In addition, the ISE notes that it is a member of the Intermarket Surveillance Group (''ISG''), which includes all of the registered national securities exchanges and the NASD. The ISE notes that members of the ISG work together to coordinate surveillance and investigative information sharing in the stock and options markets.

In a confidential submission to the Commission, the Exchange provided an analysis supporting its representation that it has the system capacity to adequately handle all options series that could be listed pursuant to this proposal, including long-term Reduced Value Index Options and long-term Micro Index Options.[22]

III. Discussion

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of section 6(b)(5) of the Act.[23] The Commission finds that the trading of Reduced Value S&P 1000 Options, Micro S&P 1000 Options, long-term Reduced Value S&P 1000 Options, and long-term Micro S&P 1000 Options will permit investors to participate in the price movements of the securities that comprise the Index. The Commission also believes that the trading of the Index Options will allow investors holding positions in some or all of the securities underlying the Index to hedge the risks associated with their portfolios. Accordingly, the Commission believes that Index Options will provide investors with an important trading and hedging mechanism. By broadening the hedging and investment opportunities of investors, the Commission believes that the trading of Index Options will serve to protect investors, promote the public interest, and contribute to the maintenance of fair and orderly markets.[24]

The trading of Index Options, however, raises several issues, including issues related to index design, customer protection, surveillance, and market impact. For the reasons discussed below, the Commission believes that the ISE has adequately addressed these issues.

A. Index Design and Structure

The Commission finds that it is appropriate and consistent with the Act to classify the Index as broad-based for purposes of index options trading, and therefore appropriate to permit ISE rules applicable to the trading of broad-based options to apply to the Index Options. Specifically, the Commission believes that the Index is broad-based because it reflects a substantial segment of the U.S. equity market. First, as described more fully above, the Index is comprised of the 400 component stocks of the S&P MidCap 400 Index, which is designed to measure the performance of the mid-range sector of the U.S. stock market, and the 600 component stocks of the S&P SmallCap 600 Index, which is designed to measure the performance of small capitalization U.S. stocks. Both the S&P MidCap 400 Index and the S&P SmallCap 600 Index are broad-based indexes.[25] According to the ISE, as of February 18, 2004, components representing over 98% of the weight of the Index were options eligible.[26] Second, as of March 25, 2004, the Index's components were classified in ten market sectors, which were weighted in the Index as follows: energy (6.37%); materials (4.32%); industrials (13.96%); consumer discretionary (18.52%); consumer staples (4.45%); health care (12.15%); financials (18.15%); information technology (16.06%); telecommunications services (0.51%); and utilities (5.51%). Third, as of February 18, 2004, the total capitalization of the Index was approximately $1.47 trillion, the capitalization of the Index's components ranged from approximately $11.80 billion to approximately $72.11 million, and the mean capitalization of the Index's components was approximately $1.47 billion. As of February 18, 2004, the largest Index component accounted for 0.80% of the weight of the Index, and the five highest weighted securities accounted for 3.14% of the weight of the Index. Fourth, because the Index is a combination of two broad-based indexes, the S&P MidCap 400 Index and the S&P SmallCap 600 Index, and the selection and maintenance criteria for S&P MidCap 400 Index and the S&P SmallCap 600 Index determine the components of the S&P 1000, the selection and maintenance criteria for the S&P MidCap 400 Index and the S&P SmallCap 600 Index should serve to ensure that the Index maintains its broad representative sample of stocks.[27]

The Commission also believes that the general broad diversification, capitalizations, liquidity, and relative weighting of the Index's component securities minimize the potential for manipulation of the Index. First, the Index is comprised of 1000 components listed and traded on the NYSE, Nasdaq, or the Amex, and no single security dominates the Index. Second, as of February 18, 2004, the total Index capitalization was approximately $1.47 trillion, the median and mean capitalizations of the Index's components were approximately $1.02 billion and $1.47 billion, respectively, and the capitalizations of the Index's components ranged from a high of approximately $11.80 billion for the highest-weighted component (which represented .80% of the weight of the Index) to a low approximately $72.11 million for the lowest-weighted Index component (which represented .005% of the weight of the Index). As of February 18, 2004, the capitalizations of the Index's five most heavily weighted components, which represented 3.14% of the weight of the Index, ranged from approximately $11.80 billion to approximately $9.3 billion. Third, as of

[22] The ISE clarified that its capacity analysis included long-term Reduced Value Index Options and long-term Micro Index Options. Telephone conversation between Florence Harmon, Senior Special Counsel, Division, Commission, and Joseph Ferraro III, Associate General Counsel, ISE, on November 6, 2004.

[23] 15 U.S.C. 78f(b)(5). In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[24] Pursuant to section 6(b)(5) of the Act, the Commission must predicate approval of any new option or warrant proposal upon a finding that the introduction of such new derivative instrument is in the public interest. Such a finding would be difficult for a derivative instrument that served no hedging or other economic function, because any benefits that might be derived by market participants likely would be outweighed by the potential for manipulation, diminished public confidence in the integrity of the markets, and other valid regulatory concerns. In this regard, the Commission believes that the Index Options will provide investors with a hedging and investment vehicle that should reflect the overall movement of a substantial segment of the U.S. equity market.

[25] *See supra* S&P SmallCap 600 Order and S&P MidCap 400 Order, note 8.

[26] The option listing standards, which are uniform among the U.S. options exchanges, provide that a security underlying an option must, among other things, meet the following requirements: (1) The public float must be at least 7 million shares; (2) there must be a minimum of 2,000 holders of the underlying security; (3) the issuer must be in compliance with any applicable requirements of the Exchange Act; (4) trading volume must have been at least 2.4 million shares over the preceding 12 months; and (5) the market price per share must meet specified levels. *See, e.g.,* ISE Rule 502.

[27] As noted above, the S&P 1000 Index does not have its own selection criteria. Instead, the selection criteria for the S&P MidCap 400 Index and the S&P SmallCap 600 Index determine the components of the S&P 1000 Index.

February 18, 2004, mean and median six-month average daily trading volume of the Index's components was 466,190 shares and 252,180 shares, respectively, and 93.6% of the Index's components had six-month average daily trading volume of at least 50,000 shares. Fourth, as of February 18, 2004, components representing over 98% of the weight of the Index were options eligible.[28] Fifth, the ISE has represented that it will monitor the Index on a quarterly basis and will notify Division staff, by a rule filing made pursuant to Rule 19b–4,[29] if and when: (1) The number of securities in the Index drops by ⅓rd or more; (2) 10% or more of the weight of the Index is represented by component securities having a market value of less than $75 million; (3) less than 80% of the weight of the Index is represented by component securities that are eligible for options trading pursuant to ISE Rule 502; (4) 10% or more of the weight of the Index is represented by component securities trading less than 20,000 shares per day; or (5) the largest component security accounts for more than 15% of the weight of the Index or the largest five components in the aggregate account for more than 50% of the weight of the Index.

The Commission believes that these factors minimize the potential for manipulation because it is unlikely that attempted manipulations of the prices of the Index's components would affect significantly the Index's value. Moreover, the surveillance procedures discussed below should detect as well as deter potential manipulations and other trading abuses.

Finally, the Commission believes that the position and exercise limits for the Index Options are designed to minimize the potential for manipulation and other market impact concerns. The position and exercise limits for the Index Options are comparable to the position and exercise limits approved for other broad-based index options.[30]

B. Customer Protection

The Commission believes that a regulatory system designed to protect public customers must be in place before the trading of sophisticated financial instruments, such as the Index Options, can commence on a national securities exchange. The Commission notes that the trading of standardized, exchange-traded options occurs in an environment that is designed to ensure, among other things, that: (1) The special risks of options are disclosed to public customers; (2) only investors capable of evaluating and bearing the risks of options trading are engaged in such trading; and (3) special compliance procedures are applicable to options accounts. Accordingly, because the Index Options will be subject to the same regulatory regime as the other standardized options traded currently on the ISE, the Commission believes that adequate safeguards are in place to ensure the protection of investors in Index Options.

As described more fully above, S&P plans to modify the weighting methodology for its U.S. indexes, including the S&P 1000, so that by September 2005 the Index will be a float-adjusted market capitalization weighted index. The ISE notes that S&P plans to modify the Index divisor to maintain the continuity of the Index and, for that reason, the value of Index Options will not change as a direct result of the float adjustment. In addition, the ISE represents that it will provide a link on its Internet web site to the S&P Internet web site page displaying float adjustment information. Accordingly, the Commission believes that investors will be able to obtain information regarding the float adjustment and that the transition to float-adjusted market capitalization should not affect the value of Index Options.

C. Surveillance

The Commission generally believes that a surveillance sharing agreement between an exchange proposing to list a stock index derivative product and the market(s) trading the stocks underlying the derivative product is an important measure for the surveillance of the derivative product and the underlying securities markets. Such agreements ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses, thereby making the stock index product less readily susceptible to manipulation. In this regard, the ISE and the NYSE, the NASD, and the Amex are members of the ISG and the ISG Agreement will apply to the trading of Index Options.[31] In addition, the ISE will apply to the Index Options the same surveillance procedures it uses currently for existing index options trading on the ISE.

D. Market Impact

The Commission believes that the listing and trading of Index Options will not adversely impact the underlying securities markets.[32] First, the Index is broad-based and comprised of 1000 component securities, no one of which dominates the Index. Second, as described above, the Index is highly capitalized and its components are actively traded. Third, the position and exercise limits applicable to the Index Options should serve to minimize potential manipulation and market impact concerns. Fourth, the risk to investors of contra-party non-performance will be minimized because the Index Options, like other standardized options traded in the U.S., will be issued and guaranteed by the Options Clearing Corporation (''OCC''). Fifth, existing ISE index options rules and surveillance procedures will apply to the Index Options.

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[33] that the proposed rule change (SR–ISE–2004–09), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[34]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 05–80 Filed 1–3–05; 8:45 am]

BILLING CODE 8010–01–M

[28] *See supra* note 26 for a description of the ISE's options eligibility standards.

[29] *See supra* November 9 Conversation, note 11.

[30] *See, e.g.,* Securities Exchange Act Release Nos. 48884 (December 5, 2003), 68 FR 69753 (December 15, 2003) (File No. SR–PHLX–2003–66) (order approving the listing and trading of Nasdaq 1000 Index options, with position limits of 50,000 contracts on either side of the market and no more than 30,000 contracts in series in the nearest expiration month); and 31382 (October 30, 1992), 57 FR 52802 (November 5, 1992) (File No. SR–CBOE–92–02) (approving the listing and trading of options on the Russell 2000 Index, with position limits of 50,000 contracts on either side of the market and no more than 30,000 contracts in series in the nearest expiration month).

[31] The ISG was formed on July 14, 1983, to, among other things, coordinate more effectively surveillance and investigative information sharing arrangements in the stock and options markets. All of the registered national securities exchanges and the NASD are members of the ISG. In addition, futures exchanges and non-U.S. exchanges and associations are affiliate members of ISG.

[32] As noted above, the ISE represented in a confidential submission to the Commission that it has the necessary systems capacity to support the introduction of the Index Options.

[33] 15 U.S.C. 78s(b)(2).

[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50939; File No. SR–NYSE–2004–031]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Relating to Amendments to Exchange Rule 633, 634, and 635

December 28, 2004.

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 June 21, 2004, the New York Stock Exchange, Inc. (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed amendments to its arbitration rules as described in items I, II and III below, which items have been prepared by the Exchange. On October 29, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.[3] 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 proposed rule change consists of amendments to Rules 633, 634, and 635 concerning appointments of members of the Board of Arbitration, appointments to the panels of securities and non-securities arbitrators, and the appointment of the Director of Arbitration of the Exchange. The text of the proposed new rules, as amended, appears below. Proposed deletions appear in [brackets]; proposed new language appears in *italics.*

* * * * *

Rule 633

[Promptly after the annual election of the Exchange, the Chairman of the Board of Directors shall appoint, subject to the approval of the Board of Directors,] *The Director of Arbitration shall appoint* a Board of Arbitration to be composed of such number of present or former members, allied members and officers of member corporations of the Exchange who are not members of the Board of [Directors] *Executives* [as the Chairman of the Board of Directors shall deem necessary to serve at the pleasure of the Board of Directors or until the next annual election of the Exchange and their successors are appointed and take office].

Rule 634

The [Chairman of the Board of Directors] *Director of Arbitration* shall from time to time appoint two panels of arbitrators, [composed of persons who are residents of or have their places of business in the Metropolitan areas of the City of New York]. [The] *the* first of such panels shall be composed of persons engaged in or retired from the securities business and the second of such panels shall be composed of persons not engaged in the securities business. [The Chairman of the Board of Directors may likewise appoint panels similar to the panels above described to serve outside the City of New York.]

Rule 635

The [Chairman of the Board,] *Chief Regulatory Officer* shall designate one of the officers or other employees of the Exchange as Director of Arbitration. The Director of Arbitration shall be charged with the duty of performing all ministerial duties in connection with matters submitted for arbitration pursuant to these Rules.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Change

In its filings with the Commission, the Exchange included statements concerning the purpose of and basis for 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

NYSE Rule 633 currently provides that the Chairman of the NYSE Board appoints, subject to approval by the Board of Directors, a Board of Arbitration. Members of the Board of Arbitration are current or former members, allied members and/or officers of member corporations. Controversies between parties who are members, allied members, member firms or member corporations (*i.e.,* there are no non-members involved in the controversy) are submitted for arbitration to members of the Board of Arbitration. The director of Arbitration is the person most familiar with the individuals being proposed as members of the Board of Arbitration. Involvement of the Chairman and the Board of Directors in the process does not serve a valid regulatory purpose, nor is their oversight of this appointment process otherwise required. Therefore, the proposed amendment would eliminate the involvement of both the Chairman and the Board, and allow the director of Arbitration to appoint a Board of Arbitration. The proposed amendment also would delete the references in the rule to the annual election of the Exchange, as the review of the members of the Board of Arbitration will be an ongoing process, and the Board will no longer be involved. Moreover, the proposal would delete the references to the Chairman's discretion as to the number of members of the Board of Arbitration, as the Chairman will no longer be involved. In addition, consistent with the recent corporate reorganization at the Exchange, the proposed amendment would delete the reference to the Board of Directors and instead would reference the Board of Executives with regard to the composition of the Board of Arbitration.

NYSE Rule 634 currently provides that the Chairman of the NYSE Board appoints two standing panels (rosters) of arbitrators, one roster of securities arbitrators and one roster of non-securities arbitrators. Arbitration panels for individual cases, pursuant to the rules, are typically composed of three arbitrators, two non-securities arbitrators and one securities arbitrator. The authority of the Chairman to appoint arbitrators to the standing panels has, pursuant to the Delegation of Authority, been delegated to the Vice President, Arbitration and Hearing Board.[4] In practice, arbitration department management routinely appoints new individuals to the rosters of arbitrators, subject to the oversight of the Vice President. In that the Chairman has not played a role in this regard, the amendment would conform the rule to current practice, but would give the Director of Arbitration the direct authority to appoint individuals to the rosters of arbitrators. The proposed amendment also would delete the references in the current rule to the appointment of panels of arbitrators

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Karen Kupersmith, Director of Arbitration, New York Stock Exchange, to Catherine McGuire, Chief Counsel, Division of Market Regulation, dated October 29, 2004 (''Amendment No. 1''). In Amendment No. 1, the Exchange amended a proposal to allow Wither its Chief Executive Officer or its Chief Regulatory Officer to appoint a Director of Arbitration, and it provided additional clarifications to the Statement of Purpose reflected in Item II.A.1, below.

[4] *See* NYSE Constitution, Article IV, Section 14.

within any particular geographic region. This proposed change would conform the rule to current practice as the Exchange does not require that arbitrators who serve in a particular region either be residents of that region or have their principal place of business in that region.

NYSE Rule 635 provides that the Chairman of the Board appoints the Director of Arbitration from the officers or employees of the Exchange. Pursuant to a recent restructuring at the Exchange, the Arbitration Department reports to the Chief Regulatory Officer (through the Vice President, Arbitration and Hearing Board).[5] The proposed amendment, in recognition of that restructuring, provides that the Chief Regulatory Officer would designate the Director of Arbitration, which is subject to the approval of the Regulatory Oversight Committee.[6]

2. Statutory Basis

The proposed changes are consistent with section 6(b)(5) of the Act,[7] in that they promote just and equitable principles of trade by ensuring that members and member organizations and the public have a fair and impartial forum for the resolution of their disputes.

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 that is 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

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days 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 self-regulatory organization 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. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2004–031 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and

Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. All submissions should refer to File Number SR–NYSE–2004–031. The file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently; please use only one method.

The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written communications 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the New York Stock Exchange, Inc. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2004–031 and should be submitted by January 25, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 05–78 Filed 1–3–05; 8:45 am]

BILLING CODE 8010–01–M

[5] *See* Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678.

[6] *See* NYSE Constitution, Article IV, Section 12(a)(4).

[7] 15 U.S.C. 78f(b)(5).

[8] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 4929]

Overseas Schools Advisory Council Notice of Meeting

The Overseas Schools Advisory Council, Department of State, will hold its Executive Committee Meeting on Thursday, January 27, 2005, at 9:30 a.m. in the Bureau of Administration's Conference Room 6320, Department of State Building, 2201 C Street, NW., Washington, DC. The meeting is open to the public.

The Overseas Schools Advisory Council works closely with the U.S. business community in improving those American-sponsored schools overseas, which are assisted by the Department of State and which are attended by dependents of U.S. Government families and children of employees of U.S. corporations and foundations abroad.

This meeting will deal with issues related to the work and the support provided by the Overseas Schools Advisory Council to the American-sponsored overseas schools. The agenda includes a review of the recent activities of American-sponsored overseas schools and the overseas schools regional associations, a review of projects selected for the 2003 and 2004 Educational Assistance Programs, which are under development, and selection of projects for the 2005 Educational Assistance Program.

Members of the general public may attend the meeting and join in the discussion, subject to the instructions of the Chair. Admittance of public members will be limited to the seating available. Access to the State Department is controlled, and individual building passes are required for all attendees. Persons who plan to attend should so advise the office of Dr. Keith D. Miller, Department of State, Office of Overseas Schools, Room H328, SA–1, Washington, DC 20522–0132, telephone 202–261–8200, prior to January 17, 2005. Each visitor will be asked to provide his/her date of birth and Social Security number at the time of registration and attendance and must carry a valid photo ID to the meeting.

All attendees must use the C Street entrance to the building.

Dated: December 28, 2004.

Keith D. Miller,

Executive Secretary, Overseas Schools Advisory Council, Department of State.

[FR Doc. 05–90 Filed 1–3–05; 8:45 am]

BILLING CODE 4710–24–P

Corrections

Federal Register

Vol. 70, No. 2

Tuesday, January 4, 2005

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket No. 04–22]

FEDERAL RESERVE SYSTEM

[Docket No. OP–1215]

FEDERAL DEPOSIT INSURANCE CORPORATION

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[No. 2004–48]

Internal Ratings-Based Systems for Retail Credit Risk for Regulatory Capital

Correction

In notice document 04–23771 beginning on page 62748 in the issue of Wednesday, October 27, 2004 make the following correction:

On page 62753, in the second column, after item 15, the equation should read as follows:

$$K = \left[LGD \times N\left(\frac{N^{-1}(PD) + \sqrt{R} \times N^{-1}(0.999)}{\sqrt{1-R}} \right) - (LGD \times PD) \right]$$

[FR Doc. C4–23771 Filed 1–3–05; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Tuesday,
January 4, 2005

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Final Rule To Designate Critical Habitat for the Santa Ana Sucker *(Catostomus santaanae)*; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AT57

Endangered and Threatened Wildlife and Plants; Final Rule To Designate Critical Habitat for the Santa Ana Sucker (*Catostomus santaanae*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the threatened Santa Ana sucker (*Catostomus santaanae*) pursuant to the Endangered Species Act of 1973, as amended (Act). This species is now restricted to three noncontiguous populations in three different stream systems in southern California: The lower and middle Santa Ana River in San Bernardino, Riverside, and Orange counties; the East, West, and North Forks of the San Gabriel River in Los Angeles County; and lower Big Tujunga Creek, a tributary of the Los Angeles River in Los Angeles County. We have identified 23,719 acres (ac) (9,599 hectares (ha)) of aquatic and riparian habitats essential to the conservation of the Santa Ana sucker. We are designating two areas in Los Angeles County, one along the San Gabriel River (Unit 2) and the other along the Big Tujunga Creek (Unit 3) as critical habitat for Santa Ana sucker. These units encompass approximately 8,305 ac (3,361 ha) of essential habitat for the Santa Ana sucker within Los Angeles County. Essential habitat for the Santa Ana sucker in Orange, Riverside, and San Bernardino counties has been excluded from the final critical habitat designation, because we have concluded that the benefits of excluding these lands from critical habitat designation outweigh the benefits of their inclusion pursuant to section 4(b)(2) of the Act.

DATES: This rule becomes effective on February 3, 2005.

ADDRESSES: Comments and materials received, as well as supporting information used in this rulemaking, are available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, California 92009. You may obtain copies of the final rule and the economic analysis from the field office address above or by calling (760) 431–9440, or from our Internet site at *http://carlsbad.fws.gov*.

If you would like copies of the regulations on listed wildlife or have questions about prohibitions and permits, please contact the Carlsbad Fish and Wildlife Office (*see* **ADDRESSES** above).

FOR FURTHER INFORMATION CONTACT: Mr. Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, at the address and phone number listed above.

SUPPLEMENTARY INFORMATION:

Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, and consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, ''Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7.'' Currently, only 445 species or 36 percent of the 1,244 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,244 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however, that a recent 9th Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service*, has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. We are currently reviewing the decision to determine what effect it may have on the outcome of consultations pursuant to Section 7 of the Act.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed. The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects, the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy

Act (NEPA), all are part of the cost of critical habitat designation. None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

Background

This revised final rule addresses the designation of critical habitat for the Santa Ana sucker (*Catostomus santaanae*) (sucker), which is endemic to the Los Angeles River, the San Gabriel River, and the Santa Ana River, and assumed to be introduced to the Santa Clara River in California. In this revised final rule, we discuss information obtained since the proposed and original final critical habitat rules published concurrently in the **Federal Register** on February 26, 2004 (69 FR 8911 and 69 FR 8839).

The sucker has evolved in the dynamic hydrological systems of southern California and requires clean, clear, and relatively cool streams of varying width and depth with appropriate substrates (*e.g.*, a mix of sand, gravel, cobble, and boulder). The sucker scrapes algae and invertebrates from hard substrates such as gravel and cobbles and spawns over a gravel and cobble substrate. Please refer to the final rule listing the species as threatened (65 FR 19686) and our previous final critical habitat rule (69 FR 8839) for a more detailed discussion about the species' physical description, ecology, range, distribution, and a discussion of factors affecting the species.

Previous Federal Action

On July 9, 2001, California Trout, Inc., the California-Nevada Chapter of the American Fisheries Society, the Center for Biological Diversity, and the Friends of the River (plaintiffs) filed a 60-day notice of intent to sue over our failure to designate critical habitat for the Santa Ana sucker. The plaintiffs filed a second amended complaint for declaratory judgment and injunctive relief on March 19, 2002, with the U.S. District Court for the Northern District of California. On February 26, 2003, the district court ordered the Service to designate final critical habitat for the Santa Ana sucker by no later than February 21, 2004, and enjoined the Service from issuing any section 7 concurrence letters or biological opinions on actions that ''may affect'' the sucker until such time as the final critical habitat is designated. The Service published the proposed and final rules concurrently on February 26, 2004 (69 FR 8911 and 69 FR 8839). As a result, the injunction prohibiting the issuance of biological opinions and concurrence letters was lifted. See the proposed rule (69 FR 8911) for a discussion of why the final rule and proposed rule were published at the same time.

The proposed critical habitat rule, published on February 26, 2004 (69 FR 8911), included a 60-day comment period during which the public could submit comments on the proposed designation. On August 19, 2004, we published a notice in the **Federal Register** (69 FR 51416) announcing the reopening of a 30-day comment period on the proposed critical habitat rule and the scheduling of a public hearing, which was held in Pasadena, California on September 9, 2004. On October 1, 2004, we published a **Federal Register** notice (69 FR 58876) announcing the availability of the draft economic analysis of the proposed critical habitat designation and reopening a 10-day public comment period for the economic analysis and proposed designation. On October 25, 2004, we published another notice in the **Federal Register** (69 FR 62238) reopening a 30-day comment period on the draft economic analysis and the proposed designation.

Summary of Comments and Recommendations

During the initial 60-day public comment period for the proposed rule (69 FR 8911), we contacted all appropriate State and Federal agencies, county governments, elected officials, scientific organizations, and other interested parties, via mail and/or fax, and invited them to submit comments and/or information concerning the proposed rule. We also published newspaper notices in the *The Press-Enterprise*, Riverside, CA, and in the *Los Angeles Times*, Los Angeles, CA, inviting public comment. During the first comment period, we received comments from three county agencies, three water districts, two businesses, three groups, and 14 individuals. Of the 22 letters we received, four letters supported the designation as proposed, six letters suggested expanding the designation, six letters suggested reducing the designation, one letter requested clarification of the designation, and five letters were neutral.

During the second comment period, we received comments from one utility agency, three groups, and four individuals. Of the six letters we received, one letter supported the designation as proposed, two letters suggested expanding the designation, one letter suggested reducing the designation, and two letters were neutral. At the public hearing during the second comment period, we received 21 oral comments, all of which requested a reduction in the designation. A transcript of the hearing is available for inspection (*see* **ADDRESSES** section).

During the third comment period (October 1 to 12, 2004), which regarded the draft economic analysis, we received comments from 1 county agency, 3 water districts, 1 business, 4 groups, and 2 individuals. Of the 7 letters we received, 4 letters were requests for an extension of the comment submission period, and 3 letters contained suggestions for improvements to the draft economic analysis. Of the latter 3 letters, 1 supported the designation as proposed and 2 suggested reducing the designation.

During the fourth comment period (October 25 to November 24, 2004), which regarded the draft economic analysis, we received comments from 7 groups, 8 individuals, and 1 project authority (representing 1 county agency and 4 water districts). Of the 13 letters we received, 10 letters supported the designation as proposed, 2 letters suggested reducing the designation, and 1 letter requested clarification of the draft economic analysis. (After the comments deadline, we received 2 letters with comments from 1 county agency suggested reducing the designation, and a letter from 1 business requesting an extension of the comments deadline.)

In accordance with our peer review policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we requested the expert opinions of seven independent specialists who are recognized authorities on freshwater fish of Southern California regarding pertinent scientific or commercial data and assumptions relating to the supporting biological and ecological information in the proposed designation. The purpose of such review is to ensure that the designation is based on scientifically sound data, assumptions, and analyses, including input of appropriate experts and specialists.

We reviewed all comments, including the oral statements presented at the public hearing and the written comments received from peer reviewers and the public during the comment periods, for substantive, relevant issues and new data regarding critical habitat and the Santa Ana sucker. Peer reviewer comments are summarized separately in the following section. We have grouped public comments into six general issues relating to critical habitat and the draft economic analysis, combined and

summarized similar comments, and provided our responses in the Public Comments section below.

Peer Review Comments

We received three written responses from peer reviewers recommending expansion of critical habitat and one written response supporting critical habitat as designated. One additional peer reviewer supported designated critical habitat, but this letter was received after the deadline. Two peer reviewers supplied specific edits and comments on the critical habitat unit boundaries and the primary constituent elements. Comments from peer reviewers have been incorporated into this final rule as appropriate.

(1) *Comment:* The upper boundary of critical habitat on the East Fork of the San Gabriel River should be the Bridge-of-No-Return and was incorrectly delineated on the map in the final rule (69 FR 8859).

Our Response: We acknowledge that this upper boundary was incorrectly delineated on the map of Unit 2 in the original final rule. This area was also inadvertently left out of the legal description of the unit. As a result, we cannot include the area in the revised final designation even though this area is essential to the conservation of the sucker. We may, under the Act, revise the designation of critical habitat in the future to include this area.

(2) *Comment:* The stretches of the San Gabriel River between the San Gabriel Dam and the Morris Dam reservoir, between the Highway 39 bridge and the Fish Canyon confluence with the river, and upstream of Cogswell Dam should be included in critical habitat because these areas contain potentially occupied and/or restorable habitat.

Our Response: Although we appreciate the importance of potentially suitable habitat within these stretches of the San Gabriel River, we do not have sufficient information to determine if these portions of the river contain the primary constituent elements essential to the conservation of the sucker and therefore, we could not designate these areas as critical habitat. Under the Act, we can revise critical habitat in the future if new information becomes available indicating that these areas are essential.

(3) *Comment:* Devil's Gulch, a tributary to the East Fork of the San Gabriel River, should not have been included in designated critical habitat because it does not support the Santa Ana sucker.

Our Response: Devil's Gulch was not designated as critical habitat.

(4) *Comment:* There is a barrier to fish movement upstream from the San Gabriel River into Big Mermaid's Canyon and therefore Big Mermaid's Canyon should not be designated as critical habitat.

Our Response: Using the best available information, including records from the California Natural Diversity Database (CNDDB), we determined that Big Mermaid's Canyon previously supported suckers and still is essential to the conservation of the sucker in that it transports water and substrate essential to the maintenance of occupied sucker habitat downstream.

(5) *Comment:* Haines Creek should be specifically described as part of designated critical habitat for the sucker.

Our Response: Haines Creek is located within the boundaries of the Big Tujunga Creek Critical Habitat Unit (Unit 3), and has been specifically listed in the description of this unit in this revised final rule.

(6) *Comment:* The Service has not adequately supported its statement that the upper Santa Ana Wash and tributaries provide sediment transport to occupied habitat.

Our Response: We based the Santa Ana sucker critical habitat designation on the best available information, including expert opinion (Dr. Thomas Haglund, Ichthyologist, pers. comm. 2004; Dr. Jonathan Baskin, Ichthyologist, California State Polytechnic University, Pomona, pers. comm. 2004) and studies in similar river systems in California (NOAA 2003).

While the Santa Ana Wash was proposed as critical habitat based on, among other things, its contribution of sediments and maintenance of a functioning hydrograph, these attributes do not, of themselves, warrant determining that an area is ''essential to the conservation of the species'', which is the statutory standard for designation of unoccupied areas. Therefore, Unit 1B, Santa Ana Wash, has been removed from the revised designation. The basis for this removal is summarized in the section entitled ''Summary of Changes''.

(7) *Comment:* The criteria used to designate individual tributaries in Unit 1B, the Santa Ana Wash and in Unit 3, Big Tujunga Creek as critical habitat were not consistently applied.

Our Response: We based our determination to designate tributaries in Unit 1B and Unit 3 on the best available data, including aerial photographs and historical sucker occurrences. We determined that these tributaries maintain a functioning hydrological system, provide and transport sediment downstream to occupied habitat, support riparian systems, and maintain the long-term viability of the sucker populations. We believe that we applied these criteria consistently to each area designated as critical habitat. Please refer to the *Methods and Criteria Used To Delineate Critical Habitat* section of this rule for a more detailed discussion. However, the Santa Ana Wash and associated tributaries within Unit 1B have been excluded from the revised designation. The basis for this exclusion is summarized in the section entitled ''Summary of Changes''.

(8) *Comment:* The primary constituent element describing substrate types should be refined to include low-embeddedness.

Our Response: We concur and have revised the description of the primary constituent element describing substrate. Please refer to the *Primary Constituent Elements* section of this rule for a detailed description.

(9) *Comment:* Minimum water depth of from 3 to 30 centimeters (cm) (1.2 to 11.8 inches (in)) should be changed. Depths less than 4 cm (1.6 in) would not provide habitat for most life stages of the sucker.

Our Response: We used 3 cm (1.2 in) as the minimum water depth because of the observations of larval suckers in sandy habitats with depths of 3 to 10 cm (1.2 to 3.9 in) of water along the margins of rivers and streams (Haglund *et al.*, 2004).

(10) *Comment:* Juvenile suckers migrate into tributaries, possibly attracted by the cooler temperatures these tributaries experience in the spring. Therefore, tributaries should be included as a primary constituent element in critical habitat. Sunnyslope Creek, Arroyo Tequesquite, Evans Lake Drain, Mt. Rubidoux Creek, Agua Mansa Drain, and the tributaries draining Hidden Valley Regional Park wetlands should be included as critical habitat.

Our Response: If a tributary within the critical habitat boundaries contained one or more of the primary constituent elements, then it was considered essential habitat. Some tributaries within the critical habitat boundaries do not contain any of the primary constituent elements and were not, therefore, considered essential. For example, a concrete-lined storm drain directing urban runoff into one of the rivers is unlikely to provide any of the primary constituent elements essential to the conservation of the species. Although we did not specifically describe tributaries as a primary constituent element, they are necessary in a functioning hydrological system and are included in the critical habitat designation where appropriate.

Several of the drains, creeks, and other tributaries listed by the commenter contain the primary constituent elements and are considered essential habitat but were excluded from the critical habitat designation under section 4(b)(2) of the Act, because they are protected under the Western Riverside Multiple Species Habitat Conservation Plan (MSHCP).

(11) *Comment:* Unnatural or anthropogenic ebbs and peaks in water volume may be inadvertently included as primary constituent elements, since the description of a functioning hydrological system as a primary constituent element did not specify that it must contain a natural hydrograph.

Our Response: We concur and have revised the primary constituent element describing a functional hydrological system. Please refer to the *Primary Constituent Elements* section of this rule for a detailed description.

Public Comments

Issue 1: Comments on the Adequacy and the Extent of Critical Habitat Designation

(12) *Comment:* Critical habitat should be designated in the Santa Clara River because (1) the Santa Clara River is essential to the conservation of the Santa Ana sucker, (2) the population provides increased genetic variability to the overall sucker population, (3) the Santa Clara River is threatened by rapid development within its watershed, and (4) the Santa Clara River is not otherwise protected under the Act. The Santa Ana sucker in the Santa Clara River should be listed under the Act, since there remains much ambiguity regarding its status as an introduced species in the Santa Clara River.

Our Response: Since the sucker population in the Santa Clara River is not federally listed (65 FR 79686), critical habitat could not be designated for that population. The sucker was not listed in the Santa Clara River due to the lack of evidence showing the sucker was native to the Santa Clara River. Our earliest record of the sucker in the Santa Clara River watershed is from 1934 (Hubbs *et al.* 1943). Conversely, we have records of the sucker in the Santa Ana River from 1897 (Snyder 1908). Therefore, based on the best available data, we have presumed the sucker in the Santa Clara River was introduced. If we determine the Santa Clara River population to be crucial to the recovery of the species as we prepare the recovery plan, we may need to reevaluate the status of this population under the Act.

(13) *Comment:* Since the area below Prado Dam in the Santa Ana River is not adequately protected by either the Santa Ana Sucker (SAS) Conservation Program or by the Western Riverside MSHCP, it should be included in the critical habitat designation. Since the SAS Conservation Program focuses conservation efforts on the upper stretch of the Santa Ana River, it may not adequately address the conservation needs of the sucker throughout the Santa Ana River. Another commenter stated that the benefits of including the areas covered by these plans in the critical habitat designation outweigh potential costs to other agencies and that critical habitat designation provides greater benefits to the sucker than either of the plans.

Our Response: Section 4(b)(2) of the Act allows the Service to exclude any area from critical habitat if we determine that the benefits of such an exclusion outweigh the benefits of including the area in the critical habitat designation, unless, based on the best scientific and commercial data available, we determine that failure to designate the area as critical habitat will result in the extinction of the species. Exclusions can be based on Integrated Natural Resource Management Plans (INRMPs) on military lands, Habitat Conservation Plans (HCPs), or other formal conservation plans; except for INRMPs, plans must provide conservation benefits to the species as well as assurances that the plan will be implemented and the conservation effort will be effective. We have determined that both the Western Riverside MSHCP and the SAS Conservation Program satisfy these requisites, and have, therefore, concluded that the benefits of excluding the lands covered by these plans from the final critical habitat designation outweigh the benefits of including these areas. As such, they are excluded from critical habitat designation. See *Lands Covered Under Existing Conservation Plans* for a detailed discussion.

(14) *Comment:* Habitat within the boundaries of the Western Riverside MSHCP and SAS Conservation Program meet the definition of critical habitat and should be included in designated critical habitat.

Our Response: Although the habitat within the boundaries of these conservation plans contains one or more of the physical and biological characteristics essential to the conservation of the sucker, we have determined that these conservation plans provide special management and/or protection for the Santa Ana sucker, and have concluded that the benefits of excluding the lands covered by these plans from the final critical habitat designation outweigh the benefits of including these areas. Thus, we have excluded these areas from critical habitat designation under 4(b)(2) of the Act.

Issue 2: Comments on Individual Units

(15) *Comment:* Commenters stated that Santa Ana suckers are declining as a result of heavy recreational use in the San Gabriel River. Conversely, some other commenters stated suckers in the San Gabriel River were not declining as the result of recreational activities or as a result of the use of summer homes.

Our Response: Based on the best available information, we believe that recreational suction dredging, artificial pool creation, off-road vehicle use, swimming, wading, bathing, and the use of recreational summer homes may have varying detrimental effects on the Santa Ana sucker.

Suction dredging, which occurs on a recreational basis in the San Gabriel River can result in the death of fish eggs, larvae, and fry (Harvey and Lisle 1998; Griffith and Andrews 1981). Suction dredging can also change the functional composition of the invertebrate community and increase sedimentation rates in sensitive spawning and feeding habitats (Somer and Hassler 1992).

The use of the river as an off-highway vehicle (OHV) recreational area may result in adverse effects to the sucker, if the OHV use occurs in areas used by the sucker during the spawning and nursery season, or if vehicles leak oil, gas, and other pollutants into the river. OHV use can change the physical structure of habitat (Wender and Walker 1998; Texas Chapter of American Fisheries Society 2002; Brown 1994), crush eggs and larvae within the substrate (Texas Chapter of American Fisheries Society 2002), and reduce the taxonomic diversity of the macroinvertebrate and algal species (Texas Chapter of American Fisheries Society 2002) which is the food base for the sucker (Haglund and Baskin 2003; Greenfield *et al.* 1970). Haglund and Baskin (2002) recently completed a one-year study in the San Gabriel River; their results suggest that macroinvertebrate diversity was reduced in vehicle ruts and tracks. However, they concluded there was no evidence at that time to indicate that the intensity of OHV usage was related to trends in native fish populations (although they recommended further investigation before drawing firm conclusions).

Swimming, wading, and bathing can degrade the physical structure and

water quality of streams. Erosion associated with heavy recreational use along streambanks contributes to degraded habitat conditions including increased sedimentation in potential spawning and feeding grounds and loss of habitat structure (*e.g.*, pools, riffles, shallow sandy margins) that provide essential elements to the survival of the sucker. The damming of the river to create recreational swimming pools may temporarily eliminate fish passage and limit the availability of suitable habitat for the sucker (Ally, in litt. 2001). Pollution associated with personal care products (*e.g.*, suntan lotion, shampoo, soap, insect repellent) that can be released into the aquatic environment during swimming, wading, and bathing can have adverse physiological effects on the endocrine system of fishes (Daughton and Ternes 1999).

We have been working and will continue to work with the U. S. Forest Service (Forest Service) to ensure their actions with respect to the sucker will not result in jeopardy to or take of the species. The Forest Service has recently implemented measures to reduce OHV activity in areas in which suckers are suspected to spawn as part of the Angeles National Forest Santa Ana Sucker Conservation Strategy.

(16) *Comment:* The San Gabriel Canyon OHV Area is currently a Department of Defense training facility and is also covered under a Forest Service management plan. Therefore, this area should be excluded from designated critical habitat.

Our Response: Section 4(b)(2) of the Act allows the Service to exclude any area from critical habitat if the Service determines the benefits of such exclusion outweigh the benefits of specifying such area as part of critical habitat, unless, based on the best scientific and commercial data available, the Service determines that failure to designate the area as critical habitat will result in the extinction of the species. Exclusions can be based on INRMPs for military lands, HCPs, and formal conservation plans. We have confirmed with the Forest Service that the Department of Defense does not currently use the San Gabriel Canyon OHV Area as a training facility (Bill Brown, U.S. Forest Service, pers. comm. 2004), and therefore does not qualify for exclusion as provided for military lands under section 4(b)(2) of the Act.

The Service must determine that a management plan provides a conservation benefit to the species, and assurances that the management plan will be implemented, and the conservation effort will be effective. We have reviewed the San Gabriel Canyon Off-Road Vehicle Management Plan (U.S. Forest Service 1985) for consistency with the aforementioned criteria. While we appreciate the significant amount of effort private individuals and the Forest Service have expended in the development of this management plan, it does not adequately address the conservation needs of the sucker in the San Gabriel River and therefore, we cannot exclude this area from the critical habitat designation under 4(b)(2) of the Act. We are working with the Forest Service to better conserve the sucker in this area.

(17) *Comment:* Only a small portion of the San Gabriel Canyon OHV Area contains suitable habitat for the Santa Ana sucker.

Our Response: Our regulations allow us to designate critical habitat in areas where the species is not present if they are in proximity to areas occupied by the species and are essential to their conservation (50 CFR 424.12(d)). Although suckers may not occupy this area when the reservoir is full, this area does provide a linkage between the West, East, and North Forks of the San Gabriel River. Linkages are essential to maintaining the genetic structure and viability of the species in this river. Therefore, we consider all portions of the San Gabriel Canyon OHV Area within the geographical boundaries of the designation as critical habitat.

(18) *Comment:* Habitat for the sucker is not present in the plunge pool immediately downstream of Cogswell Dam or for 1,000 feet downstream of Cogswell Dam in the West Fork of San Gabriel River. Therefore, this section of the river should be excluded from critical habitat.

Our Response: Based on the best available information, we have determined that this area of the West Fork of the San Gabriel River contains substrate, vegetation, and water that are essential for the conservation of the species (Haglund and Baskin 1996; Haglund and Baskin 1995; U.S. Forest Service 2003). The Santa Ana sucker was detected in the vicinity of this area during the last decade (Haglund and Baskin 1996). Therefore, since this area had been occupied and since it contains the primary constituent elements of critical habitat, this area will remain designated as critical habitat. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(19) *Comment:* A 1,000-foot portion of the East Fork of the San Gabriel River downstream of the confluence of the East, West, and North forks should be excluded from critical habitat because critical habitat designation will limit the implementation of flood protection measures, the amount of water that can be stored behind the San Gabriel Dam, and revenue for the hydroelectric plant located downstream of the dam.

Our Response: This area was included in the critical habitat designation because it provides a linkage between the West, East, and North Forks of the San Gabriel River. Linkages are essential to maintaining the genetic structure and viability of the species in this river. Our regulations allow us to designate critical habitat in areas where the species is not present if they are in proximity to areas occupied by the species and are essential to their conservation (50 CFR 424.12(d)). In addition, significant numbers of suckers were detected in the vicinity of this area during recent surveys (M. Chimienti, Los Angeles County Department of Public Works, pers. comm. 2004). Therefore, this area of the East Fork of the San Gabriel River will remain in the critical habitat designation. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(20) *Comment:* Within the San Gabriel River, critical habitat should be designated between Morris Dam and Fish Canyon as well as lower San Jose Creek, a tributary to San Gabriel River. The commenter did not state why this area should be designated.

Our Response: Although we appreciate the potential for habitat in this portion of the San Gabriel River and lower San Jose Creek, we do not have sufficient information to determine if these areas contain the primary constituent elements essential to the conservation of the sucker. Therefore, we cannot designate these areas as critical habitat. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(21) *Comment:* Within Big Tujunga Creek, habitat for the sucker is not present in the plunge pool immediately below Big Tujunga Dam or for one mile downstream of Big Tujunga Dam. Therefore, these sections of Big Tujunga Creek should be excluded from critical habitat.

Our Response: We have determined that the upstream sections of the Big Tujunga Creek transport sediment from upstream tributaries to known occupied habitat in the lower Big Tujunga Creek. In addition, this portion of the creek meets the definition of critical habitat since it contains water, substrates, and riparian and aquatic vegetation essential for the conservation of the species (Andresen 2001; Haglund and Baskin 2001). Although some structures in this area may seasonally limit upstream movement of suckers, these structures

are not necessarily year-round impediments to fish passage (Swift 2002). Therefore, since this area maintains essential habitat downstream, has a strong potential to be occupied, and contains the primary constituent elements of critical habitat, this area is essential to the conservation of the species and will remain in the critical habitat designation. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(22) *Comment:* Habitat is not present within an unnamed tributary of Big Tujunga Creek that is 500 feet downstream of Foothill Boulevard.

Our Response: We have not been provided with enough information to determine the location of this unnamed tributary. However, the floodplain of Big Tujunga Creek meets the definition of critical habitat since it contains the necessary hydrology, substrates, water, and vegetation essential to the conservation of the species. Therefore, any tributaries with these primary constituent elements are considered critical habitat when they are within the Big Tujunga Creek floodplain. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(23) *Comment:* Some commenters stated that Little Tujunga Creek in Unit 3 should be excluded from critical habitat because it is not occupied by the sucker, and does not provide sediment or water to occupied habitat in Big Tujunga Creek. Other commenters emphasized the importance of maintaining the original area proposed as critical habitat, including Little Tujunga Creek.

Our Response: Based on comments and information we received during the public comment periods and additional field investigations, we have removed Little Tujunga Creek upstream of its confluence with Big Tujunga Creek from the final critical habitat designation and revised the maps accordingly.

(24) *Comment:* In Unit 3, critical habitat should be designated in Trail Canyon and La Paloma Canyon and all other tributaries to the Big Tujunga Creek.

Our Response: Although we appreciate the potential for habitat and water supply in Trail and La Paloma Canyons, as well as in many of the other tributaries to Big Tujunga Creek, we do not have sufficient information to determine if these tributaries contain the primary constituent elements essential to the conservation of the sucker. Therefore, we cannot designate these areas as critical habitat. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(25) *Comment:* Critical habitat should be designated in the Los Angeles River between State Route 134 and Interstate 5.

Our Response: Although we appreciate the potential for habitat in this portion of the Los Angeles River, we do not have sufficient information to determine if it contains the primary constituent elements essential to the conservation of the sucker. Therefore, we cannot designate this area as critical habitat. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(26) *Comment:* Unit 1B (Santa Ana Wash) is not occupied and therefore is not essential to the conservation of the species. Also, Mill Creek is generally dry and could not support the sucker. Furthermore, the Service has not demonstrated that Unit 1B supports a natural hydrograph, is essential to the conservation of the species, or is necessary for the long-term viability of the species.

Our Response: As stated in the previous final critical habitat rule or listing rule, Mill Creek, City Creek, and the upper Santa Ana Wash in Unit 1B are a source of sediment for the occupied portion of the Santa Ana River (Dr. Thomas Haglund, pers. comm. 2004; Dr. Jonathan Baskin, pers. comm. 2004; EIP Associates 2004). This sediment, which is composed of cobble, gravel, and sand, provides spawning and feeding substrates for the sucker and is essential to the conservation of the species.

In addition to sediment transport, Unit 1B supports a functioning hydrological system (Dr. Thomas Haglund, pers. comm. 2004; Dr. Jonathan Baskin, pers. comm. 2004) that experiences peaks and ebbs in water volume within the Santa Ana River watershed (Dr. Thomas Haglund, pers. comm. 2004; Dr. Jonathan Baskin, pers. comm. 2004). Although much of the surface water within Unit 1B has been diverted for municipal uses or other purposes, heavy rainstorms during the rainy season do provide flows that are biologically important to the sucker (Swift 2001; EIP Associates 2004).

While the Santa Ana Wash was proposed as critical habitat based on, among other things, its contribution of sediments and maintenance of a functioning hydrograph, these attributes do not, of themselves, warrant determining that an area is ''essential to the conservation of the species'', which is the statutory standard for designation of unoccupied areas. Therefore, Unit 1B, Santa Ana Wash, has been removed from the revised designation. The basis for this removal is summarized in the section entitled ''Summary of Changes''.

(27) *Comment:* Unit 1B does not support riparian systems that are essential to the conservation of the sucker.

Our Response: As stated in previous rules, the existing riparian habitat in City Creek, Mill Creek, and the upper Santa Ana Wash in Unit 1B contributes to maintaining water quality and the community structure essential for the conservation of the sucker. City Creek, Mill Creek, and the upper Santa Ana Wash contribute organic nutrients (*e.g.*, woody debris, invertebrates) to the system (Klapproth and Johnson 2000a; Sweeney 1993) and filter pollutants and sediments entering the watershed (Mills and Stevenson 1999; Klapproth and Johnson 2000b.

Unit 1B, Santa Ana Wash, has been removed from the revised designation. The basis for this removal is summarized in the section entitled ''Summary of Changes''.

(28) *Comment:* In Unit 1B, the Service inconsistently and arbitrarily included a portion of the Santa Ana River covered by the Santa Ana Sucker (SAS) Conservation Program. This portion of the river extends upstream from the La Cadena Avenue bridge to the Mission Channel confluence with the Santa Ana River.

Our Response: The portion of Unit 1B between the La Cadena Avenue bridge and the Mission Channel confluence was inadvertently included in the previous critical habitat designation. The text and maps have been modified in this revised final rule to reflect the exclusion of all areas covered by the SAS Conservation Program as allowed under section 4(b)(2) of the Act (see Unit 1 map).

(29) *Comment:* There are no new anticipated impacts to the Santa Ana Wash (Unit 1B) and therefore, it should be excluded from critical habitat designation.

Our Response: The Santa Ana Wash is threatened by rapid development of the Santa Ana River watershed in San Bernardino County, and by the demand for increased building materials (*e.g.*, sand and gravel) and water supplies. However, Unit 1B, Santa Ana Wash, has been removed from the revised designation. The basis for this removal is summarized in the section entitled ''Summary of Changes''.

(30) *Comment:* Chino Creek in Unit 1A does not contain habitat for the Santa Ana sucker and should be removed from the critical habitat designation.

Our Response: Chino Creek supported the Santa Ana sucker historically (Koehn, in litt. 1966), and still contains one or more of the primary constituent elements (Swift, pers. comm. 2004). In addition, the riparian habitat adjacent to the stream and the stream's contribution to the overall hydrological regime help the sucker population in the Santa Ana River.

While Chino Creek in the Northern Prado Basin was proposed as critical habitat based on, among other things, its contribution of sediments and maintenance of a functioning hydrograph, these attributes do not, of themselves, warrant determining that an area is ''essential to the conservation of the species'', which is the statutory standard for designation of unoccupied areas. Therefore, Unit 1A, Northern Prado Basin, has been removed from the revised designation. The basis for this removal is summarized in the section entitled ''Summary of Changes''.

(31) *Comment:* Critical habitat should be designated in Cajon Creek, a tributary to the Santa Ana River.

Our Response: Although we appreciate the potential for sucker habitat in Cajon Creek, we do not have sufficient information to determine if this tributary contains the primary constituent elements essential to conservation of the sucker. Therefore, we cannot designate this tributary as critical habitat. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(32) *Comment:* Please clarify if energy facilities are specifically excluded from the designated critical habitat and whether this includes powerhouse number 3 on Mill Creek in Unit 1B.

Our Response: We have clarified the language in the final rule to specifically exclude energy production facilities from the critical habitat designation. However, stream channels adjacent to energy production facilities within the geographical boundaries of the critical habitat designation that contain one or more of the primary constituent elements are considered critical habitat. Unit 1B, which includes Mill Creek, has been removed from the revised critical habitat designation.

Issue 3: Comments on Science

(33) *Comment:* Information used in designating critical habitat was inaccurate, insufficient, and not the best available data.

Our Response: We believe we used the best available commercial and scientific data to designate critical habitat for the sucker, including peer-reviewed primary source journal articles, expert opinions, species survey reports, project reports, and other scientific studies. All new information provided during the public comment periods was considered in this final designation as appropriate.

Issue 4: Procedural and Legal Comments

(34) *Comment:* The Service cannot exclude lands covered by conservation plans from critical habitat if those plans use public funds and lands to mitigate the taking of threatened and endangered species by private applicants for private purposes.

Our Response: Section 4(b)(2) of the Act allows the Service to exclude any area from critical habitat if the Service determines the benefits of such exclusion outweigh the benefits of designating such area as critical habitat, unless, based on the best scientific and commercial data available, the Service determines that failure to designate the area as critical habitat will result in the extinction of the species. Exclusions under section 4(b)(2) can be based on INRMPs, HCPs, and formal conservation plans, or other relevant considerations. In the case of HCPs and other formal conservation plans, the Service must determine that the plan provides conservation benefit to the species, and assurances that the management plan will be implemented and the conservation effort will be effective. The Service is not prohibited from excluding lands covered by plans using public funds or public lands if the plan meets the aforementioned criteria.

(35) *Comment:* The Service unlawfully pre-determined that the exclusion of essential sucker habitat from designated critical habitat outweighs any benefit.

Our Response: We issued the final rule (69 FR 8839) designating critical habitat for the sucker without the opportunity for public comment, because we found it would be impracticable and contrary to the public interest to delay the effective date of the final rule (*see* comment 37 for further details). In the proposed rule (69 FR 8911) that was published concurrently with the final rule, we specifically solicited comments from the public on the exclusion of essential habitat from the critical habitat designation. If additional information had been submitted during the comment period indicating that the conservation plans on which these exclusions were based were not conserving the sucker, we could have re-proposed critical habitat for the excluded areas. However, we did not receive any comments to that effect. Furthermore, the Western Riverside MSHCP has been finalized and an Incidental Take Permit has been issued for this plan. Significant progress has been made in the ongoing formal consultation with the U.S. Army Corps of Engineers (the Corps) on the SAS Conservation Program and we expect to issue a biological opinion on this program shortly. Therefore, we have excluded these areas of essential habitat from the critical habitat designation as allowed under section 4(b)(2).

(36) *Comments:* The Service did not comply with the National Environmental Policy Act (NEPA). Under NEPA, an Environmental Impact Statement or an Environmental Assessment must be prepared.

Our Response: Environmental impact statements and environmental assessments, as defined under NEPA, are not required for regulations enacted under section 4 of the Act (*see* 48 FR 49244; October 25, 1983). We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

(37) *Comment:* The rights of concerned citizens were violated because they were not allowed to participate in the rule-making process.

Our Response: The Service published the previous final rule designating critical habitat for the sucker (69 FR 8839) without providing an opportunity for the public to comment under the good cause exemption of the Administrative Procedure Act (APA). Section 553(b)(B) of the APA recognizes an exemption to the public comment requirements. The Service issued the final rule designating critical habitat for the sucker without the opportunity for public comment, because we found it would be impracticable and contrary to the public interest to delay the effective date of the final rule (*see* comment 37 for further details). The Service also provided the opportunity for the public to comment on the proposed rule identical to and issued concurrently with the final rule. We have reviewed and responded to the substantive comments that we received by the deadline of the each of the 4 public comment periods. Based on these comments, we have revised the final rule to reflect corrections and modifications to the final rule designating critical habitat for the sucker as appropriate.

(38) *Comment:* The Service failed to hold formal public hearings as required under section 556 and 557 of title 5 of the APA. In addition, all settlements resulting from ongoing negotiations with the Service should be made part of the administrative record for this critical habitat designation.

Our Response: Section 553(d) of the APA allows publication of a final rule

to take effect immediately upon publication if the agency finds good cause for doing so and provides the reasoning in the final rule. In the final rule published on February 26, 2004, designating critical habitat for the Santa Ana sucker, we stated that we found good cause to make the final rule effective immediately upon publication for reasons outlined in the response to comment 37. Delaying publication of the rule to hold public hearings would have been impracticable and contrary to the public interest at that time (69 FR 8840). We subsequently held a public hearing on the proposed rule—which was identical to and published concurrently with the final rule—on September 9, 2004. Therefore, we have complied with the requirements of the APA and the Act.

(39) *Comment:* The Service can publish a rule that is effective immediately only if the Service has determined the sucker requires emergency protection. If the Service publishes a rule that is effective immediately, the Service must incorporate reasons for the emergency determination into the final rule. Since there was no justification for emergency designation included in the publication of the final rule, the final rule is invalid and unenforceable.

Our Response: Section 553(d) of the APA allows publication of a final rule to take effect immediately upon publication if the agency finds good cause for doing so and provides the reasoning in the final rule. In the final rule published on February 26, 2004, designating critical habitat for the Santa Ana sucker, we stated that we found good cause to make the final rule effective immediately upon publication for the following reasons: (1) To comply with the district court's order; (2) to conduct section 7 consultations and prepare written concurrences regarding projects funded, permitted, or carried out by Federal agencies that may affect the Santa Ana sucker or its essential habitat; (3) to ensure those activities will not jeopardize the continued existence of the species; and (4) to ensure Federal agencies can comply with the requirements of the Act, including section 9. Delaying the effective date of the rule would have been impracticable and contrary to the public interest (69 FR 8840). We complied with the requirements of the APA and the Act and therefore the rule is valid and effective. The Service did not issue the final rule based on an emergency finding requiring immediate designation of critical habitat for the sucker.

(40) *Comment:* Data were not made available for public review.

Our Response: As stated in the proposed and final critical habitat rules published on February 26, 2004, the supporting information for the rules is available to the public for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service office in Carlsbad, California.

(41) *Comment:* The designation of critical habitat in the Santa Ana and San Gabriel Rivers, and the Big Tujunga Creek will limit the ability of flood control agencies and water conservation districts from maintaining sufficient flood protection and water supplies.

Our Response: The designation of critical habitat does not prevent public agencies from implementing flood control protection and water conservation actions. If these actions require a Federal permit, funding, or permission and if the Federal agency determines that these actions may adversely modify designated critical habitat, the Federal agency must request consultation with the Service prior to initiating that action.

(42) *Comment:* The designation of critical habitat should not preclude cooperative conservation efforts implemented in concert with actions that may adversely affect the sucker.

Our Response: We encourage cooperative conservation efforts by private individuals, organizations, and local, county, State, and Federal government agencies. We will continue to work with Federal, State, and local entities and private individuals to minimize project-related impacts to the sucker and its habitat.

Issue 5: Misinterpretation of the Original Final Rule

(43) *Comment:* The Service unfairly exempted Federal agencies and private individuals from the requirements of critical habitat.

Our Response: In the previous final rule, the Service did not exempt Federal agencies or private individuals from regulations regarding critical habitat. Instead, the Service described potential Federal actions that may be affected by the critical habitat designation or that may affect critical habitat. If a Federal agency determines their action may affect critical habitat, then they will be required to consult with the Service under section 7 of the Act. Private individuals do not have to consult with the Service if their actions may affect critical habitat unless their actions are permitted or funded by a Federal agency. However, private individuals should consult with the Service if their actions have the potential to result in take of individual suckers and therefore violate section 9 of the Act.

(44) *Comment:* The critical habitat designation will result in the closure of the National Forest lands to the public resulting in significant effects to many recreational users.

Our Response: The designation of critical habitat does not require the Forest Service to close critical habitat areas within the National Forest to the public. The Forest Service will be required to consult with the Service under section 7 of the Act, if they determine that any of their actions may adversely modify critical habitat. However, we intend to continue working with the Forest Service to minimize any impacts to the sucker and its habitat that may result from recreation activities.

Issue 6: Comments on Economic Analysis or Lack of Economic Analysis

(45) *Comment:* The Service violated the Act because it did not complete an economic analysis prior to issuing a final critical habitat rule, and therefore the rule should be vacated.

Our Response: As previously stated (see response to comments 35 and 37), we dispensed with the notice and comment period for the final designation of critical habitat under the good cause exemption of the APA (69 FR 8839), while concurrently publishing the proposed rule to allow for public comment. In the proposed rule (69 FR 8911), we announced our intention to prepare an economic analysis and seek public review and comment on the economic analysis.

(46) *Comment:* Several comments objected to the short timeframe allowed for comments and the lack of immediate availability of the draft economic analysis online.

Our Response: We had two comment periods for the draft Economic Analysis, the first for 10 days and the second for 30 days. A Notice of Availability (NOA) was published in the **Federal Register** on October 1, 2004 (69 FR 58876) opening a 10-day public comment period on the economic analysis. On October 25, 2004, we published another notice in the **Federal Register** (69 FR 62238) reopening a 30-day comment period on the draft economic analysis and the proposed designation. All comments on the economic analysis have been incorporated into the final economic analysis and the revised final rule as appropriate.

(47) *Comment:* Two groups suggested that prior written comments they had submitted concerning the economic impacts of the Santa Ana Sucker critical

habitat designation were not addressed by the draft economic analysis.

Our Response: Northwest Economic Associates (NEA) and the Service reviewed all of the previously submitted comments in the course of preparing the draft economic analysis. The comments provided useful insight into potential economic effects of the listing and designation of critical habitat for the sucker. However, in some cases, further research revealed that the economic effects could not be substantiated through available information or that the effects were considered too speculative to be considered reasonably foreseeable. For example, one commenter noted that private lands within critical habitat that are dedicated for recreational purposes but not excluded will require ''re-evaluation of [previously approved] private projects.'' This re-evaluation would result in assessment of an ''appropriate fee,'' with an effect of ''greater than 100 million dollars.'' The authors found no evidence that such a fee would result from designation of critical habitat. In other cases, the draft economic analysis included costs that were not addressed by prior written comments.

(48) *Comment:* One comment suggested that the amenity values estimates should appear in the main report, not an appendix.

Our Response: See response to Comment 49.

(49) *Comment:* One comment suggested that the amenity values as analyzed are highly conservative and that a broader range should be presented, using a broader range of assumptions. This comment also stated that other benefits, such as indirect or non-use benefits, should be analyzed as well. It also criticized the use of different accounting standards in the evaluation of benefits (amenity values) and costs.

Our Response: We appreciate the comment in support of the approach used in the DEA to estimate some of the economic benefits that may be associated with designating riparian corridors as critical habitat for the SAS. However, after further consideration and consultation with the Office of Management and Budget (OMB), we have decided that this approach does not fully meet the minimum standards required by OMB in estimating the potential economic benefits of a proposed Federal action. OMB Circular A–4 stresses that the Benefit-Transfer method, which was the approach used in the DEA, should only be used as a last-resort option to measuring benefits and should not be used without explicit justification. The underlying rationale for this reasoning is that while the Benefit-Transfer method can provide a quick, low-cost approach for obtaining desired monetary values (as opposed to collecting original data), the methods are often associated with uncertainties and potential biases of unknown magnitude.

Circular A–4 is very specific in the criteria that must be satisfied in order to use the Benefit-Transfer method. Criteria include using studies that are based on adequate data, sound and defensible empirical methods and techniques, and ensuring that the studies relied upon are measuring similar values that do not have unique attributes. In the DEA, we relied on two studies (Colby and Wishart 2002, Streiner and Loomis 1995) the first measuring the property value premium riparian areas generate for nearby landowners in the arid West, the second measuring the benefits incurred by nearby landowners associated with restoring degraded urban streams. Neither study, it was determined after consultation with OMB, fully met the necessary criteria to base an assessment of the potential economic benefits of SAS critical habitat designation. In the Colby study, concern was expressed over the statistical robustness of the overall model. Concerns over the Loomis study focused on the fact that the measurement of the value associated with restoring degraded riparian corridors was not equivalent to the designation of critical habitat, which essentially recognizes healthy riparian corridors that can support the species. While we attempted to address these and other concerns in the DEA, we were not able to fully satisfy all of the necessary criteria that would allow us to transfer the findings of these two studies to the SAS.

In future analyses we will continue to investigate the appropriateness of using existing data to estimate the economic benefits of critical habitat designation. However, even if we are able to credibly measure such effects, we continue to believe that in carrying out our duty under section 4(b)(2) of the Act that the benefits associated with designating any particular area as critical habitat are best expressed and considered in biological terms.

(50) *Comment:* One comment questioned the failure of the draft economic analysis to address economic impacts to the mining industry. An independent report on potential economic impacts was attached to this comment in support.

Our Response: The draft economic analysis considered impacts to the sand and gravel mining industry. Sand and gravel are important resources in southern California that support development activities such as residential and commercial construction and road building. Due to the costs of transporting the material, sand and gravel mines tend to be located in areas relatively near development. Some of these mines have historically been, and continue to be, located within flood plains and can directly impact sucker habitat. The upper Santa Ana River area has had mining activities for many years.

The boundaries of the proposed critical habitat exclude existing mining activities and the Service has indicated that no burdens will be imposed on existing facilities that operate according to historic practices, as discussed in the draft economic analysis. The independent report suggests the possibility of future expansion of mining activities within Unit 1B. The Corps has received no request for permits to expand operations within the proposed critical habitat. There has only been one emergency consultation associated with sand and gravel mining since the sucker was listed, and it was conducted to protect a bridge and did not involve an ongoing commercial operation. While it is true that new mining activity is being considered within Unit 1B, there is no information with which to demonstrate economic effects. An HCP that will cover mining activities is in the initial stages of development but lacks sufficient detail to base reasonable predictions on how the critical habitat designation for the sucker will affect new mining activities within Unit 1B. However, the HCP has not yet specifically considered the Santa Ana sucker, and therefore no documentation is available to suggest additional conservation measures that may need to be adopted. Furthermore, Unit 1B is not included in the revised critical habitat designation.

(51) *Comment:* One comment questioned the failure of the draft economic analysis to address economic impacts of the water conservation project at Seven Oaks Dam in Unit 1B.

Our Response: The draft economic analysis considered potential economic impacts to the proposed water conservation project. According to the Corps, Seven Oaks Dam has not been permitted as a water conservation facility. Its primary purpose is for flood control. Several agencies have pursued the idea of using Seven Oaks as a source of municipal water supply. For example, a letter dated December 11, 2000 from the Service to the Corps attached to the comment letter refers to actions by the Corps and the San

Bernardino Valley Municipal Water District indicating that water conservation activities are reasonably certain to occur and that the application accompanying the petition to revise the appropriation of the Santa Ana River requests the right to store up to 50,000 acre-feet per annum in the reservoir formed by Seven Oaks Dam. However, recent discussions with the Corps suggest that no decisions to change the dam's purpose have been finalized. It is uncertain whether Seven Oaks Dam will be permitted for water conservation with or without critical habitat designation for the sucker. Furthermore, the Service has indicated that it will not require conservation measures unless the releases from the dam are altered from past practices. There is no indication how and if the flow regime will be altered even if the dam is used to provide additional water supply to municipalities. Furthermore, we find no evidence that the Corps is proposing a change of use of the facility to include water conservation.

(52) *Comment:* One comment stated that the although they believe the draft economic analysis underestimates the full economic impact of critical habitat designation, the estimates contained in the analysis still support the exclusion of Unit 1B as benefits do not outweigh costs.

Our Response: The draft economic analysis did consider the effects of mining and water conservation as described above. Also as discussed above, we did consider the economic and other impacts of the designation when we issued our interim rule, however we also conducted an economic analysis to more fully consider these impacts.

(53) *Comment:* Two groups asserted that the draft economic analysis mischaracterizes the San Gabriel Canyon OHV Area status, and expressed a desire to have local efforts toward sucker recovery be included in the draft economic analysis.

Our Response: The draft economic analysis included efforts to properly characterize the status of OHV use in the San Gabriel Canyon. In response to the Santa Ana sucker's listing and critical habitat designation, the Forest Service has installed information signs in the OHV area. In the OHV staging area, there are some educational brochures available with general information on acceptable and unacceptable behaviors. There is also a kiosk with informational signs relating to the sucker. In the past three years, the Forest Service has coordinated with the Service and California Department of Fish and Game (CDFG) to develop ''avoidance criteria'' for OHV users at San Gabriel OHV Park, to include the elimination of two stream crossings and the placement of rock and boulders along the riverbank to prevent people from driving into the river. Patrols have increased in sensitive areas, especially during weekends. The Forest Service also has worked with the local OHV club to develop sucker education programs. In addition to the Forest Service efforts, the OHV club is self-policing its members. The OHV club has placed at least one vehicle and drivers per weekend at the San Gabriel OHV Area for the past several years. The draft economic analysis included costs associated with efforts by local OHV groups to provide protection measures and minimize impacts to sucker habitat (pp. 75–78). These costs are shown in Tables 30 and 31 of the draft economic analysis.

(54) *Comment:* Two groups claim that mitigation of other projects, such as dams, is incorrectly described within the draft economic analysis and that the costs of mitigation are understated.

Our Response: There are five flood control dams and multiple hydroelectric facilities operating in and around the essential habitat units for the sucker. The economic effects on these operations were quantified in Section 6.6 of the draft economic analysis.

(55) *Comment:* Two groups suggest that the draft economic analysis should address recovery.

Our Response: Economic analyses only address cost associated with designation of critical habitat, as required by the Act.

(56) *Comment:* One group suggests that the draft economic analysis findings support the inclusion of all areas currently designated as critical habitat for the sucker.

Our Response: The Secretary considers the draft economic analysis along with other information in determining whether the benefits of excluding particular areas from a revised final critical habitat designation outweigh the biological benefits of including those areas in a revised final designation.

(57) *Comment:* One comment from the Santa Ana Watershed Project Authority provided a number of details on the Santa Ana Regional Interceptor (SARI) line to correct information presented in the draft economic analysis. The comment noted the difficulty in estimating costs for a project that is still conceptual and suggests that the ultimate design choice will likely result in costs ''significantly less'' than those in the draft economic analysis.

Our Response: We appreciate the comment from the watershed authority. The draft economic analysis was based at the time on the information obtained through the Corps, Orange County Sanitation District, and public information about the line available through the internet. The analysis recognizes that a variety of alternatives are under consideration at this time and that associated construction cost estimates are preliminary. However, because the commenter did not provide any specific new estimates, we will rely on those presented in the draft economic analysis, with the understanding that they may overstate actual final costs should one of the design alternatives be implemented.

(58) *Comment:* The County of Los Angeles Department of Public Works submitted a very detailed comment letter addressing a number of specific areas in the draft economic analysis. This letter was received after the deadline for comments. Nevertheless, the comments are addressed below.

Our Response: The County of Los Angeles Department of Public Works (Public Works) provides several comments that argue for exclusion of Unit 3, Big Tujunga Creek. In addition, Public Works provides several comments that can be addressed through minor changes and additions to the text in the draft economic analysis and do not result in changes to estimated economic effects. Public Works expressed concern that future utilization of sediment placement sites may be affected by sucker conservation activities. However, there is no evidence from past consultations to suggest that current sediment placement sites will be affected or will be the subject of future consultations. In the comment letter, Public Works speculates that future sucker conservation activities will affect the availability of water conservation storage in San Gabriel Reservoir. However, as stated in the draft economic analysis, no conservation measure or ponding restrictions are anticipated as protection measures for the sucker. Consequently, it was considered to be reasonable to exclude water conservation losses in San Gabriel Reservoir in the draft economic analysis.

Several of the comments from Public Works addressed sediment removal activities. Public Works stated that the draft economic analysis failed to mention the sediment management plan for Cogswell Reservoir and associated sucker conservation activities. While the draft economic analysis does not mention the plan or consider sucker-related costs, the authors believe that

the conservation measures discussed in the comment letter would be implemented with or without the sucker listing and critical habitat designation. It appears that these measures were in place prior to the sucker listing and that they were instituted for the benefit of a number of fish species and have not been altered to specifically address the Santa Ana sucker. Public Works states that periodic cleanouts of Big Tujunga Reservoir will also be necessary in the future and that annual monitoring of the sucker will likely be required as a result. This is new information that was not considered in the draft economic analysis, as it was received after the close of the comment period. Public Works estimates that annual sucker-related costs for the routine cleanouts, which will occur once every ten years, will be $82,350.

Public Works also contends that ongoing costs associated with the Big Tujunga Wash Mitigation Bank should be included in the economic analysis. Mitigation Bank costs were not included in the draft economic analysis because the site was purchased as mitigation for flood control activities prior to the sucker listing. Furthermore, it appears that the activities related to the Mitigation Bank cited in the comment letter would have occurred with or without the sucker listing and critical habitat designation. While it is possible that a small portion of the costs of these activities could be attributed to sucker-related conservation activities, the consultation history reveals that these activities presented only minor concerns for the sucker.

Finally, Public Works argues for inclusion of potential impacts to energy supply at San Gabriel Dam and provides an estimate of losses between $300,000 and $1 million annually. However, Public Works admits that it is ''not aware of any final Santa Ana Sucker Conservation Strategy adopted yet for the San Gabriel River.'' The estimates of hydropower losses are contingent upon hypothetical reservoir level restrictions. Such restrictions have not been imposed and there is little indication to suggest that they will be imposed in the foreseeable future.

(59) *Comment:* Public Works states that the draft economic analysis does not fully consider the economic costs of components of private development projects that are transferred to public agencies for management.

Our Response: The draft economic analysis utilized the development mitigation costs as presented in the Western Riverside MSHCP as a means of estimating economic costs of private development. These costs are considered to be representative of the full costs of mitigation, including ongoing management. While there may be some additional costs associated with ongoing operation and maintenance of specific components of development projects, at this time there is inadequate information available to support their inclusion in the draft economic analysis.

(60) *Comment:* Public Works states that the effects on road maintenance and transportation are underestimated in the analysis because it only considers costs related to past transportation projects, noting: ''There were only 4 past project[s], all of which were related to Bridge Projects.''

Our Response: The draft economic analysis considered a broader approach in estimating future costs. Future projects were estimated using Geographic Information System (GIS) coverage of past Corps permitting within the Santa Ana sucker critical and essential habitat boundaries to identify projects occurring within sucker habitat. In total, 49 Corps permits were issued within sucker habitat between 1999 and 2003. All permits involving construction and maintenance of transportation facilities were selected from this list. In total, ten permits were issued for transportation projects over the five-year period. Thus, the draft economic analysis considers future sucker-related costs on transportation activities by assuming that past permits are appropriate indicators of future costs. Public Works further contends that affected transportation projects are likely to increase in the future. However, no evidence was uncovered during research for the draft economic analysis to support this conclusion.

(61) *Comment:* One comment notes that ''the ensuing analysis on small entities [addressed in Appendix A] appears to not include costs to the Corps and Public Works. The comment quotes Paragraph 3 of Page A–4, which includes: ''There are five flood control dams operating in and around the critical and essential habitat units for the sucker * * *. The facilities are operated by the U.S. Army Corps of Engineers or owned by [Public Works], and do qualify as small entities.''

Our Response: Although the authors acknowledge the quote on Page A–4, the statement in the draft economic analysis is in error. The last sentence should state, ''The facilities are operated by the USACE or owned by the LADPW, and do not qualify as small entities.'' The analysis remains unchanged, as these facilities exceed the size standards for small entities, and were properly omitted from the analysis.

Summary of Changes From the Proposed Rule and the Original Final Rule

On the basis of public comments, we reviewed our description and delineation of critical habitat in the Big Tujunga Creek and the San Gabriel and Santa Ana Rivers. Using information provided in these comments and obtained from field work, we removed Little Tujunga Creek upstream of its confluence with Big Tujunga Creek in Los Angeles County from the critical habitat designation in Unit 3, Big Tujunga Creek. We also refined the text to accurately reflect the critical habitat designation in the San Gabriel River. The text in the proposed rule stated that the upper boundary of Unit 2 along the East Fork of the San Gabriel River in Los Angeles County extended to the Bridge-of-No-Return. However, this upper boundary was not delineated on the map or the legal description of this unit. While this area is essential to the conservation of the species, it cannot be included in the revised final rule since it was never actually proposed.

We also removed proposed units 1A and B from the designation. Units 1A and 1B were proposed because are a source of sediment for the occupied portion of the Santa Ana River. This sediment, which is composed of cobble, gravel, and sand, provides spawning and feeding substrates for the sucker downstream of the proposed units. They were also proposed due to their conveying flood waters to help maintain variability in the hydrological system downstream, because they support riparian vegetation that provides organic nutrients and woody debris which becomes food for the species downstream, and because potions were historically, but not currently, occupied.

However, these attributes do not, of themselves, warrant determining that an area is ''essential to the conservation of the species'', which is the statutory standard for designation of unoccupied areas. There are many things—indeed, an almost endless range of possibilities—which contribute to the maintenance of primary constituent elements or otherwise provide a beneficial influence to areas designated as critical habitat. That does not warrant also designating the areas from which they originate, or pass through, as critical habitat.

In fact, Congress has instructed us to be ''exceedingly circumspect'' in designating critical habitat outside of areas currently occupied by the species (House Report 95–1625). With that guidance in mind, we do not find these unoccupied areas essential to the

conservation of the species, and so have not designated them as critical habitat.

Overall, these changes resulted in reducing the designated critical habitat by 12,824 ac (5,190 ha). Table 1 outlines the changes in acreages for each unit between the original and revised final rules.

TABLE 1.—CHANGES IN ACREAGES (AC; HA) FOR EACH OF THE UNITS BETWEEN ORIGINAL AND REVISED FINAL RULES

Unit	Original final rule	Revised final rule
Santa Ana River, San Bernardino County (Units 1A and 1B)	11,709 ac (4,738 ha)	0 ac (0 ha)
San Gabriel River, Los Angeles County (Unit 2)	5,765 ac (2,333 ha)	5,765 ac (2,333 ha)
Big Tujunga Creek, Los Angeles County (Unit 3)	3,655 ac (1,479 ha)	2,540 ac (1,028 ha)
Total	21,129 ac (8,551 ha)	8,305 ac (3,361 ha)

Critical Habitat

Please refer to the previous final rule designating critical habitat for the Santa Ana sucker for a general discussion of sections 3, 4, and 7 of the Act and our policy in relation to the designation of critical habitat (69 FR 8839).

Methods

As required by section 4(b) of the Act and its implementing regulations (50 CFR 424.12), this rule is based on the best scientific and commercial data available concerning the species' current and historical range, habitat, biology, and threats. In preparing this rule, we reviewed and summarized the current information available on the Santa Ana sucker, including the physical and biological features essential for the conservation of the species (see ''Primary Constituent Elements'' section), and identified the areas containing these features. We also identified areas outside the geographic range of the species that are essential for its conservation. These areas contribute sediment necessary to maintain breeding and feeding substrates in occupied areas. The information used in the preparation of this designation includes: site-specific species and habitat information collected and/or maintained by the Service; the California Natural Diversity Database (CNDDB); unpublished survey reports, notes, and communications with qualified biologists or experts; peer reviewed scientific publications; the Angeles National Forest Santa Ana Sucker Conservation Strategy (U.S. Forest Service 2003); the SAS Conservation Program (Conservation Team 2003); the final listing rule for the sucker published April 12, 2000 (65 FR 19686); and discussions and recommendations from Santa Ana sucker experts.

Primary Constituent Elements

In accordance with sections 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we are required to base critical habitat determinations on the best scientific and commercial data available and to focus on those physical and biological features (primary constituent elements) essential to the conservation of the species and may require special management considerations or protection. These primary constituent elements include, but are not limited to: space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

Much of what is known about the physical and biological requirements of Santa Ana sucker was described in the previously published final rule designating critical habitat for the species (69 FR 8839). The primary constituent elements for the Santa Ana sucker were determined by reviewing studies examining the habitat requirements and ecology of the sucker in the Santa Ana River (Allen 2003; Baskin and Haglund 2001; Haglund *et al.* 2003; Haglund *et al.* 2004; Saiki 2000; Swift 2001), the San Gabriel River (Saiki 2000; Haglund and Baskin 2002; Haglund and Baskin 2003), and the Santa Clara River (Greenfield *et al.* 1970). Designated critical habitat has been designed to provide sufficient habitat to maintain self-sustaining populations of sucker throughout its range, and to provide those physical or biological features essential for the conservation of the species. These physical or biological features provide for the following: (1) Space for individual and population growth and for normal behavior (primary constituent elements 1, 2, 3, and 6); (2) food, water, air, light, minerals, or other nutritional or physiological requirements (primary constituent elements 1, 2, 3, 4, 5, and 6); (3) cover or shelter (primary constituent elements 2 and 6); (4); sites for breeding, reproduction, and development of offspring (primary constituent elements 1, 2, 3, and 6); and (5) habitats that are representative of the historic geographical and ecological distribution of the species (primary constituent elements 1, 2, 3, 4, 5, and 6). Based on the occurrence of this species and associated biological information, all of these physical or biological features are essential to the conservation of the species.

We believe conservation of the Santa Ana sucker is dependent upon multiple factors, including the conservation and management of areas to maintain ''normal'' ecological functions where existing populations survive and reproduce. The areas we are designating as critical habitat provide some or all of the physical or biological features essential for the conservation of this species. Based on the best available information, the primary constituent elements essential for the conservation of the sucker are the following:

(1) A functioning hydrological system that experiences peaks and ebbs in the water volume reflecting seasonal variation in precipitation throughout the year;

(2) A mosaic of loose sand, gravel, cobble, and boulder substrates in a series of riffles, runs, pools, and shallow sandy stream margins;

(3) Water depths greater than 3 cm (1.2 in) and bottom water velocities greater than 0.03 m per second (0.01 ft per second);

(4) Non-turbid water or only seasonally turbid water;

(5) Water temperatures less than 30°C (86°F); and

(6) Stream habitat that includes algae, aquatic emergent vegetation, macroinvertebrates, and riparian vegetation.

Based on the specific biological and physical requirements of this species, critical habitat units contain many of the same physical and biological features. Management, therefore, will

address both the maintenance of these features and the reduction of threats specific to each critical habitat unit.

Criteria Used To Identify Essential Habitat

We considered several factors in selecting areas essential to the conservation of the Santa Ana sucker. We reviewed all streams and rivers currently occupied by the sucker and those areas outside of the current geographical distribution supporting one or more of the primary constituent elements.

We analyzed the known historical and current distribution of suckers based on data from the Carlsbad Fish and Wildlife Office internal geographic information systems (GIS) database, California Natural Diversity Database (CNNDB), Los Angeles County Museum Ichthyology Catalog, and the Fish Division of the University of Michigan Museum of Zoology. We also reviewed various scientific articles and reports on the Santa Ana River (Allen 2003; Baskin and Haglund 2001; Haglund *et al.* 2003; Haglund *et al.* 2004; Saiki 2000; Swift 2001), the Big Tujunga Creek (Haglund and Baskin 2001; Holland and Swift 2002), and the San Gabriel River (Saiki 2000; Haglund and Baskin 2002; Haglund and Baskin 2003).

Historically occupied river stretches that have been highly modified by the construction of canals with concrete-lining on sides and bottoms were not considered essential habitat. Other historically occupied habitat no longer providing primary constituent elements were eliminated from this analysis. We selected areas essential for the conservation of the sucker based on the potential for restoration and the presence of one or more of the primary constituent elements in currently occupied and potentially occupied habitat. We eliminated the Santa Clara River population in Ventura and Los Angeles counties from this analysis because it does not appear to represent a native population of the Santa Ana sucker (and it is not listed). We determined that streams, rivers, and associated riparian habitat within the Santa Ana River, San Gabriel River, and Big Tujunga Creek and associated tributaries provide essential habitat for the sucker.

We then considered if this essential area was adequate for the conservation of the Santa Ana sucker, and concluded that it is. The greatest threat to the conservation of the sucker lies in the human-generated alteration of the function, physical structure, water supply, and water quality of existing habitat. The physical structure of and water supply to each of the three currently occupied streams have been altered by flood control structures (*e.g.*, dams, drop structures, concrete-lined channels), and water conservation operations. In addition to these easily identifiable threats, pollution and water quality standards that are not protective of the sucker also threaten the survival and recovery of the species.

We used the best available scientific and commercial information to determine which areas are essential to the conservation of the sucker. However, we recognize that the historic and recent collection records for this species are incomplete. River segments or small tributaries not included in this final designation may harbor small limited populations of the sucker or may become occupied in the future. The exclusion of such areas does not diminish their potential individual or cumulative importance to the conservation of the species. We believe that proper management of each of the three designated critical habitat units will provide lasting conditions capable of supporting sucker populations and allow for assisted or natural dispersal into adjacent streams in each watershed.

We will continue (with the assistance of State, Federal, and private researchers), to conduct surveys, research, and conservation actions on the species and its habitat in areas designated and not designated as critical habitat. When additional scientific information becomes available on the species' biology, distribution, and threats, we will evaluate the need to revise critical habitat or refine boundaries of critical habitat as appropriate. Areas occupied by this species that are not designated as critical habitat will continue to receive protection under the Act's section 7 jeopardy standard where a Federal nexus may occur (see ''Critical Habitat'' section).

Mapping

We determined that three units are essential to the conservation of Santa Ana sucker, and are designating critical habitat in 2 of those units. The third unit consists entirely of essential habitat that is being excluded pursuant to section 4(b)(2) of the Act (see Exclusions Under Section 4(b)(2) of the Act for a detailed discussion of this exclusion). We used site-specific information to determine the extent of these units. The designated critical habitat units were delineated by screen digitizing polygons (map units) using ArcView, a computer GIS program. Based on the known distribution of the sucker, the dynamics of alluvial floodplain systems, and riparian habitat associated with rivers and streams, we placed boundaries around the species' locations, as well as their primary constituent elements. In defining these critical habitat boundaries, we made an effort to exclude all developed areas, such as housing developments, active mines, and other lands unlikely to contain the primary constituent elements essential for the conservation of the sucker. We used Universal Transverse Mercator (UTM) zone 11, North American Datum 1927 (NAD27) coordinates in meters (m) to designate the boundaries of critical habitat.

Need for Special Management Considerations or Protection

Areas occupied by the species and designated as critical habitat contain one or more of the primary constituent elements essential to the conservation of the species (see ''Primary Constituent Elements'' section). Unoccupied areas that contain one or more of the PCEs are also included in the designation. When designating critical habitat, we assess whether the areas containing PCEs may require special management considerations or protections. Regulations at 50 CFR 424.02(j) define special management considerations or protection to mean any methods or procedures useful in protecting the physical and biological features of the environment for the conservation of listed species. Critical habitat designations apply only to Federal activities or those funded or authorized by a Federal agency.

All critical habitat units identified in this final designation may require special management considerations or protection to maintain a functioning hydrological regime consisting of a mosaic of loose sand, gravel, and cobble substrates; channel morphology (*i.e.,* runs, riffles, pools, and stream margins); sufficient water quality, volume, and depth; and complex native stream associations involving algae, aquatic emergent vegetation, macroinvertebrates, and riparian vegetation. Each designated unit is threatened by activities that may result in the alteration of the hydrological system, reduced water quality or supply, loss of suitable substrates for spawning and feeding, loss of complex floral and faunal associations, and an increase in populations of nonnative predatory and competitive species.

We have determined the critical habitat units may require special management or protection, due to the existing threats to this fish, and because no long-term protection or management plans exist for any of the units. Absent

special management or protection, these three units are susceptible to existing threats and activities such as the ones listed in the ''Effects of Critical Habitat'' section, which could result in degradation and disappearance of the populations and their habitat.

Critical Habitat Designation

We determined that three units are essential to the conservation of Santa Ana sucker, and are designating critical habitat in 2 of those units. The third unit consists entirely of essential habitat that is being excluded pursuant to section 4(b)(2) of the Act (see Exclusions Under Section 4(b)(2) of the Act for a detailed discussion of this exclusion).

Essential Habitat Excluded From Critical Habitat (Unit 1) for Santa Ana Sucker, Orange, Riverside, and San Bernardino Counties, California (15,414 ac (6,238 ha))

The Santa Ana River essential habitat excluded from designation includes the mainstem of the Santa Ana River from the confluence of Mission Channel and the Santa Ana River downstream to the vicinity of the Route 90 crossing and portions of Prado Basin, as identified in the map titled ''Essential habitat excluded from critical habitat (Unit 1) for Santa Ana Sucker'' in the *Regulations Promulgation* section. The Santa Ana River supports one of three listed populations of the Santa Ana sucker. Approximately 60 percent of the total remaining range of the listed Santa Ana sucker is in the Santa Ana River (65 FR 19686).

The occupied essential habitat has been excluded from designation because they fall within the Western Riverside MSHCP (Riverside County) and the SAS Conservation Program (Orange, Riverside, and San Bernardino counties). The basis for these exclusions are summarized in the section entitled ''Exclusions Under 4(b)(2)''.

Critical Habitat Unit Descriptions

We are designating two critical habitat units encompassing 8,305 ac (3,361 ha) of streams and rivers in Los Angeles County. We are designating critical habitat on lands having one or more of the primary constituent elements as described above. Lands designated as critical habitat are under Federal (6,356 ac (2,573 ha)) and private (1,949 ac (790 ha)) ownership. For each stream reach identified as a critical habitat unit, the up- and downstream boundaries are described in general in the unit descriptions below; more precise latitudinal and longitudinal (UTM) coordinates for the unit boundaries are provided in the *Regulation Promulgation* section of this rule. Habitat areas contained within the designated units constitute our best evaluation of areas essential for the conservation of the sucker. Critical habitat for the sucker may be revised should new information become available.

We have designated critical habitat in Los Angeles County. We determined that essential habitat for the Santa Ana sucker occurs in four counties (Los Angeles, Orange, Riverside, and San Bernardino counties). Essential habitat for the Santa Ana sucker in Riverside, Orange, and portions of San Bernardino counties is being excluded from critical habitat designation under section 4(b)(2) of the Act (See Exclusions Under 4(b)(2) of the Act for a detailed discussion of these exclusions).

To provide determinable legal descriptions of the critical habitat boundaries, we drew polygons around these units. Criteria used to delineate the unit boundaries included the primary constituent elements, the known extent of the populations, and the extent of riparian vegetation on an aerial image. We made an effort to avoid developed areas that are unlikely to contribute to the conservation of Santa Ana sucker. Areas within the boundaries of the mapped units such as paved roads, bridges, parking lots, railroad tracks, railroad trestles, and residential, commercial, and industrial developments including energy production facilities do not contain one or more of the primary constituent elements and are therefore not considered critical habitat for the sucker. Federal actions limited to these areas would not trigger consultation pursuant to section 7 of the Act, unless they affect the species or primary constituent elements in the critical habitat. The areas designated as critical habitat in Los Angeles County are under Federal and private ownership.

Unit 2: San Gabriel River Critical Habitat Unit, Los Angeles County, California (5,765 ac (2,333 ha)).

The San Gabriel River Unit (Unit 2) consists of the West, North, and East Forks of the San Gabriel River and the following tributaries: Cattle Canyon Creek, Bear Creek, Bichota Canyon Creek, and Big Mermaids Canyon Creek. The San Gabriel River portion of the unit extends from the Cogswell Dam on the West Fork to 3,882 ft (1,229 m; 0.77 miles; 1.21 kilometers) downstream of the Bridge-of-No Return on the East Fork, and just above the confluence of Coldbrook and Soldier creeks on the North Fork. Suckers occupy the West, North, and East Forks of the San Gabriel River and Cattle Canyon Creek, Bear Creek, and Big Mermaids Canyon Creek.

Approximately 15 percent of the total remaining range of the listed Santa Ana sucker is in the San Gabriel River (65 FR 19686). Approximately 15 percent of its distribution in the San Gabriel River Basin occurs on private lands, and the remaining 85 percent occurs in the Angeles National Forest (65 FR 19686).

The San Gabriel River Unit provides the best remaining habitat capable of sustaining the Santa Ana sucker. Data gathered during sampling indicated the San Gabriel River may contain the largest population of Santa Ana suckers (R. Ally, in litt. 1996; Mike Guisti, CDFG, in litt. 1996; M. Wickman, in litt., 1996; Juan Hernandez, CDFG, in litt. 1997; M. Saiki, pers. comm. 1999). Moyle and Yoshiyama (1992) considered the population of suckers in the San Gabriel River drainage to be the only viable population within the species' native range. This population is found in the relatively undisturbed watershed of the Angeles National Forest, unlike the population within the Santa Ana River which is within a highly urbanized watershed receiving significant urban and agricultural run-off. The high quality riparian habitat adjacent to the river and tributaries provide organic inputs essential to the maintenance of a healthy stream ecosystem (Diana 1995; Klapproth and Johnson 2000a; Sweeney 1993). The East and North Forks and associated tributaries are largely unimpeded by dams or other obstructions.

This is the only unit that has a sediment transport and hydrological regime existing in a relatively natural state. This unit supports a population occurring within a relatively intact watershed that provides good water quality, supply, and sediment transport. The inclusion of this area in critical habitat ensures the conservation of the only extant population of listed suckers that can avoid chronic exposure to urban run-off or tertiary-treated wastewater discharges, reduced water supply, and loss of feeding and spawning substrates. Lands designated as critical habitat may require special management to avoid and minimize activities associated with recreational off-road vehicle use, grazing, road, bridge, or dam construction and/or maintenance in the Angeles National Forest.

Unit 3: Big Tujunga Creek Critical Habitat Unit, Los Angeles County, California (2,540 ac (1,028 ha)).

The Big Tujunga Creek Unit (Unit 3) consists of the stretch of Big Tujunga Creek between the Big Tujunga Dam and

Hansen Dam and the following tributaries: Stone Canyon Creek, Delta Canyon Creek, and Gold Canyon Creek. Haines Creek, a small stream within the floodplain of Big Tujunga Creek is also within this critical habitat designation. The Santa Ana sucker occupies the Big Tujunga Creek between Big Tujunga Dam and Hansen Dam. Please see ''Summary of Changes From the Proposed Rule and the Original Final Rule'' section for more details on the removal of Little Tujunga Creek from the critical habitat designation.

Approximately 25 percent of the total remaining range of the Santa Ana sucker is within Big Tujunga Creek (65 FR 19686). In Big Tujunga Creek, approximately 60 percent of the current range of the Santa Ana sucker occurs on private lands. The remaining 40 percent of the range occurs on Angeles National Forest lands managed by the Forest Service.

The upstream portion of this population in Big Tujunga Creek is largely contained within the Angeles National Forest. It is not exposed to the effects of urban run-off and tertiary treated wastewater discharge. This is the only unit supporting three of the remaining native freshwater fishes in southern California (Swift 1993). Although this ecological association is not well understood at this time, this fragile community may offer unique insights into the ability of the sucker to coexist with native and nonnative species in this ecosystem. This unit contains one or more PCEs and is also essential because it maintains habitat for the northernmost extent of the distribution of the Santa Ana sucker. The unit enhances the long-term sustainability of the sucker by maintaining its genetic adaptive potential and a well-distributed geographical range to buffer the sucker's particular vulnerability to environmental fluctuations and catastrophe (Moyle 2002).

Stone Canyon Creek, Delta Canyon Creek, and Gold Canyon Creek are not known to be occupied, but are essential to the conservation of the sucker because they transport sediment necessary to maintain preferred substrates utilized by this fish. These creeks convey stream flows and flood waters necessary to maintain habitat conditions for the Santa Ana sucker; and support riparian habitats that protect water quality in the occupied portions of the Big Tujunga Creek. Similar to the Santa Ana River, these tributaries are essential to the Big Tujunga Creek sucker population because they provide renewal of spawning and feeding substrates and peaks and ebbs in water volumes. These three tributaries are particularly essential to the conservation of the sucker and require special management and protection since the Big Tujunga Dam has reduced the transfer of sediment downstream and altered the natural flow in the upper Big Tujunga Creek.

The sucker has been able to maintain its population in the Big Tujunga Creek despite the fragmented habitat and presence of nonnative species. Most likely, the sucker population has survived because of the presence of the relatively undisturbed condition of the tributaries to Big Tujunga Creek.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.2, we define destruction or adverse modification as ''a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to: Alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). The conservation recommendations in a conference report are advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that their actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. ''Reasonable and prudent alternatives'' are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Federal activities that may affect the Santa Ana sucker or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the Corps

under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (*e.g.*, Federal Highway Administration (FHA) or Federal Emergency Management Agency (FEMA) funding), will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the Santa Ana sucker. Federal activities that, when carried out, may adversely affect critical habitat for the sucker include, but are not limited to:

(1) Actions that would alter the hydrology to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, impoundment, channelization, water diversion, construction, licensing, re-licensing, and operation of dams or other water impoundments.

(2) Actions that would significantly alter water quality to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, release of chemicals, biological pollutants, or heated effluents into the surface water or connected groundwater at a point source or by dispersed release (non-point).

(3) Actions that would significantly increase sediment deposition within the stream channel to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, excessive sedimentation from livestock grazing, road construction, timber harvest, off-road vehicle use, residential, commercial, and industrial development, and other watershed and floodplain disturbances.

(4) Actions that would significantly alter channel morphology or geometry to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, channelization, impoundment, road and bridge construction, mining, and destruction of riparian vegetation.

(5) Actions that would introduce, spread, or augment nonnative aquatic species into critical habitat to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, stocking for sport, biological control, or other purposes; aquaculture; and construction and operation of canals.

Previous Section 7 Consultations

Federal actions that we have reviewed since the sucker received protection under the Act include Federal land management plans, flood control, channelization, channel maintenance, dam construction, dam operation, bridge construction, a habitat conservation plan, and issuance of permits under section 404 of the Clean Water Act. Federal agencies involved with these activities included the Forest Service, the Corps, and the FHA. Since the listing of the sucker, 10 formal consultations have been initiated and 8 have been completed. None of the completed consultations resulted in a finding that the proposed action would jeopardize the continued existence of the sucker.

In each of the biological opinions resulting from these consultations, we included discretionary conservation recommendations to the action agency. Conservation recommendations are activities that would avoid or minimize the adverse effects of a proposed action on a listed species or its critical habitat, help implement recovery plans, or develop information useful to the species' conservation.

These biological opinions also included nondiscretionary reasonable and prudent measures, with implementing terms and conditions, which are designed to minimize the proposed action's incidental take of the sucker. Section 3(18) of the Act defines the term take as ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or to attempt to engage in any such conduct.'' Harm is further defined in our regulations (50 CFR 17.3) to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

Conservation recommendations and reasonable and prudent measures provided in previous biological opinions for the sucker have included: restricting in-stream activities during the spawning and nursery season; minimizing activities in actively flowing streams; reducing pollution from roads and highways; restoring, enhancing, or creating sucker habitat; maintaining or improving water quality standards, developing a nonnative aquatic species removal program; modifying or removing obstructions to fish passage; investigating velocities against which suckers can swim; and conducting sediment transport studies.

The designation of critical habitat will not have an impact on private landowner activities not requiring Federal funding or permits. Designation of critical habitat is only applicable to activities approved, funded, or carried out by Federal agencies.

If you have questions regarding whether specific activities may constitute adverse modification of critical habitat in California, contact Ecological Services, Carlsbad Fish and Wildlife Office ((760) 431–9440). To request copies of the regulations on listed wildlife and plants, and for inquiries regarding prohibitions and permits, please contact the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 N.E. 11th Avenue, Portland, OR 97232 (telephone (503) 231–2063; facsimile (503) 231–6243).

Exclusions Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

Lands we have excluded pursuant to section 4(b)(2) include those covered by the following types of plans if they provide assurances that the conservation measures they outline will be implemented and effective: (1) Legally operative HCPs that cover the species, (2) draft HCPs that cover the species and have undergone public review and comment (*i.e.*, pending HCPs), (3) Tribal conservation plans that cover the species, (4) State conservation plans that cover the species, and (5) National Wildlife Refuge System Comprehensive Conservation Plans.

We have determined that the benefits of excluding essential habitat within the boundaries of the Western Riverside MSHCP and essential habitat within the area covered by SAS Conservation Program outweigh the benefits of including these areas as critical habitat, as described in further detail below. Exclusion of these areas will not result in the extinction of the sucker.

Western Riverside Multiple Species Habitat Conservation Plan

Section 10(a) of the Act authorizes the Service to issue to non-Federal entities a permit for the incidental take of endangered or threatened species. This permit allows a non-Federal landowner to proceed with an activity that is legal in all other respects, but results in the incidental taking of a listed species (*i.e.*, take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). The Act specifies that an application for an incidental take permit must be accompanied by a conservation plan. A permit may not be issued unless the conservation plan submitted to the Service meets certain requirements, as provided in section 10(a)(2)(A) of the Act. For example, the conservation plan must specify what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps. After an opportunity for public comment on the conservation plan, the Service may issue the permit provided we determine that certain conditions, as specified in section 10(a)(2)(B), are met. For instance, the Service must find that the taking will be incidental, and the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

The Western Riverside MSHCP was in development for six years and we issued a biological opinion and a 75-year Incidental Take Permit (ITP) on June 22, 2004. Participants in the Western Riverside MSHCP include 14 cities: the County of Riverside (including the Riverside County Flood Control and Water Conservation District, Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department); the California Department of Parks and Recreation; and the California Department of Transportation. The Western Riverside MSHCP will also serve as a sub-regional plan under the State's Natural Community Conservation Program (NCCP) and was developed in cooperation with the California Department of Fish and Game. The NCCP permit was issued on July 22, 2004. Within the 1.26 million-acre (510,000 ha) planning area of the Western Riverside MSHCP, approximately 153,000 ac (62,000 ha) of diverse habitats are proposed for conservation. The conservation of 153,000 ac (62,000 ha) will complement other, existing natural and open space areas that are already conserved through other means (*e.g.*, State Parks, Forest Service, and county park lands).

We believe that the Western Riverside MSHCP meets the three criteria used by the Service to determine if a plan provides adequate special management or protection to a listed species. First, the Western Riverside MSHCP provides a conservation benefit to the species through the protection of 3,480 acres of habitat within the Santa Ana River. The primary constituent elements of essential habitat for the sucker will be maintained in the Santa Ana River in Riverside County by the following conservation measures: (1) The implementation of a nonnative species removal program, (2) maintaining or improving water quality standards, (3) removing or modifying barriers to fish passage within the Santa Ana River, and (4) assessing any threats from degraded habitat to the sucker in the Santa Ana River in Riverside County and addressing those threats as feasible. Third, the Western Riverside MSHCP provides assurance that the conservation management strategies and actions will be implemented. All permittees for the Western Riverside MSHCP have entered into an Implementation Agreement to ensure that conservation measures for each species are being implemented as appropriate. This Implementing Agreement was signed by all Permittees on June 22, 2004. Funding for the conservation measures and land acquisition, which is described by the Implementing Agreement, will be supported by fees collected by Riverside County, the Cities, and other Permittees. The Western Riverside MSHCP provides assurances that conservation strategies and actions will be implemented by outlining a schedule of management and monitoring activities to be conducted for the Santa Ana sucker. Third, to provide assurances that the conservation strategies and measures will be effective, the HCP was developed on the basis of the best available information, and the adaptive management program developed for the Western Riverside MSHCP uses a flexible approach to management to ensure that the covered species, including the sucker, are maintained and/or enhanced within the MSHCP Conservation Area during the term of the Incidental Take Permit. Management principles and the monitoring efforts are described in the Western Riverside MSHCP document available at the County of Riverside website: *http://rcip.org/conservation.htm.*

For the reasons described above, we have determined that lands covered by the Western Riverside MSHCP can be excluded from this final designation of critical habitat pursuant to section 4(b)(2) of the Act.

Draft Santa Ana Sucker Conservation Program and Associated Maintenance and Operation Activities of Existing Water Facilities on the Santa Ana River

The SAS Conservation Program, developed over a six-year period, is a multi-agency partnership of Federal, local government agencies, and the private sector that encourages a river-wide approach to conservation of the Santa Ana sucker within the Santa Ana River and its tributaries. This partnership is intended to: Increase the knowledge base to implement recovery strategies for the sucker in the Santa Ana River; ensure that each participating agency minimizes, to the extent possible, effects from routine activities that occur within their jurisdiction in the Santa Ana River; and develop restoration techniques for degraded habitat. Partners in the SAS Conservation Program include the Corps, the Service, Santa Ana Watershed Project Authority, and the following participating agencies (Participants): Orange County Water District, Orange County Resources and Development Management Department, Orange County Sanitation District, Riverside County Flood Control and Water Conservation District, Riverside County Transportation Department, City of Riverside Regional Water Quality Control Plant, San Bernardino County Flood Control District, and the City of San Bernardino Municipal Water Department Rapid Infiltration and Extraction Facility.

We believe that the SAS Conservation Program meets the criteria used by the Service to determine if a plan provides adequate special management or protection to a listed species. First, the SAS Conservation Program provides a conservation benefit to the species through the development of avoidance and minimization measures, research, and habitat restoration efforts. Participants in the SAS Conservation Program are required to implement specific avoidance and minimization measures that will significantly reduce the magnitude of the effects of their activities on the sucker. The SAS

Conservation Program has also yielded several scientific reports, many of which were used in preparation of the critical habitat designation. The SAS Conservation Program is also funding efforts to restore or enhance primary constituent elements of critical habitat in the Santa Ana River watershed. Planned research projects of the SAS Conservation Program in 2004 include the development of habitat restoration methods, characterization of the movement and diet of various life history stages of suckers, and investigate the effects of nonnative adult fish on larval and juvenile suckers.

Second, the SAS Conservation Program provides assurances that the conservation management strategies and actions will be implemented. Although the SAS Conservation Program is in draft form currently, we expect that the section 7 consultation on the SAS Conservation Program initiated with the U.S. Army Corps of Engineers in January 2003 will be completed within the following year. Further, the Participants have shown their commitment to the SAS Conservation Program by meeting monthly with the Service since 1998 to develop and implement appropriate measures to conserve and/or conduct research and focus habitat restoration goals on recovering the species in the Santa Ana River. The Participants have also drafted a Memorandum of Agreement that is currently being discussed. For the past 6 years, the SAS Conservation Program has been funded for $125,000 per annum on an annual basis by the Participants. Participants will continue funding at this level or greater for the life of the SAS Conservation Program. The Administrator of the SAS Conservation Program, currently the Santa Ana Watershed Project Authority, annually issues an invoice to each Participant. Implementation of the SAS Conservation Program is assured by the requirement that an Annual Operating Plan must be submitted to the Service and the SAS Conservation Team by July 31st of each year, and approved by August 31st, which then functions from September 1st through August 31st of the following year.

Third, to provide assurances that the conservation strategies and measures will be effective, the SAS Conservation Program was developed on the basis of the best available information. The SAS Conservation Program also requires an annual report that summarizes all activities conducted during the past year, provides success or failure of existing avoidance and minimization measures, and any recommendations be submitted to the Service for review. The SAS Conservation Program also includes an Annual Operating Plan that allows the Service to refine research and habitat restoration goals and objectives and avoidance and minimization measures as necessary based on the information supplied in their annual reports.

For the reasons described above, we have determined that lands covered by the SAS Conservation Program can be excluded from this final designation of critical habitat pursuant to section 4(b)(2) of the Act.

(1) Benefits of Inclusion

The benefits of designating critical habitat on lands within the boundaries of HCPs and other conservation plans that cover the species for which critical habitat is being designated are small. Conservation plans generally include management measures and protections designed to protect, restore, monitor, manage, and enhance the habitat to benefit the conservation of the species, while a critical habitat designation can only mandate protection against actions with a Federal nexus. There is nothing in the critical habitat designation which ensures restoration, monitoring, active management or habitat enhancement. The Western Riverside MSHCP seeks to accomplish these goals for the Santa Ana sucker through the implementation of specific conservation measures. The principal benefit of designating critical habitat is that federally authorized or funded activities that may affect a species' critical habitat would require consultation with us under section 7 of the Act. Under section 7, proposed actions that would adversely modify or destroy designated critical habitat cannot go forward, unless they are altered to eliminate the adverse modification or destruction of critical habitat.

An important objective of the Western Riverside MSHCP is to implement measures, including monitoring and management, necessary to conserve important habitat for the Santa Ana sucker within the plan's boundaries. Thus, the purpose of the Western Riverside MSHCP is consistent with the purpose served by undergoing consultation under section 7 to ensure that critical habitat of the sucker is not adversely modified by a proposed Federal action, and provides benefits far in excess of those that would result from the critical habitat designation. Because issuance of an incidental take permit (ITP) under section 10 is a Federal action, we completed an internal section 7 consultation for every species that is covered under the MSHCP and ITP, including the Santa Ana sucker. During consultation, we analyzed the impacts of the MSHCP and ITP on the Santa Ana sucker and its essential habitat within the plan boundaries and whether or not that habitat was officially designated as critical habitat. Therefore, including the Santa Ana River within the boundaries of the Western Riverside MSHCP as critical habitat would provide little benefit to the Santa Ana sucker, because the potential impacts to the species' essential habitat within the MSHCP area have been addressed under the plan and have been analyzed in our internal section 7 consultation on the ITP.

The SAS Conservation Program includes measures to restore, monitor, and enhance habitat for the Santa Ana sucker in the Santa Ana River. Similar to the Western Riverside MSHCP, the SAS Conservation Program is specifically designed to benefit the sucker and its essential habitat within the Santa Ana River. The SAS Conservation Program is a comprehensive conservation program for the sucker that includes measures to minimize the impacts of routine water management activities on the sucker and restore degraded river habitat to improve the species' prospects for survival and recovery. As noted previously, this type of active management and restoration is not part of a critical habitat designation. Because the SAS Conservation Program is specifically designed to benefit the sucker and its essential habitat within the Santa Ana River habitat and the programmatic consultation on the SAS Conservation Program will analyze the effects of the SAS Conservation Program on the sucker and its habitat, the designation of critical habitat within the area covered by the SAS Conservation Program would provide fewer benefits to this species than does the SAS Conservation Program.

(2) Benefits of Exclusion

Excluding lands within the Western Riverside MSHCP or within the area covered by the SAS Conservation Program from critical habitat will provide several benefits. Exclusion of the lands from the final designation will allow us to continue working with the participants in a spirit of cooperation and partnership. In the past, HCP applicants and participants in voluntary conservation programs have generally viewed the designation of critical habitat as having a potential negative regulatory effect that discourages voluntary, cooperative, and proactive efforts to conserve listed species and their habitats by non-Federal parties. Partners and cooperators view designation of critical habitat as an

indication by the Federal government that their proactive efforts to protect the species and its habitat are inadequate. Excluding these areas from critical habitat will ensure the continuation of the existing conservation efforts and provide the basis for future opportunities to conserve species and their essential habitat.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We are excluding areas along the Santa Ana River because they are within the planning area boundary for the Western Riverside MSHCP and the SAS Conservation Program from critical habitat designation. Exclusion of these areas will not result in extinction of the sucker. We find the benefits of exclusion outweigh the benefits of designating the areas covered by the plans as critical habitat.

The exclusion of these areas from critical habitat will help preserve the partnerships we have developed with the local jurisdictions and agencies in the development of the Western Riverside MSHCP and SAS Conservation Program. The only potential benefit of designating critical habitat within these areas, apart from the conservation actions discussed above, would be educational—informing the public of areas essential for the long-term survival and conservation of the species. However, this information has already largely been provided to the public through the critical habitat designation process and resulting publicity, including public participation as set forth above, the material provided on our website, and through the ample opportunity for public participation provided throughout the development of the Western Riverside MSHCP. The Corps is also likely to issue a Public Notice and solicit public comment on the issuance of a permit for activities related to the maintenance and operation of existing water facilities on the Santa Ana River in association with the SAS Conservation Program, further increasing the public's knowledge of the importance of the Santa Ana River to the sucker. We believe that designating critical habitat has little benefit in areas covered by the Western Riverside MSHCP and SAS Conservation Program. The Western Riverside MSHCP and SAS Conservation Program have ensured authorized activities within these areas include measures to protect the Santa Ana sucker and its habitat.

Based on our evaluation of our past consultation history on the sucker and the analysis conducted for those consultations, we believe that we have a general understanding of potential impacts, including those related to economics, of this designation. We have considered these potential impacts in the development of this designation and do not believe, at this time, that additional exclusion, including those based on economics, pursuant to section 4(b)(2) of the Act are warranted.

Economic Impacts

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species concerned.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The draft analysis was made available for public review on October 1, 2004 (69 FR 58876); the public comment period was open for 10 days. On October 25, 2004, we published another notice in the **Federal Register** (69 FR 62238) reopening a 30-day comment period on the draft economic analysis and the proposed designation.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the sucker. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the proposed rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

Categories of direct and indirect costs considered in the analysis included the costs associated with: (1) Conducting section 7 consultations; (2) modifications to projects, activities, or land uses resulting from section 7 consultations; (3) uncertainty and public perceptions resulting from the designation of critical habitat, including potential effects on property values; and (4) the potential offsetting beneficial costs associated with critical habitat. The most likely economic effects of critical habitat designation are on activities funded, authorized, or carried out by a Federal agency (*i.e.*, direct costs).

The economic analysis determined that retrospective costs (*i.e.*, costs since listing, 1999–2004) total $4.2 million, with transportation comprising $3.4 million of those costs. The remainder of retrospective costs was split among OHV recreation, flood control agencies, and Federal agencies. Total prospective costs of the proposed rule (*i.e.*, costs for the 20-year period 2004–2024) are $30.5 million assuming a three percent discount rate and $21.8 million with a seven percent discount rate. Annual prospective costs are estimated to be $2.0 million. Costs associated with transportation contribute 49 percent of the annual costs and overall prospective costs. Other leading activities include water supply, flood control agencies, and residential and commercial development.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this final rule easier to understand, including answers to questions such as the following:

(1) Are the requirements in the final rule clearly stated?

(2) Does the final rule contain technical jargon that interferes with the clarity?

(3) Does the format of the final rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity?

(4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the final rule?

(5) What else could we do to make this final rule easier to understand?

Send a copy of any comments on how we could make this final rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: *Exsec@ios.doi.gov.*

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but will not have an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. As explained above, we prepared an economic analysis of this action. We used this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat. We also used it to help determine whether to exclude any area from critical habitat, as provided for under section 4(b)(2), if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA also amended the RFA to require a certification statement.

Small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.,* housing development, grazing, oil and gas production, timber harvesting). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the sucker. Federal agencies also must consult with us if their activities may affect critical habitat. However, we believe this will result in minimal additional regulatory burden on Federal agencies or their applicants because most consultations would already be required due to the presence of the Santa Ana sucker or other federally listed species or their respective critical habitats (*e.g.,* San Bernardino kangaroo rat (*Dipodomys merriami parvus*)), and consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process and trigger only minimal additional regulatory impacts beyond the duty to avoid jeopardizing any listed species.

Designation of critical habitat could result in an additional economic burden on small entities due to the requirement to reinitiate consultation for ongoing Federal activities. The economic analysis determined that costs involving conservation measures for the SAS would be incurred for activities involving residential and commercial development, water treatment facilities, the Santa Ana River Interceptor (SARI) line, water supply, flood control agencies, off-highway vehicle (OHV) recreation, transportation, flood control dams, and federal agencies. Of these, only businesses that are involved with land development would be affected; in all other cost categories, the affected entities exceed the SBA size criteria for small entities. For businesses that are involved with land development, the relevant threshold for small businesses is an annual revenue of $6 million or less. The effects on small businesses in the land development sector would be concentrated in San Bernardino, where most of the development is expected to take place. Based on the estimated costs to development and the average sales per small business, the annual costs range from 0.13 percent to 3.97 percent of sales for a small firm in the land development sector depending upon county.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for the approximately four small businesses, on average, that may be required to consult with us each year regarding their project's impact on the Santa Ana sucker and its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer ''reasonable and

prudent alternatives.'' Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or result in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives.

Second, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal or plant species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through non-discretionary terms and conditions. We may also identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species.

Based on our experience with consultations pursuant to section 7 of the Act for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. We can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and this critical habitat designation. Within the final CHUs, the types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Regulation of activities affecting waters of the United States by the Corps under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization implemented or licensed by Federal agencies;

(3) Transportation issues such as bridges, rights-of-way, etc. that may involve the Federal Highway Administration;

(4) Regulation of grazing, mining, and recreation by the USFS;

(5) Hazard mitigation and post-disaster repairs funded by the FEMA; and

(6) Activities funded by the EPA, U.S. Department of Energy, or any other Federal agency.

It is likely that a developer or other project proponent could modify a project or take measures to protect the sucker. The kinds of actions that may be included if future reasonable and prudent alternatives become necessary include conservation set-asides, management of competing nonnative species, restoration of degraded habitat, and regular monitoring. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and proposed critical habitat designation. These measures are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons and based on currently available information, that it is not likely to affect a substantial number of small entities. Federal involvement, and thus section 7 consultations, would be limited to a subset of the area designated. The most likely Federal involvement could include Corps permits, permits we may issue under section 10(a)(1)(B) of the Act, FHA funding for road improvements, and regulation of grazing, mining, and recreation by the USFS. A regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.)

Under SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an annual effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule to designated critical habitat for the Santa Ana sucker is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, Tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal

private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. As such, Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating approximately 8,305 ac (3,361 ha) of lands in Los Angeles County, California as critical habitat for the Santa Ana sucker in a takings implication assessment. The takings implications assessment concludes that this final designation of critical habitat for the sucker does not pose significant takings implications.

Federalism

In accordance with Executive Order 13132, this rule does not have significant federalism effects. A federalism assessment is not required. In keeping with Department of the Interior policy, the Service requested information from, and coordinated development of this critical habitat designation with, appropriate State resource agencies in California, as well as during the listing process. The impact of the designation on State and local governments and their activities was fully considered in the economic analysis. As discussed above, the designation of critical habitat in areas currently occupied by the Santa Ana sucker would have little incremental impact on State and local governments and their activities. The designations may have some benefit to these governments in that the areas essential to the conservation of these species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning, rather than waiting for case-by-case section 7 consultation to occur.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act, as amended. This rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs that are essential for the conservation of the Santa Ana sucker.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain new or revised information collection for which OMB approval is required under the Paperwork Reduction Act. 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.

National Environmental Policy Act

We have determined that we do not need to prepare an Environmental Assessment or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969, in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Government'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We are not aware of any Tribal lands essential for the conservation of the Santa Ana sucker. Therefore, the critical habitat designation for the sucker does not contain any Tribal lands or lands that we have identified as impacting Tribal trust resources.

References Cited

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

Author

The primary author of this document is the Carlsbad Fish and Wildlife Office (*see* **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ For the reasons given in the preamble, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

■ 2. Amend § 17.11(h), by revising the entry for ''Sucker, Santa Ana'' under ''FISHES'' to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rule
Common name	Scientific name						
*	*	*	*	*	*		*
FISHES							
*	*	*	*	*	*		*
Sucker, Santa Ana ..	(*Catostomus santaanae*).	U.S.A. (CA)	Los Angeles River basin, San Gabriel River basin, Santa Ana River basin.	T	694	17.95(e)	N/A
*	*	*	*	*	*		*

■ 3. Amend § 17.95(e) by adding critical habitat for the Santa Ana sucker (*Catostomus santaanae*) in the same alphabetical order as this species occurs in 17.11(h).

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) Fishes. * * *

Santa Ana Sucker (Catostomus santaanae)

(1) Areas determined to be essential to the conservation of the Santa Ana sucker and designated critical habitat units are depicted for Los Angeles County, California, on the maps and as described as follows:

(2) Based on the best available information, primary constituent elements essential for the conservation of the Santa Ana sucker include the following:

(i) A functioning hydrological system that experiences peaks and ebbs in the water volume that reflects seasonal variation in precipitation throughout the year;

(ii) A mosaic of loose sand, gravel, cobble, and boulder substrates in a series of riffles, runs, pools, and shallow sandy stream margins;

(iii) Water depths greater than 3 cm (1.2 in) and bottom water velocities greater than 0.03 meter per second (0.01 feet per second);

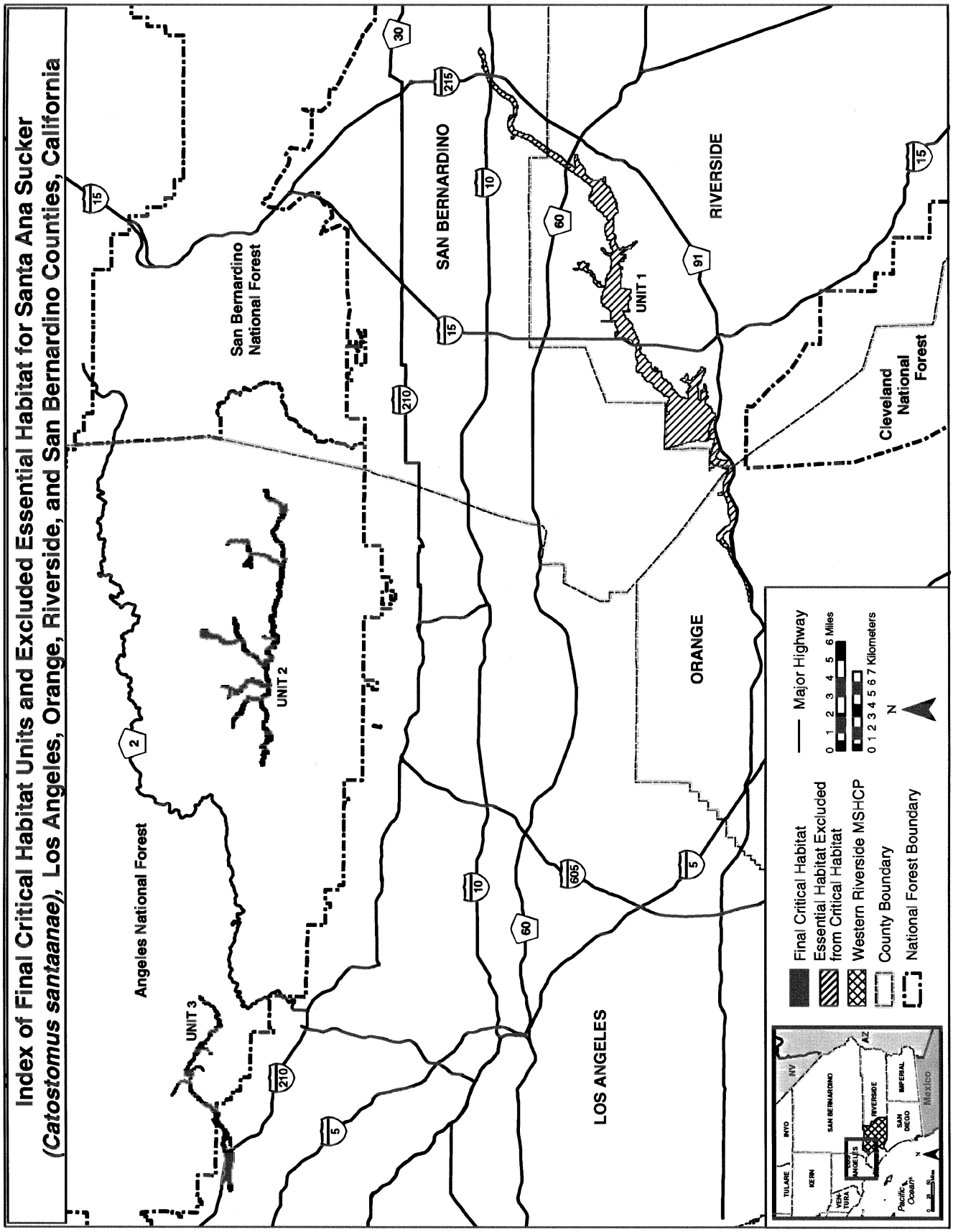
(iv) Non-turbid water or only seasonally turbid water;

(v) Water temperatures less than 30 °C (86 °F); and

(vi) Stream habitat that includes algae, aquatic emergent vegetation, macroinvertebrates, and riparian vegetation.

(3) Existing features and structures made by people, such as paved roads, bridges, parking lots, railroad tracks, railroad trestles, and residential, commercial, and industrial developments including energy production and distribution facilities (exclusive of the stream channel), do not contain one or more of the primary constituent elements and are not critical habitat. Federal actions limited to those areas, therefore, would not trigger a consultation under section 7 of the Act unless they may affect the species and/or primary constituent elements in adjacent critical habitat.

(4) Areas determined to be essential to the conservation of the Santa Ana sucker and designated critical habitat units are shown on the following index map.

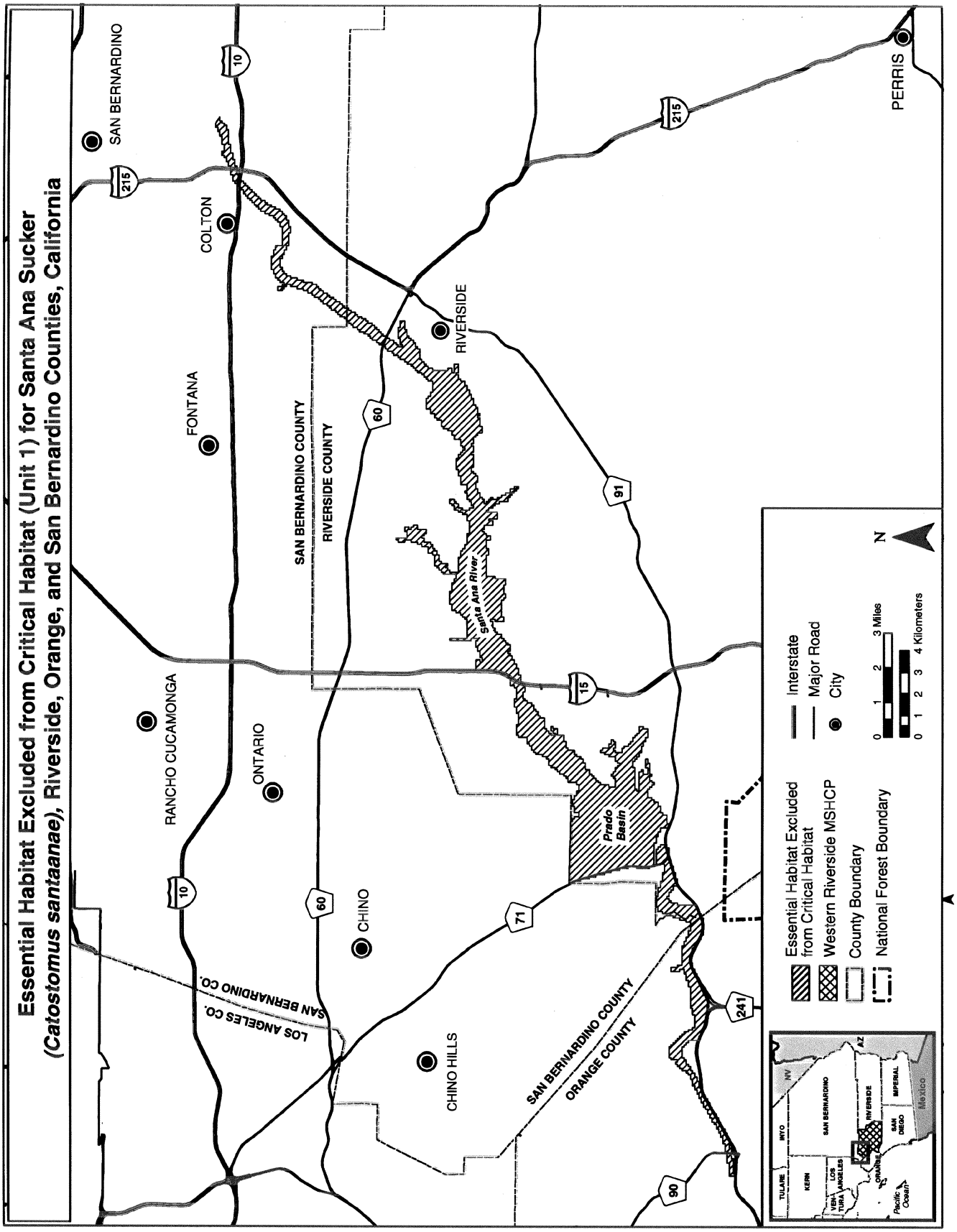


BILLING CODE 4310–55–P

(5) Areas that have been determined to be essential to the conservation of the Santa Ana sucker and that have been excluded from critical habitat designation pursuant to section 4(b)(2) of the Act are described as follows:

(i) All essential areas within the boundaries of the Western Riverside Multiple Species Habitat Conservation Plan (which may be obtained by going to the Riverside County Integrated Project Web site (*http://www.rcip.org/conservation.htm*) and other areas of the Santa Ana River, from the confluence of Mission Channel and the Santa Ana River downstream to the vicinity of the Route 90, covered by the Santa Ana Sucker Conservation Program.

(ii) *Note:* Map of essential habitat excluded from critical habitat (Unit 1) for Santa Ana Sucker follows:



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(6) The following textual unit descriptions are the definitive source for determining critical habitat boundaries. General location maps by unit are provided at the end of each unit description and are provided for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries.

(7) Unit 2: San Gabriel River system in Los Angeles County, California.

(i) Unit 2 includes the West, North and East Forks of the San Gabriel River and the following tributaries: Cattle Canyon Creek, Bear Creek, Bichota Canyon Creek, and Big Mermaids Canyon Creek. The San Gabriel River portion of the unit extends from the Cogswell Dam on the West Fork to approximately 3,882 feet (1,229 meters; 0.77 miles; 1.21 kilometers) downstream from the Bridge-of-No Return on the East Fork, and portions of the North Fork. The lateral extent of Unit 2 is defined by the UTM coordinates described in the legal description.

Unit 2: San Gabriel River. Los Angeles County, California. From USGS 1:24,000 quadrangle maps Azusa, Crystal Lake, Glendora, Mount Baldy, Mount San Antonio, and Waterman Mountain, California, land bounded by the following UTM 11 NAD 27 coordinates (E, N): 422700, 3795100; 423300, 3795100; 423300, 3795000; 423400, 3795000; 423400, 3794400; 423300, 3794400; 423300, 3794300; 423200, 3794300; 423200, 3794200; 423100, 3794200; 423100, 3794000; 423000, 3794000; 423000, 3793400; 422900, 3793400; 422900, 3793300; 422800, 3793300; 422800, 3793200; 422700, 3793200; 422700, 3793100; 422600, 3793100; 422600, 3792900; 422500, 3792900; 422500, 3792800; 422400, 3792800; 422400, 3792100; 422500, 3792100; 422500, 3791800; 422700, 3791800; 422700, 3791900; 422900, 3791900; 422900, 3792000; 423100, 3792000; 423100, 3792100; 423800, 3792100; 423800, 3792200; 424500, 3792200; 424500, 3791900; 424300, 3791900; 424300, 3791800; 424000, 3791800; 424000, 3791700; 423900, 3791700; 423900, 3791600; 423400, 3791600; 423400, 3791700; 423200, 3791700; 423200, 3791600; 423000, 3791600; 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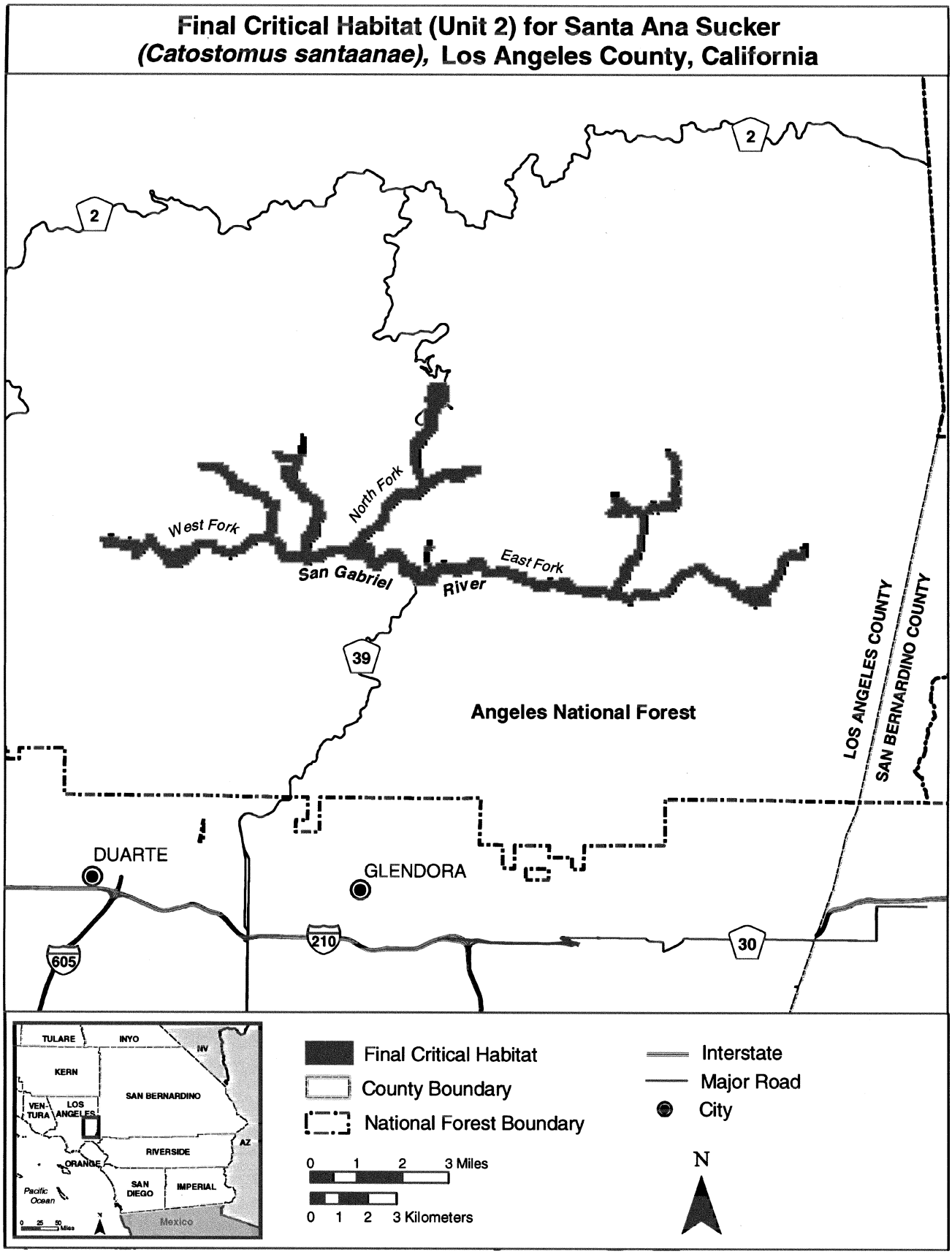
(ii) The map of Unit 2 follows:



BILLING CODE 4310–55–P

(8) Unit 3: Big Tujunga Creek system in Los Angeles County, California.

(i) Unit 3 includes the stretch of Big Tujunga Creek between the Big Tujunga Dam and Hansen Dam and the following tributaries: Stone Canyon Creek, Delta Canyon Creek, and Gold Canyon Creek. The lateral extent of Unit 3 is defined by the UTM coordinates described in the legal description.

Unit 3: Big Tujunga Canyon. Los Angeles County, California. From USGS 1:24,000 quagrangle maps Condor Peak, San Fernando, and Sunland, California, land bounded by the following UTM 11 NAD 27 coordinates (E, N): 381900, 3797700; 382100, 3797700; 382100, 3797600; 382200, 3797600; 382200, 3797500; 382400, 3797500; 382400, 3797400; 382600, 3797400; 382600, 3797300; 382800, 3797300; 382800, 3797200; 383000, 3797200; 383000, 3797100; 383100, 3797100; 383100, 3797000; 383200, 3797000; 383200, 3796900; 383300, 3796900; 383300, 3796500; 383400, 3796500; 383400, 3796400; 383300, 3796400; 383300, 3796200; 383200, 3796200; 383200, 3796100; 383500, 3796100; 383500, 3796000; 383600, 3796000; 383600, 3796300; 383700, 3796300; 383700, 3796500; 384300, 3796500; 384300, 3796400; 384400, 3796400; 384400, 3796300; 384600, 3796300; 384600, 3796200; 384900, 3796200; 384900, 3796100; 385000, 3796100; 385000, 3796000; 385100, 3796000; 385100, 3795900; 385200, 3795900; 385200, 3795800; 385300, 3795800; 385300, 3795700; 385800, 3795700; 385800, 3795600; 386000, 3795600; 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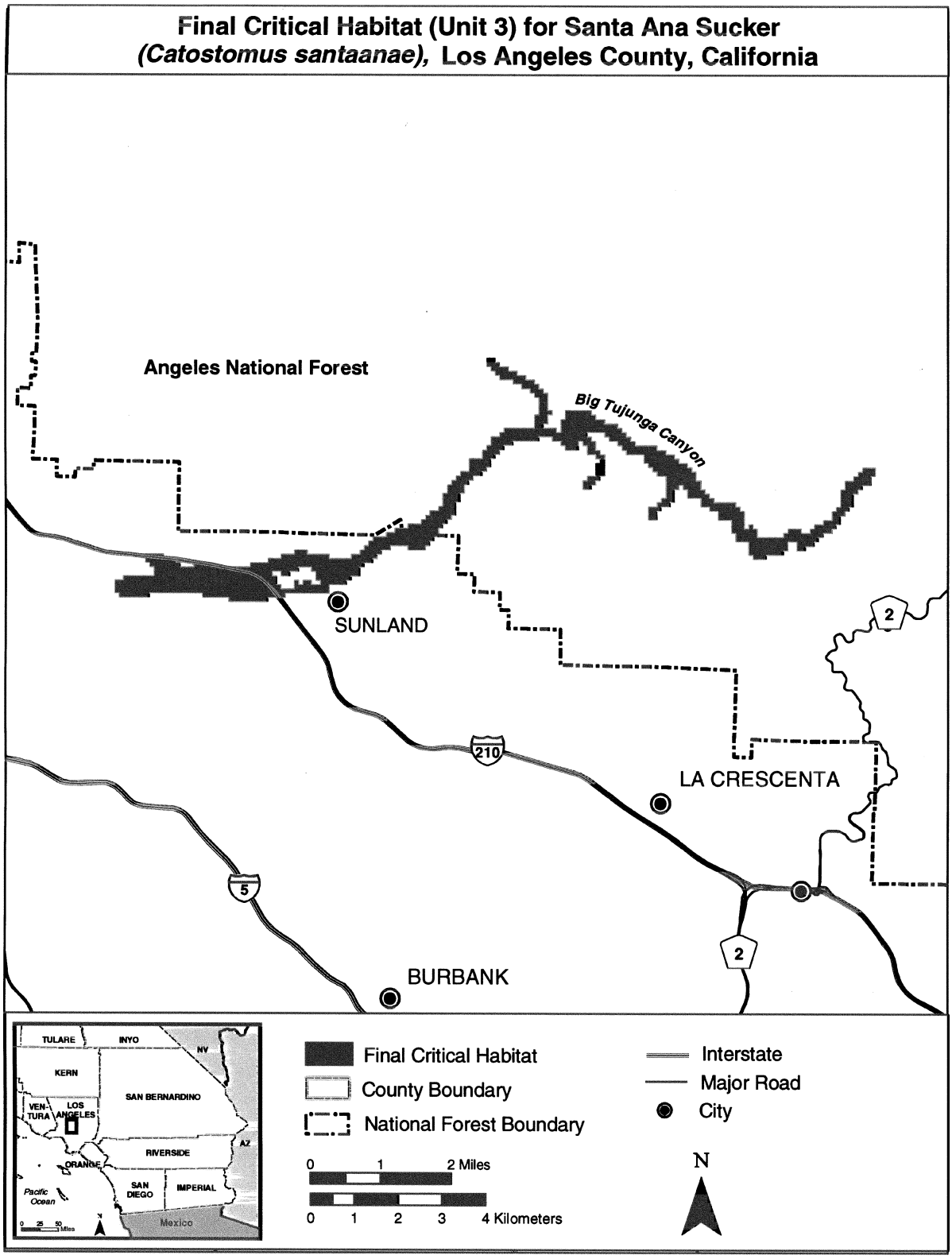
(ii) The map of Unit 3 follows:



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Dated: December 21, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–28286 Filed 12–30–04; 8:45 am]

BILLING CODE 4310–55–C

Federal Register

Tuesday,
January 4, 2005

Part III

Department of Agriculture

Animal and Plant Health Inspection Service

9 CFR Parts 93, 94, 95, and 96

Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities; Final Rule and Notice

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 93, 94, 95, and 96

[Docket No. 03–080–3]

RIN 0579–AB73

Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations regarding the importation of animals and animal products to establish a category of regions that present a minimal risk of introducing bovine spongiform encephalopathy (BSE) into the United States via live ruminants and ruminant products and byproducts, and we are adding Canada to this category. We are also establishing conditions for the importation of certain live ruminants and ruminant products and byproducts from such regions. These actions will continue to protect against the introduction of BSE into the United States while removing unnecessary prohibitions on the importation of certain commodities from minimal-risk regions for BSE, currently only Canada.

EFFECTIVE DATE: March 7, 2005.

FOR FURTHER INFORMATION CONTACT: For information concerning ruminant products, contact Dr. Karen James-Preston, Director, Technical Trade Services, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 734–4356.

For information concerning live ruminants, contact Lee Ann Thomas, Director, Technical Trade Services, Animals, Organisms and Vectors, and Select Agents, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 734–4356.

For other information concerning this rule, contact Dr. Gary Colgrove, Director, Sanitary Trade Issues Team, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 734–4356.

SUPPLEMENTARY INFORMATION:

I. Purpose

This document makes final, with changes, a proposed rule that the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA or the Department) published in the **Federal Register** on November 4, 2003 (68 FR 62386–62405, Docket No. 03–080–1). In that document, we proposed to establish a category of regions that present a minimal risk of introducing bovine spongiform encephalopathy (BSE) into the United States via live ruminants and ruminant products and byproducts, and to add Canada to this category. The proposal also set forth conditions for the importation of certain live ruminants and ruminant products and byproducts from BSE minimal-risk regions. We solicited public comment on the proposed rule and its underlying risk analysis and other supporting analyses for 60 days ending on January 5, 2004. At the time the proposed rule was published, BSE had never been detected in a native animal in the United States and only a single case in a native animal had been reported in Canada (in Alberta in May 2003). In December 2003, BSE was detected in an imported dairy cow in Washington State. This document describes the course of this rulemaking before and after the detection in Washington State, including how the rulemaking was affected by additional BSE-related safeguards imposed by USDA's Food Safety and Inspection Service (FSIS) in January 2004. It also responds to public comments received on the proposed rule and its underlying risk analysis and other supporting analyses, both before the original closing date on January 5, 2004, and during an extended comment period that closed on April 7, 2004, and explains the changes we are making in this final rule.

II. Summary of Changes Made in This Final Rule

Based on our continued analysis of the issues and on information provided by commenters, we have made certain changes in this final rule from the provisions we proposed in November 2003, as supplemented by our March 2003 notice of the extension of the comment period. Those changes, summarized in the list below, are discussed in detail in our responses to comments.

1. For bovines imported from a BSE minimal-risk region for feeding and then slaughter (referred to as feeder cattle), we are making the following changes:

- We are requiring that feeder cattle be permanently marked before entry as to country of origin with a brand or other means of identification approved by the Administrator, rather than by an ear tattoo as proposed. Feeder cattle imported from Canada must be marked with ''C∧N.''
- We are requiring that feeder cattle be individually identified before entry by an eartag that allows the animal to be traced back to the premises of origin and are specifying that the eartag may not be removed until the animal is slaughtered.
- We are requiring that the animal health certification currently required under existing § 93.405 for certain live animals imported into the United States include, for feeder cattle imported from a BSE minimal-risk region, additional information relating to animal identification, origin, destination, and responsible parties.
- We are requiring that feeder cattle be moved from the port of entry to a feedlot in a sealed means of conveyance and then from the feedlot to a recognized slaughtering establishment in a sealed means of conveyance. The cattle may not be moved to more than one feedlot.
- When referring to the destination of feeder cattle imported into the United States, we are using the terminology ''the feedlot identified on the APHIS Form VS 17–130'' rather than ''designated feedlot.''
- We are specifying that the physical location of the feedlot of destination and the person responsible for movement of the cattle be identified on the documentation required for movement from the port of entry to the feedlot.

2. For sheep and goats imported from a BSE minimal-risk region for feeding and then slaughter (referred to as ''feeder sheep and goats'') we are making the following changes:

- As with cattle, we are requiring that feeder sheep and goats be permanently marked before entry as to country of origin (with the requirements for marking modified as appropriate for sheep and goats). Feeder sheep and goats imported from Canada must be marked with ''C.''
- As with cattle, we are requiring that feeder sheep and goats be individually identified before entry by an eartag that allows the animal to be traced back to the premises of origin and are specifying that the eartag may not be removed until the animal is slaughtered.
- We are continuing to refer to the feedlot of destination for feeder sheep and goats as a ''designated feedlot'' and are adding criteria for such feedlots. The sheep and goats may not be moved to more than one designated feedlot.
- We are requiring the same additional information on the health certification required under § 93.405 as described above for feeder cattle.
- We are requiring that feeder sheep and goats be moved from the port of entry to a designated feedlot as a group in a sealed means of conveyance, not be

commingled with any sheep or goats that are not being moved directly to slaughter from the designated feedlot at less than 12 months of age, and be moved from the designated feedlot to a recognized slaughtering establishment in a sealed means of conveyance.

3. For sheep and goats imported from a BSE minimal-risk region for immediate slaughter, we are prohibiting the importation of sheep and goats that are positive, suspect, or susceptible for TSEs.

4. We are moving the provisions for the importation of feeder sheep and goats from Canada from proposed § 93.436 to § 93.405 and § 93.419.

5. We are moving the provisions for the importation of sheep and goats from Canada for immediate slaughter from proposed § 93.436 to § 93.419 and § 93.420.

6. We are clarifying in § 93.420 that all ruminants imported from Canada for immediate slaughter must be moved to a recognized slaughtering establishment in a sealed means of conveyance.

7. We are not specifying in our regulations that the intestines from bovines imported from Canada be removed at slaughter in the United States and be disposed of in a manner approved by the Administrator.

8. We are not including any import restrictions because of BSE for live cervids (e.g., deer, elk) and cervid products from a BSE minimal-risk region.

9. We are specifying that there are no import restrictions because of BSE for camelids (i.e., llamas, alpacas, guanacos, and vicunas) from a BSE minimal-risk region.

10. We are also providing in § 94.18 for the overland transiting of products derived from bovines, sheep, and goats from a BSE minimal-risk region that are eligible for entry into the United States. Additionally, we are clarifying that the existing provisions in § 94.18 for the transiting of ruminant products from regions in which BSE exists or that pose an undue risk of BSE apply only to transiting at air or sea ports.

11. We are requiring that bovines, sheep, and goats imported from a BSE minimal-risk region be subject to a ruminant feed ban equivalent to requirements established by Food and Drug Administration (FDA) of the U.S. Department of Health and Human Services at 21 CFR 589.2000. This is a change from our proposal that the ruminants ''are not known to have been fed ruminant protein, other than milk protein.''

12. In the definition of *bovine spongiform encephalopathy (BSE) minimal-risk region,* we are rewording the factor that said a BSE minimal-risk region is one that has ''a ban on the feeding of ruminant protein to ruminants that appears to be an effective barrier to the dissemination of the BSE infectious agent, with no evidence of significant noncompliance with the ban'' to say instead that the region is one in which ''a ruminant-to-ruminant feed ban is in place and is effectively enforced.''

13. We are providing that meat, meat byproducts, and meat food products derived from bovines from a BSE minimal-risk region may not be imported into the United States unless an air-injected stunning process was not used at slaughter and unless the specified risk materials (SRMs) and the small intestine were removed in the exporting region, consistent with the FSIS regulations at 9 CFR 313.15 and 310.22 for stunning and processing in the United States. We are defining SRMs as those materials designated as such by FSIS in 9 CFR 310.22, to include the brain, skull, eyes, trigeminal ganglia, spinal cord, vertebral column (excluding the vertebrae of the tail, the transverse process of the thoracic and lumbar vertebrae, and the wings of the sacrum), and dorsal root ganglia of cattle 30 months of age and older, and the tonsils and distal ileum of the small intestine of all cattle.

14. We are removing the proposed requirement that imported meat derived from bovines from BSE minimal-risk regions be derived only from animals less than 30 months of age when slaughtered.

15. We are removing the proposed requirement that meat derived from bovines in a BSE minimal-risk region that are slaughtered in that region come from animals slaughtered at a facility that either slaughters only bovines less than 30 months of age or complies with an approved segregation process.

16. We are clarifying that the final rule applies to ''meat,'' ''meat byproducts,'' and ''meat food products'' as defined by FSIS.

17. We are removing the requirement that hunter-harvested meat be accompanied by a certificate of the national government of Canada.

18. We are clarifying the type of ruminant offal from a BSE minimal-risk region that is allowed importation into the United States.

19. We are providing that tallow may be imported from a BSE minimal-risk region provided the tallow is composed of less than 0.15 percent insoluble impurities and is not commingled with any other material of animal origin.

20. We are providing that, except for gelatin allowed importation under § 94.18(c), gelatin imported from a BSE minimal-risk region must be derived from the bones of bovines that were subject to a ruminant feed ban equivalent to the requirements established by FDA at 21 CFR 589.2000 and from which SRMs were removed.

21. We are providing that sheep casings may be imported from a BSE minimal-risk region provided the sheep from which the casings were derived were less than 12 months of age when slaughtered and were subject to a ruminant feed ban equivalent to that of FDA at 21 CFR 589.2000.

22. We are adding and revising definitions in this final rule to clarify the meaning of certain terms used in the rule.

III. Background

A. Bovine Spongiform Encephalopathy

APHIS regulates the importation of animals and animal products into the United States to guard against the introduction of various animal diseases, including BSE. The regulations are contained in 9 CFR parts 92, 93, 94, 95, and 96.

BSE is a progressive and fatal neurological disorder of cattle that results from an unconventional transmissible agent. BSE belongs to the family of diseases known as transmissible spongiform encephalopathies (TSEs). In addition to BSE, TSEs include, among other diseases, scrapie in sheep and goats, chronic wasting disease (CWD) in deer and elk, and variant Creutzfeldt-Jakob disease in humans. The agent that causes BSE and other TSEs has yet to be fully characterized. The theory that is most accepted in the scientific community is that the agent is a prion, which is an abnormal form of a normal protein known as cellular prion protein. The BSE agent does not evoke any demonstrated immune response or inflammatory reaction in host animals. BSE is confirmed by postmortem microscopic examination of an animal's brain tissue or by detection of the abnormal form of the prion protein in an animal's brain tissues. The pathogenic form of the protein is both less soluble and more resistant to degradation than the normal form. The BSE agent is extremely resistant to heat and to normal sterilization processes. BSE is spread to cattle primarily through the consumption of animal feed containing protein from ruminants infected with BSE.

BSE was first diagnosed in 1986 in the United Kingdom. Since then, there have been more than 187,000 confirmed cases of BSE in cattle worldwide. The disease

has been confirmed in native-born cattle in 20 European countries in addition to the United Kingdom, and in some non-European countries, including Japan, Israel, and Canada. Over 95 percent of all BSE cases have occurred in the United Kingdom, where the epidemic peaked in 1992/1993. Agricultural officials in the United Kingdom have taken a series of actions to mitigate BSE, including making it a reportable disease, banning mammalian meat-and-bone meal in feed for all food-producing animals, prohibiting the inclusion of animals more than 30 months of age in the animal and human food chains, and destroying all animals showing signs of BSE and other potentially exposed animals at high risk of developing the disease. As a result of these actions, most notably the feed bans, the annual incidence of BSE in the United Kingdom has fallen dramatically. The figure below illustrates the downward trend in BSE cases among cattle born after implementation of the feed ban.

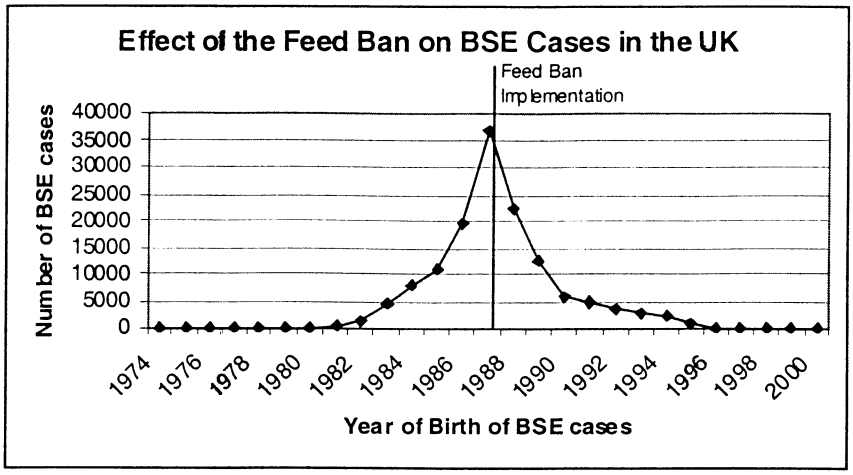

Figure 1.–Confirmed cases in UK cattle born after feed ban implementation. [Note: The first feed ban was implemented in the summer of 1988 (before fall calving).]

Variant Creutzfeld-Jakob disease (vCJD), a chronic and fatal neurodegenerative disease of humans, has been linked via scientific and epidemiological studies to exposure to the BSE agent, most likely through consumption of cattle products contaminated with the BSE agent. To date, since vCJD was first identified in 1996, approximately 150 probable and confirmed cases of vCJD have been identified. The majority of these cases have either been identified in the United Kingdom or were linked to exposure that occurred in the United Kingdom, and all cases have been linked to exposure in countries with native cases of BSE. Some studies estimate that more than 1 million cattle may have been infected with BSE throughout the epidemic in the United Kingdom. This number of infected cattle could have introduced a significant amount of infectivity into the human food supply. Yet, the number of cases of vCJD identified to date suggest a substantial species barrier that may protect humans from widespread illness due to BSE.

B. APHIS' Regulatory Approach to BSE: Past and Present

Since 1989 APHIS has prohibited the importation of live cattle and other ruminants and certain ruminant products, including most rendered protein products, into the United States from countries where BSE is known to exist. In 1997, due to concerns about widespread risk factors and inadequate surveillance for BSE in many European countries, APHIS added an additional classification of countries as regions of undue risk for BSE and extended importation restrictions on ruminants and ruminant products to all of the countries in Europe. In December 2000, APHIS expanded its prohibitions on imports of rendered ruminant protein products from BSE-restricted regions to include rendered protein products of any animal species, due to concern that cattle feed supposedly free of ruminant protein may have been cross-contaminated with the BSE agent. The same importation restrictions apply to regions where BSE has been confirmed in a native animal and regions that present an undue risk of BSE because of import requirements less restrictive than those that would be acceptable for import into the United States and/or because of inadequate surveillance (9 CFR 94.18).

In effect then, until implementation of this final rule, countries have fallen into one of three categories with regard to BSE:

- Regions in which BSE is known to exist;
- Regions that present an undue risk of BSE because of import requirements less restrictive than those that would be acceptable for import into the United States and/or because of inadequate surveillance; and
- Regions that do not fall into either of the above two categories.

This regulatory framework recognized only two risk situations—those regions considered free of BSE and those regions considered to present a BSE risk—and prohibited the importation of live ruminants and most ruminant products from those regions considered to present a BSE risk.

In our November 2003 proposed rule, we explained that we believed it was appropriate to establish an additional category of regions with regard to BSE—the BSE minimal-risk region. We stated that regions that could be eligible for a minimal-risk classification would be (1) those regions in which a BSE-infected animal has been diagnosed, but in which measures have been taken that make it unlikely that BSE would be introduced from that region into the United States, and (2) those regions that cannot be considered BSE-free even though BSE has not been detected, but that have taken sufficient measures to be

considered minimal risk. We proposed to add Canada to the new BSE minimal-risk category and also proposed conditions for the importation of certain live ruminants and ruminant products and byproducts from BSE minimal-risk regions.

Our proposed definition of BSE minimal-risk regions included the standards we would use to evaluate the BSE risk from a region and to classify a region as one of minimal risk for BSE. To qualify as a BSE minimal-risk region, we proposed that a region be one that meets the following standards:

1. The region maintains and, in the case of regions where BSE was detected, had in place prior to the detection of BSE, risk mitigation measures adequate to prevent widespread exposure and/or establishment of the disease. Such measures include the following:

- Restrictions on the importation of animals sufficient to minimize the possibility of infected ruminants being imported into the region, and on the importation of animal products and animal feed containing ruminant protein sufficient to minimize the possibility of ruminants in the region being exposed to BSE;
- Surveillance for BSE at levels that meet or exceed recommendations of the Office International des Epizooties (OIE, also now referred to as the World Organisation for Animal Health) for surveillance for BSE; and
- A ban on the feeding of ruminant protein to ruminants that appears to be an effective barrier to the dissemination of the BSE agent, with no evidence of significant noncompliance with the ban.

2. In regions where BSE was detected, the region conducted an epidemiological investigation following detection of BSE sufficient to confirm the adequacy of measures to prevent the further introduction or spread of BSE, and continues to take such measures.

3. In regions where BSE was detected, the region took additional risk mitigation measures, as necessary, following the BSE outbreak based on risk analysis of the outbreak, and continues to take such measures.

We stated in our proposal that we would use these standards as a combined and integrated evaluation tool, basing a BSE minimal-risk classification on the overall effectiveness of control mechanisms in place (e.g., surveillance, import controls, and a ban on the feeding of ruminant protein to ruminants). We noted that this approach would differ from some of the numerical guidelines specified by OIE in its recommendations for a BSE minimal-risk country or zone (discussed below).

Basis for Focused Regulatory Restrictions

Our proposed rule was based on a number of considerations. A significant amount of research has been conducted on BSE since the disease was initially identified and since we first established our regulatory framework to protect against the introduction of BSE. (Please note: In this final rule, we use the term ''importation'' to mean the movement of animals or products into the United States or another country and the term ''introduction'' to mean the movement of a disease agent into the United States or another country.)

While there are many unanswered questions, both research studies and field epidemiological experience have demonstrated effective control measures to prevent spread of this disease. Ongoing studies have identified specific tissues where the majority of infectivity appears to reside, so that these tissues can be removed from the food chain. Early epidemiological work identified contaminated feed as the primary method of spread of the disease between animals. Continued monitoring and surveillance in Europe—where the exposure is assumed to be the highest—have demonstrated the effectiveness of control measures that have been enacted, such as feed bans that prevent the recycling of the agent. This increased body of knowledge provides a sound and compelling scientific basis for more focused regulatory restrictions with regard to BSE than those we have been operating under.

A more focused approach is also supported by the international community, as evidenced by the evolution of BSE guidelines adopted by the OIE (Ref 1). The OIE is recognized by the World Trade Organization (WTO) as the international organization responsible for development and periodic review of standards, guidelines, and recommendations with respect to animal health and zoonoses (diseases that are transmissible from animals to humans). The OIE guidelines for trade in terrestrial animals (mammals, birds, and bees) are detailed in the Terrestrial Animal Health Code (Ref 2). The OIE guidelines on BSE, contained in Chapter 2.3.13 of the Terrestrial Animal Health Code, and supplemented by Appendix 3.8.4 of the Code, currently provide for five possible BSE classifications for regions. For each classification, the guidelines recommend different export conditions for live animals and products, based on the risk presented by the region. This framework not only recognizes different levels of risk among regions, but provides for trade in live animals and products under certain conditions even from regions considered high-risk under the OIE guidelines.

As a member of the OIE, the United States, represented by APHIS, has been actively involved in the development of OIE guidelines and fully supports the OIE position that gradations in BSE risk among regions should be recognized and that trade should be commensurate with risk. Although APHIS did not incorporate the text of OIE's BSE guidelines into its proposed rule, the agency based its standards on these guidelines. The standards contain the same basic factors for assessing a region's BSE status as the OIE guidelines (e.g., import requirements, incidence, surveillance, feed restrictions, etc.). APHIS also considered the OIE guidelines, in conjunction with other relevant factors and available information, when evaluating Canada as a BSE minimal-risk region, and will do so in the future in evaluating other countries that may apply for minimal-risk status under our regulations. It is in this context that APHIS' standards and the OIE guidelines should be viewed.

We believe it is important to explain the relationship of our standards to the OIE guidelines because a number of commenters questioned why we did not adopt the OIE guidelines outright and/or assumed that differences in text meant that APHIS had rejected the OIE guidelines. While there are differences between the APHIS standards and the OIE guidelines, these differences reflect the different purposes and uses of the OIE guidelines and our standards.

The OIE guidelines are designed to provide a science-based reference document for international trade in animals and animal products. To this end, the OIE Terrestrial Animal Health Standards Commission draws upon the expertise of internationally renowned specialists to draft new and revised articles of the Terrestrial Code in light of advances in veterinary science. Draft texts are circulated to member countries for review and comment and, as a general rule, are adopted based on consensus of the OIE membership. Articles adopted by the membership provide guidance for use by veterinary authorities, import/export services, epidemiologists and all those involved in international trade. OIE guidelines are not intended to be prescriptive; each member nation may determine its own appropriate level of protection and, therefore, establish its own import requirements. (In accordance with Article 5 of the WTO ''Agreement on the Application of Sanitary and

Phytosanitary Measures'' (WTO–SPS Agreement), WTO members are obligated to base their import requirements on an assessment of risk, taking into account the standards, guidelines, and recommendations, and the risk assessment techniques developed by the relevant international organizations.)

Regulations, which may be based on the OIE guidelines, are prescriptive, as they are intended to be enforced as written and are not designed to be a point of reference. Furthermore, because rulemaking may take considerable time, the most successful regulations must also be flexible enough to allow a country to consider individual circumstances among its trading partners, as well as changes in science, without undergoing constant revisions. One reason that APHIS has decided not to simply adopt the OIE guidelines as regulations is that they are constantly evolving and subject to change. Some chapters, in fact, such as the one on BSE, are continually being updated as new information becomes available. For example, the OIE is currently considering proposing a three-tier country classification system for BSE as an alternative to the existing five-tier system. In 2004, the OIE changed the recommended reported incidence rate for minimal-risk regions from less than 1 case per million during each of the last four consecutive 12-month periods within the cattle population over 24 months of age to less than 2 cases per million during that time period within that cattle population. This example of a numeric threshold points to another reason that APHIS chose not to adopt the OIE guidelines as regulations. In some cases, holding a country to a rigid criterion without consideration of compensatory risk reduction measures may not be scientifically justified and unfairly discriminate against regions where the overall conditions indicate equivalence with minimal BSE risk. In other cases, rigidly applying a numeric criterion without a thorough consideration and evaluation of relevant factors (e.g., the quality of a country's surveillance program and the supporting veterinary infrastructure) could result in trade with a region that may meet OIE guidelines but, nonetheless, present, in our view, an undue risk of BSE introduction. Therefore, rather than incorporate the text of the OIE guidelines into our regulations, APHIS chose to base its evaluation on OIE guidelines in a way that allows us to consider an individual country's specific situation and to analyze risk based on the overall effectiveness of actions taken by the country to prevent the introduction and spread of BSE.

As stated above, APHIS considered the OIE guidelines in evaluating whether Canada met our proposed standards, and we plan to consider them in assessing whether other countries that may apply for minimal-risk classification meet our standards. To illustrate how we would use the OIE guidelines for minimal-risk regions in applying our own standards, we can look to our evaluation of the incidence of BSE with respect to Canada. Although APHIS' standards do not include a numerical threshold for incidence, our standards provide that a region must have in place risk mitigation measures adequate to prevent widespread exposure and/or establishment of the disease. In concluding that measures taken in Canada had prevented widespread exposure and/or establishment, we compared Canada's incidence rate of two infected cattle in 2003 out of a population of 5.5 million cattle over 24 months of age with OIE's recommendation of less than two infected cattle per million during each of the last four consecutive 12-month periods within the cattle population over 24 months of age. Canada's incidence rate (0.4 per million head of adult cattle) is well below the current OIE recommendation regarding incidence in minimal-risk regions. We also considered that the reported rate of disease cannot be considered independently from either the level and quality of disease surveillance or from the position on the epidemic curve. In this regard, we note that Canada exceeds the OIE recommended level of testing. We also consider Canada's surveillance program for BSE in cattle to be of high quality because it includes active surveillance for BSE in cattle that is appropriately targeted based on known risk factors. Also, because Canada implemented import restrictions and a feed ban before detection of BSE in any indigenous animals, it is more likely that the incidence of BSE in Canada is decreasing (on the down slope of the epidemic curve), rather than increasing (on the up slope).

The November 2003 Proposed Rule

As explained above, our proposed standards for minimal-risk regions were based on the OIE guidelines for BSE minimal-risk regions, using those guidelines as a reference. We based our proposed classification of Canada as a minimal-risk region, as well as our proposed mitigation measures for live ruminants and ruminant products and byproducts from Canada, on an analysis of risk APHIS prepared entitled, ''Risk Analysis: BSE Risk from Importation of Designated Ruminants and Ruminant Products from Canada into the United States.'' The analysis drew on a number of sources of information, including scientific literature, results of epidemiological investigations, data provided by the Canadian Government, a quantitative analysis (i.e., uses numerical values) of the risk of BSE in Canada prepared by the Canadian Food Inspection Agency (CFIA), and quantitative analyses of the consequences of BSE being introduced into the United States prepared by the Harvard Center for Risk Analysis at Harvard University (HCRA) and the Center for Computational Epidemiology at Tuskegee University (Ref 3) (discussed in more detail below under the heading ''Harvard-Tuskegee Investigation of BSE Risk in the United States''). This analysis was made available to the public when the proposed rule was published in November 2003.

We solicited public comment on the proposed rule and its underlying risk analysis and other supporting analyses for 60 days ending on January 5, 2004. As noted, at the time the proposed rule was published, BSE had never been detected in a native animal in the United States, and only a single case in a native animal had been reported in Canada (in Alberta in May 2003).

The Reopening of the Comment Period and Explanatory Note

On December 23, 2003, less than 2 weeks before the close of the comment period for our proposed rule, USDA announced a presumptive positive case of BSE in a dairy cow in Washington State. Samples had been taken from the cow on December 9 as part of USDA's BSE surveillance program. The BSE diagnosis was made on December 22 and 23 by histopathology and immunohistochemical testing at the National Veterinary Services Laboratories in Ames, IA, and was verified on December 25 by the international reference laboratory, the Veterinary Laboratories Agency in Weybridge, England.

Upon detection of the BSE-positive cow in Washington State, USDA, FDA, and other Federal and State agencies, along with CFIA, immediately began working together to perform an epidemiological investigation (Ref 4), trace any potentially infected cattle, trace potentially contaminated rendered product, increase BSE surveillance, and take additional measures to address human and animal health.

The epidemiological investigation and DNA test results confirmed that the infected cow was not indigenous to the United States, but rather was born and most likely became infected in Alberta, Canada, before Canada's 1997 implementation of a ban on feeding mammalian protein to ruminants.

Following detection of the imported BSE-infected cow in Washington State in December 2003, further safeguards on human and animal health were implemented in the United States by FDA and FSIS. These actions are described in more detail below under the headings ''Measures Implemented by FSIS'' and ''Measures Implemented by FDA.''

In response to comments from the public requesting an extension of the comment period and in order to give the public an additional opportunity to comment on the proposed rule in light of these developments, on March 8, 2004, we published a notice in the **Federal Register** (69 FR 10633–10636, Docket No. 03–080–2) reopening and extending the comment period until April 7, 2004. The notice also announced the availability of a document titled ''Explanatory Note'' that discussed each component of the original risk analysis and related information in light of the new BSE case. (You may view the Explanatory Note document on the Internet by accessing the APHIS Web site at *http://www.aphis.usda.gov/lpa/issues/bse/bse.html.* Click on the document titled ''Analysis of Risk—Update for the Final Rule: Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities, December 2004.'')

The Explanatory Note stated that APHIS did not consider the detection of a second BSE case to have an effect on the conclusions of the original risk analysis and explained why. The original risk analysis addressed the likelihood that animals might have been infected before Canada implemented its feed ban in 1997 and also concluded that compliance with the feed ban in Canada would have minimized the likelihood of infectivity from these animals spreading to other ruminants in Canada.

As noted above, the epidemiological investigation and DNA test results indicated that the infected cow most likely became infected before Canada's 1997 implementation of a ban on feeding mammalian protein to ruminants. Both animals diagnosed with BSE were older than 30 months of age. The cow found to have BSE in December 2003 also was imported into the United States when it was older than 30 months; the proposed rule would not have allowed the importation of cattle 30 months of age or older.

The Explanatory Note observed further that, although an additional animal of Canadian origin had been diagnosed with BSE since the time APHIS published its November 2003 proposed rule and risk analysis, the fact remained that only two cases of BSE had been detected in animals born in Canada. The Explanatory Note also discussed the additional BSE control measures taken by Canada after BSE had been detected in that country.

The March 2004 notice that reopened and extended the comment period on our proposed rule also proposed allowing the importation of beef from Canada, regardless of the age of the cattle from which it was derived, provided other specified mitigating conditions were met, and invited comment on this change from our November 2003 proposal. The original proposal would have required the beef to come from cattle that were less than 30 months of age at the time of slaughter.

We explained in the notice that the change in our thinking was based on the changes FSIS made in its regulations in January 2004, and the fact that Canada had also implemented the changes made by FSIS. Among other things, FSIS required that cattle tissues considered at particular risk of containing the BSE agent in infected animals (referred to as ''specified risk materials'' or SRMs) be removed from cattle at slaughter and prohibited their use in human food. FSIS designated as SRMs the brain, skull, eyes, trigeminal ganglia, spinal cord, vertebral column (excluding the vertebrae of the tail, the transverse process of the thoracic and lumbar vertebrae, and the wings of the sacrum), and dorsal root ganglia of cattle 30 months of age and older, and the tonsils and distal ileum of the small intestine of all cattle. To ensure effective removal of the distal ileum, FSIS also required that the entire small intestine be removed and be disposed of as inedible. FSIS did not restrict the age of cattle eligible for slaughter, because the removal of SRMs effectively mitigates the BSE risk to humans associated with cattle that pass both ante-mortem and post-mortem inspections (i.e., apparently healthy cattle); FSIS and FDA regulations prohibit the use of other cattle in human food. The Canadian Government had already established equivalent safeguards in Canada in July 2003. In addition, because regions wishing to export meat and meat products to the United States must follow processing practices equivalent to those of FSIS, the FSIS requirements effectively require removal of SRMs from all cattle slaughtered outside the United States when meat derived from those cattle is intended for export to the United States, which would prevent such materials from entering the food chain in the United States. Additionally, FDA's feed ban prohibits ruminant protein from entering the ruminant feed chain. Therefore, we stated in our notice that we did not believe it was necessary to require that beef imported from BSE minimal-risk regions be derived from cattle under 30 months of age, provided measures equivalent to those of FSIS regarding SRM removal are in place in the exporting region and provided such other measures as are necessary (e.g., a prohibition on the use of air injection stunning devices, controls to prevent cross-contamination) are in place.

We received a total of 3,379 comments on the proposed rule from the public by the close of the comment period on April 7, 2004.

C. Background Information for APHIS' Response to Comments

Before discussing the comments received, we consider it useful to discuss a number of documents and actions that contributed to the basis for our establishment of a BSE minimal-risk region category and our inclusion of Canada in that category. These include: Measures implemented by FSIS and FDA to further reduce BSE risk in the United States; the Harvard-Tuskegee investigations of BSE risk in the United States; a memorandum from Joshua Cohen and George Gray of the HCRA; measures taken in Canada in response to BSE risk prior to May 2003; a 2002 Canadian assessment of BSE risk in that country; the epidemiological investigation and a report by an international review team following the diagnosis of BSE in a cow in Canada in May 2003; additional measures taken in Canada; and an update to the APHIS analysis of the risk of allowing the importation of ruminants and ruminant products and byproducts from Canada.

Roles of Different Agencies

Protecting human and animal health from the risks of BSE is carried out on the Federal level primarily by APHIS regarding animal health and FSIS regarding food safety, in coordination with the following FDA Centers: The Center for Veterinary Medicine regarding animal feed; the Center for Food Safety and Applied Nutrition regarding foods other than meat, poultry, and egg products; and other Centers regarding drugs, biologics, and

devices containing bovine material. These agencies collaborate, issuing regulations under their respective authorities, to implement a coordinated U.S. response to BSE.

APHIS is promulgating this final rule under the authority of the Animal Health Protection Act, which gives the Secretary broad discretion to regulate the importation of animals and animal products when he or she determines it to be necessary. As discussed below, FSIS and FDA have recently published regulations regarding BSE to protect human health. Because of the specific focus of each of these three agencies, provisions for similar products may sometimes differ slightly in the agencies' respective regulations as appropriate based on the intended consumer.

Measures Implemented by FSIS

FSIS, in a series of three interim final rules that were published and made effective on January 12, 2004, took additional measures to prevent the BSE agent from entering the human food supply. In its interim final rule titled, ''Prohibition on the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle'' (FSIS Docket No. 03–025IF; 69 FR 1861), and referred to below as the SRM rule, FSIS designated certain cattle tissues as SRMs and prohibited their use in human food. As noted earlier, FSIS designated as SRMs the brain, skull, eyes, trigeminal ganglia, spinal cord, vertebral column (excluding the vertebrae of the tail, the transverse process of the thoracic and lumbar vertebrae, and the wings of the sacrum), and dorsal root ganglia of cattle 30 months of age and older, and the tonsils and distal ileum of the small intestine of all cattle as SRMs. FSIS also required removal of the entire small intestine and disposal of it as inedible to ensure effective removal of the distal ileum.

To facilitate enforcement of the SRM rule, FSIS has developed procedures to verify the approximate age of cattle that are slaughtered in official establishments. Such procedures, based on records or examination of teeth, are intended to ensure that SRMs from cattle 30 months of age and older are effectively segregated from edible materials (Ref 5).

As provided by the SRM rule, materials designated as SRMs if they are from cattle 30 months of age and older will be deemed to be SRMs unless the establishment can demonstrate that they are from an animal that was younger than 30 months of age at the time of slaughter.

Further, FSIS developed procedures to verify that cross-contamination of edible tissue with SRMs is reduced to the maximum extent practical in facilities that slaughter cattle or process carcasses or parts of carcasses of cattle, for cattle both younger than 30 months of age and 30 months of age and older (Ref 5).

The SRM rule also declared mechanically separated beef (MS(beef)) to be inedible and prohibited its use for human food. Additionally, the SRM rule prohibited all non-ambulatory disabled cattle for use as human food.

The second interim final rule, titled ''Meat Produced by Advanced Meat/Bone Separation Machinery and Meat Recovery (AMR) Systems'' (FSIS Docket No. 03–038IF; 69 FR 1874–1885), prohibited products produced by advanced meat recovery (AMR) systems from being labeled as ''meat'' if, among other things, they contain central nervous system (CNS) tissue. AMR is a technology that enables processors to remove the attached skeletal muscle tissue from livestock bones without incorporating significant amounts of bone and bone products into the final meat product. FSIS had previously established and enforced regulations that prohibited spinal cord from being included in products labeled ''meat.'' The interim final rule expanded that prohibition to include dorsal root ganglia (DRG)—clusters of CNS tissue connected to the spinal cord along the vertebral column. In addition, because the vertebral column and skull of cattle 30 months of age and older have been designated as SRMs, they cannot be used for AMR. Because they are not SRMs, the skull and vertebral column from cattle younger than 30 months of age are allowed to be used in AMR systems. However, establishments that use skulls and vertebral columns in the production of beef AMR product must be able to demonstrate that such materials are from cattle younger than 30 months of age.

The third interim final rule, titled ''Prohibition on the Use of Certain Stunning Devices Used to Immobilize Cattle During Slaughter'' (FSIS Docket No. 01–0331IF; 69 FR 1885–1891), prohibited the use of penetrative captive bolt stunning devices that deliberately inject air into the cranial cavity of cattle, because the use of such devices may force large fragments of CNS tissue into the circulatory system of stunned cattle where the fragments may become lodged in edible tissues.

Also on January 12, 2004, FSIS published a notice, ''Bovine Spongiform Encephalopathy Surveillance Program,'' announcing it would no longer pass and apply the mark of inspection to carcasses and parts of cattle selected for BSE testing by APHIS until the sample testing has been completed, and the result is negative (FSIS Docket No. 03–048N; 69 FR 1892).

Measures Implemented by FDA

FDA, like FSIS, has taken additional measures to prevent the BSE agent from entering the human food supply. In an interim final rule published in the **Federal Register** on July 14, 2004, ''Use of Materials Derived from Cattle in Human Food and Cosmetics,'' FDA prohibited SRMs (the same as defined by FSIS), the small intestine of all cattle, material from non-ambulatory disabled cattle, material from cattle not inspected and passed for human consumption, and MS(beef) from use in FDA-regulated human food, including dietary supplements, and cosmetics (69 FR 42255; FDA Docket No. 2004N–0081).

In an advance notice of proposed rulemaking issued jointly by FDA, FSIS, and APHIS on July 14, 2004, ''Federal Measures to Mitigate BSE Risks: Considerations for Further Action'' (69 FR 42288–42300, FDA Docket No. 2004N–0264, FSIS Docket No. 04–021ANPR, APHIS Docket No. 04–047–1), FDA requested additional information to help it determine the best course of action to reduce the already small risk of BSE spread through animal feed. (We refer to the advance notice of proposed rulemaking below as the ''USDA/FDA joint notice.'')

FDA continues to conduct inspections to monitor compliance of domestic feed mills, renderers, and protein blenders with regulations it put in place in 1997 to prevent recycling of potentially infectious cattle tissue through ruminant feed. (FDA regulations at 21 CFR 589.2000 prohibit the feeding of most mammalian protein to ruminants in the United States.) FDA also has expanded the scope of its inspections to include other segments of animal feed production and use, such as transportation firms, farms that raise cattle, and animal feed salvage operations. Compliance with the feed ban by U.S. feed mills, renderers, and protein blenders is currently very high. As of July 2004, conditions or practices warranting regulatory sanctions had been found in less than 1 percent of inspected facilities (Ref 6).

Harvard-Tuskegee Investigation of BSE Risk in the United States

In April 1998, USDA commissioned the HCRA at Harvard University and the Center for Computational Epidemiology at Tuskegee University to conduct a comprehensive investigation of BSE risk

in the United States. The report was completed in 2001 and released by the USDA. Following a peer review of the Harvard-Tuskegee Study in 2002 (Ref 7), the authors responded to the peer review comments (Ref 8) and released a revised risk assessment in 2003 (Ref 3). The report, widely referred to as the Harvard Risk Assessment or the Harvard Study, is referred to in this document as the Harvard-Tuskegee Study.

The Harvard-Tuskegee Study reviewed available scientific information related to BSE and other TSEs, assessed pathways by which BSE could potentially occur in the United States, and identified measures that could be taken to protect human and animal health in the United States. The assessment concluded that the United States is highly resistant to any amplification of BSE or similar disease and that measures taken by the U.S. Government and industry make the United States robust against the spread of BSE to animals or humans should it be introduced into this country.

The Harvard-Tuskegee Study concluded that the most effective measures for preventing the potential spread of BSE are: (1) The ban placed by APHIS on the importation of live ruminants and ruminant meat-and-bone meal from the United Kingdom since 1989 and all of Europe since 1997; and (2) the feed ban instituted in 1997 by FDA. The Harvard-Tuskegee Study further indicated that, if introduction of BSE had occurred via importation of live animals from the United Kingdom before 1989, mitigation measures in place in the United States at the time the Study was conducted would have minimized exposure and worked to eliminate the disease from the U.S. cattle population.

The Harvard-Tuskegee Study also identified three practices that could create a pathway for human exposure to the BSE agent or the spread of BSE should it be introduced into the United States: (1) Non-compliance with FDA's regulations prohibiting the use of certain proteins in feed for cattle and other ruminants; (2) rendering of animals that die on the farm and use (through illegal diversion or cross-contamination) of the rendered product in ruminant feed; and (3) the inclusion of high-risk tissues from cattle, such as brain and spinal cord, in products for human consumption.

The Harvard-Tuskegee Study's independent evaluation of the potential risk mitigation measures predicts that a prohibition against rendering of animals that die on the farm would reduce the number of potential cases of BSE in cattle following hypothetical exposure by 82 percent as compared to the base case scenario, and that a ban on SRMs (which included, according to the evaluation, the brain, spinal cord and vertebral column, ''gut,'' and eyes) from inclusion in human and animal food would reduce potential BSE cases in cattle by 88 percent and potential human exposure to BSE by 95 percent as compared to the base case scenario (Ref 9).

In 2003, following the identification of BSE in a native-born cow in Canada, USDA, working with HCRA, evaluated the implications of a then-hypothetical introduction of BSE into the United States from Canada, using the same simulation model developed for the initial Harvard-Tuskegee Study. This assessment, titled ''Evaluation of the Potential Spread of BSE in Cattle and Possible Human Exposure Following Introduction of Infectivity into the United States from Canada'' (Ref 10), confirmed the conclusions of the earlier Harvard-Tuskegee Study—namely, that a very low risk exists of BSE becoming established or spreading should it be introduced into the United States.

Cohen and Gray Memorandum

Following receipt of comments from the public on its November 2003 proposed rule, APHIS requested the HCRA to respond to comments that pertained to the Harvard-Tuskegee Study. The HCRA's response to the comments, authored by Joshua Cohen and George Gray, was reported to APHIS in a June 18, 2004, memorandum, referred to below as ''the Cohen and Gray memorandum.'' The memorandum also updates the model used in the Harvard-Tuskegee Study with new data from the FDA addressing two critical model parameters—mislabeling of products containing prohibited ruminant protein and contamination of nonprohibited protein with prohibited protein. You may view the memorandum on the Internet by accessing the APHIS Web site at *http://www.aphis.usda.gov/lpa/issues/bse/bse.html.* Click on the document titled ''Analysis of Risk—Update for the Final Rule: Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities, December 2004.''

Measures Taken in Canada in Response to BSE Risk Prior to May 2003

Import restrictions. Canada imposed import restrictions to guard against the introduction of BSE, starting in 1990. In that year, Canada prohibited the importation of live cattle from the United Kingdom and the Republic of Ireland. In 1994, an import ban was imposed on all countries where BSE had been detected in native cattle. In 1996, Canada made this policy even more restrictive and prohibited the importation of live ruminants from any country that had not been recognized as free of BSE following a comprehensive risk assessment. Some animals were imported into Canada from high-risk countries prior to the imposition of these import restrictions. A total of 182 cattle were imported into Canada from the United Kingdom between 1982 and 1990. Similar to actions taken in the United States, efforts were made in Canada to trace these animals. In late 1993, after Canada identified a case of BSE in one of the imported bovines, all cattle imported from the United Kingdom or the Republic of Ireland that remained alive at that time were killed.

Canada has also restricted the importation of ruminant products, including meat-and-bone meal, since 1978. In general, Canada has prohibited the importation of most meat-and-bone meal from countries other than the United States, Australia, and New Zealand. Limited amounts of specialty products of porcine or poultry origin have been allowed to be imported into Canada under permit for use in aquaculture feed products. No meat-and-bone meal for livestock feed-associated uses has been imported, except from the United States, Australia, and New Zealand.

Feed ban. A crucial element in preventing the spread and establishment of BSE in a country is the implementation of a ruminant-to-ruminant feed ban. Canada implemented a feed ban in 1997 that prohibits the feeding of most mammalian protein to ruminants. Under the ban in Canada, mammalian protein may not be fed to ruminants, with certain exceptions. These exceptions include pure porcine or equine protein, blood, milk, and gelatin. The feed ban is equivalent to the feed ban in place in the United States, with the addition that Canada prohibits the feeding of plate waste and poultry litter to ruminants.

Canada has provided information, including statistics on compliance, demonstrating that an effective feed ban is in place in the rendering, feed manufacturing, and livestock raising industries. Few cattle born before implementation of the Canadian feed ban are alive today, given that most male cattle are slaughtered before 24 months of age and given the normal cull rates for beef and dairy cows. It is estimated that 39.4 percent of the beef cattle born in 1996 are alive today. It is estimated that 5.8 percent of the dairy cattle born in 1996 are alive today.

Infected animals typically exhibit clinical signs of BSE 4 to 6 years after infection, and 95 percent of infected cattle exhibit clinical signs in less than 7 years. Since cattle born before the feed ban would now be 7 years of age or older, any remaining infected cattle, if present, would likely be showing clinical signs of BSE that would allow their detection through Canada's BSE surveillance system.

Canadian Government authorities inspect rendering facilities, feed manufacturers, and feed retailers to ensure compliance with the feed ban. Rendering facilities are regulated under an annual permit system, and compliance with the regulations is verified through at least one inspection each year. Feed manufacturers or mills, feed retailers, and farms have been inspected on a routine basis. These inspections have shown a high level of compliance. CFIA indicates that, with respect to the inedible rendering sector, full compliance with the feed ban requirements has been consistently achieved, and that, with respect to the Canadian commercial feed industry, CFIA has identified noncompliance of ''immediate concern'' in fewer than 2 percent of feed mills inspected during 2003–2004. Those instances of noncompliance of ''immediate concern'' are dealt with when identified. According to CFIA, noncompliance of immediate concern includes situations where direct contamination of ruminant feed with prohibited materials has occurred, as identified through inspections of production documents or visual observation, and where a lack of appropriate written procedures, records, or product labeling by feed manufacturers may expose ruminants to prohibited animal proteins (Ref 11).

Surveillance. Canada has an adult cattle population of approximately 5.5 million cattle older than 24 months of age. The current OIE Code, Appendix 3.8.4, references adult cattle populations as those greater than 30 months and recommends examining at least 300 samples per year from high-risk animals in a country with an adult cattle population of 5 million, or 336 samples per year in a country with an adult cattle population of 7 million. Even though the adult cattle population in Canada is defined as greater than 24 months of age and OIE defines it as greater than 30 months of age, Canada has met or exceeded this level of surveillance for the past 7 years, thus exceeding the OIE guidelines. Active targeted surveillance was begun in Canada in 1992, with numbers of annual samples ranging from 225 in 1992 to current levels of over 15,800 per year. This surveillance has continued to be targeted surveillance, with samples obtained from adult animals exhibiting some type of clinical signs or considered high risk for other reasons that could be considered consistent with BSE. During the time Canada has been conducting surveillance for BSE, BSE has been detected in only two cattle indigenous to Canada—the cows diagnosed with BSE in May and December 2003.

Canadian 2002 BSE Risk Assessment

In December 2002, CFIA issued an assessment of the risk of BSE in Canada. The assessment evaluated BSE risk factors and correlating risk mitigation measures being taken in Canada, as well as surveillance being conducted in that country to detect any BSE-infected animals. The risk assessment analyzed the possibility that BSE infectivity was introduced into Canada through 665 cattle imported into Canada from Europe between 1979 and 1997, when Canada implemented its feed ban. The analysis indicated a low potential for cumulative introduction of infectivity into Canada via these cattle and further suggested that the likelihood of the spread and establishment of BSE in Canada, both before and after the 1997 feed ban, was negligible (Ref 12).

Epidemiological Investigation and a Report by an International Review Team

On May 20, 2003, CFIA reported a case of BSE in a beef cow in northern Alberta. Following the detection of the BSE-infected cow, Canada conducted an epidemiological investigation of the BSE occurrence, working with, among others, APHIS representatives. The epidemiological investigation showed that the animal was born before implementation of the feed ban in 1997, and that exposure likely occurred prior to or near the time of the imposition of the feed regulations. Although a specific source of infection was not identified, the most likely source of exposure was feed that contained protein from an infected animal imported from the United Kingdom between 1982 to 1989.

Additionally, the epidemiological investigation focused on rendered material or feed that could have been derived from the carcass of the infected cow. As part of that investigation, a survey was conducted of approximately 1,800 sites that were at some risk of having received such rendered material or feed. The survey suggested that 99 percent of the sites surveyed experienced either no exposure of cattle to the feed (96 percent of the sites) or only incidental exposure (3 percent of the sites). The remaining 1 percent represented limited exposures, such as cattle breaking into feed piles, sheep reaching through a fence to access feed, and a goat with possible access to a feed bag. Depopulation of Canadian herds possibly exposed to the feed in question was carried out by the Canadian Government. Canadian officials conducted a wide-ranging investigation of possible exposure to the feed in question and carried out depopulation of Canadian herds possibly exposed to the feed. On each of those farms where the investigation could not rule out the possibility of exposure to feed that may have contained rendered protein from the infected animal, the herds were slaughtered and tested. All of those animals tested negative for BSE and their carcasses were disposed of in ways, such as disposal in landfills, to ensure that they did not go into the animal food chain (Ref 13).

In June 2003, an international review team (IRT) of animal disease experts assessed the CFIA's investigation of the May 2003 case of BSE and Canada's overall protective measures. The IRT noted the quality of the Canadian investigation and the effectiveness of protective measures in place in Canada. The IRT recommended a number of actions to further enhance the safety of human and animal health, including putting in place a national requirement that SRMs be removed from products destined for consumption; a review of animal feed restrictions; strengthened tracking and tracing systems; improved disease testing and surveillance; and additional efforts to improve disease awareness among producers, veterinarians, and the public (Ref 14).

Additional Measures Taken in Canada

Response to the IRT Report. Subsequent to the IRT report, in July 2003 Canada implemented the requirement that SRMs be removed from cattle at slaughter (Ref 15). Additionally, Canada implemented enhanced measures for identification and for tracking and tracing, as well as for increased BSE surveillance and testing. We discuss the increased surveillance and testing in greater detail below. (Ref 16).

Epidemiological Investigation of the Case in Washington State. As noted above, in December 2003, BSE was detected in a Canadian-origin cow in Washington State. Canada, along with the United States, conducted a rigorous epidemiological investigation. As with the May 2003 case, the epidemiological investigation showed that the animal was born in Canada before implementation of the feed ban in 1997 and, in all likelihood, was exposed to

BSE before or near the time the Canadian feed ban was imposed. As with the May 2003 case, although a specific source of infection was not identified, the investigation indicated that the most likely source of exposure was feed that contained protein from an infected animal imported from the United Kingdom between 1982 to 1989. Again, the investigation resulted in the destruction and testing of a large number of potentially exposed cattle, and testing resulted in no further evidence of infection.

Increased Surveillance. In January 2004, the Canadian Government announced that it would increase its level of BSE testing. As of December 1, 2004, Canada had tested more than 15,800 animals for BSE in 2004, all with negative results, and has announced its goal of testing at least 30,000 animals in 2005. The surveillance program focuses on testing high-risk cattle: dead, dying, diseased, and down cattle over 30 months of age and cattle showing neurological symptoms consistent with BSE. This level of testing represents a significant increase over previous testing levels; surveillance levels in Canada have increased to current levels from under 500 animals per year in 1996.

Update to APHIS' Risk Analysis and Summary of Mitigation Measures and Their Applicability to Canada as a BSE Minimal-Risk Region

In order to add transparency to APHIS' basis for establishing a BSE minimal-risk category and including Canada in that category, we are making available a separate update of factors and measures that mitigate the risk of BSE and their applicability to imports from Canada. This update, titled ''Analysis of Risk-Update for the Final Rule: Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities, December 2004,'' can be viewed on the Internet at *http://www.aphis.usda.gov/lpa/issues/bse/bse.html.* Click on the document titled ''Analysis of Risk-Update for the Final Rule: Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities, December 2004.''

The update extends the discussions APHIS provided previously in its risk analysis, explanatory note, proposed rule, and notice extending the comment period. In the update, we summarize the APHIS standards for a BSE minimal-risk region and the factors considered in our evaluation of such a region. We expand on our considerations of Canada as a minimal-risk region in the context of those standards. In accordance with OIE guidelines (Chapter 1.3.2), the original analysis had four major components: (1) Release assessment; (2) exposure assessment; (3) consequence assessment; and (4) risk estimation. In the update, we discuss in detail two of these four components—the release assessment and exposure assessment—and provide, in more depth, data relevant to our consideration of BSE risk. Finally, the update addresses information that has become available subsequent to our original analysis.

IV. Comments From the Public

As noted above, we received a total of 3,379 comments from the public by the close of the comment period on April 7, 2004. They were from members of Congress, representatives of State and local governments, livestock producers, importers and exporters, organizations representing livestock producers, organizations representing processors and distributors of animal products and byproducts, individual companies, representative of foreign governments, a national animal health association, human health associations, the academic community, and other members of the public.

Subjects of Comments Received

A number of commenters supported the rule and recommended no changes to the proposed provisions. Other commenters supported the rule in general but recommended certain changes to the proposed provisions. Others comments consisted only of recommended changes, objections to the rule in general or to specific provisions, or requests for clarification. In general, the comments we received on the proposed rule can be categorized as follows:

- Comments on the proposed standards for BSE minimal-risk regions;
- omments on whether Canada should be recognized as a minimal-risk region;
- Comments on the proposed risk mitigation measures for the importation of live ruminants from Canada;
- Comments on the proposed risk mitigation measures for the importation of ruminant meat and meat products derived from animals in Canada;
- Comments on the risk analysis;
- Comments on the economic analysis;
- Comments on the environmental analysis;
- Comments advocating that we delay implementation of this rule or withdraw the proposal;
- Comments on miscellaneous issues related to the proposed rule.

We discuss these comments by topic below.

Clarification

We note that, in order to clarify our intent in this final rule, we are making a change to the proposed minimal-risk standards that was not addressed by commenters. One of the standards we proposed to evaluate for a BSE minimal-risk region was whether the region maintains, and, in the case of regions where BSE was detected, had in place prior to the detection of BSE, risk mitigation measures adequate to prevent widespread exposure and/or establishment of the disease. In this final rule, we are clarifying that the BSE detection referred to in that factor is detection in an animal indigenous to the region, consistent with the OIE guidelines for BSE. We are making this change to distinguish between the risk of BSE from detection in indigenous animals and imported animals. In this regard, detection of the disease in an indigenous animal suggests that transmission of the agent has occurred in the region, whereas an imported case does not.

In this final rule, we are making several other clarifications of our regulations. These additional clarifications are discussed below, following the discussion of comments, under the heading ''V. Additional Clarifications.''

A. Proposed Standards for BSE Minimal-Risk Regions

Some of the comments we received on our proposed rule agreed with the standards proposed for a BSE minimal-risk region and supported our proposed classification of Canada as such a region. However, a number of other commenters questioned the clarity of and basis for the BSE minimal-risk standards. Others disagreed that Canada should be considered such a region.

Proposed Minimal-Risk Standards in General

Issue: One commenter requested that APHIS reconsider the approach of establishing a category of BSE minimal-risk region. The commenter stated that, because OIE already lists a category very similar to APHIS' BSE minimal-risk category, referring to ''minimal risk'' in the proposal is an unnecessary duplication of definitions and could lead to confusion. The commenter also suggested that APHIS link definitions and the consequent treatment of animals and meat products to the OIE Code. Several commenters said that APHIS should not adopt criteria for BSE minimal-risk regions that differ from

OIE guidelines for BSE minimal-risk regions or questioned APHIS' basis for doing so. One of these commenters stated that OIE guidelines have highly detailed and specific criteria that allow the identification of minimal-risk regions and said that APHIS did not provide sufficient analysis in the proposed rule to support the creation of a new minimal-risk category. Some others said that APHIS did not adequately describe the scientific basis for deviating from the OIE guidelines, particularly with respect to time during which ruminant feed restrictions have been in place.

Response: We are making no changes based on these comments. We consider the definition of *BSE minimal-risk region* in this rule to be clear. We have explained our reasoning in detail for adopting performance standards for the critical factors, and discussed at some length our conclusion that some regulatory flexibility is essential. We noted the that the OIE guidelines are fluid, and discussed above in section III. B., under the heading ''APHIS' Regulatory Approach to BSE: Past and Present,'' that OIE may revise its BSE classifications in the near future.

As discussed above in section III. B. under the heading ''More Focused Regulatory Restrictions,'' although APHIS did not incorporate the text of OIE's BSE guidelines into its proposed rule, the agency based its standards on those guidelines, and the APHIS standards contain the same essential factors for assessing a region's BSE status as the OIE guidelines (*e.g.*, import requirements, incidence, surveillance, feed restrictions, etc.). The proposed rule and associated risk analysis explain where APHIS' proposed standards for minimal-risk regions departed from OIE guidelines. The preamble to the proposed rule discussed how we would use those standards to evaluate the BSE risk of a region. We said we would use the standards as a combined and integrated evaluation tool in evaluating a region, focusing on the overall effectiveness of all control mechanisms in place (*e.g.*, surveillance, import controls, and a ban on the feeding of ruminant protein to ruminants). We further explained that, in regions where BSE had been diagnosed, we would base our evaluation on the overall effectiveness of all control mechanisms in place at the time BSE was diagnosed in the region, and on actions taken after the diagnosis (*e.g.*, the epidemiological investigation of the occurrence). We agree that this approach differs from the OIE's in that it does not adhere to specific numerical recommendations specified in some of the OIE guidelines, but, as discussed earlier, the OIE guidelines are in flux and are meant to be a reference document. Further, disqualification of a region for failure to precisely meet one OIE recommendation would not account for a region's potential to present an overall minimal risk for BSE by exceeding other OIE recommendations or other relevant factors bearing on a risk to animal health.

We discussed in the proposed rule's preamble how we applied our standards for minimal risk to an evaluation of Canada's BSE risk. For example, we stated that, although Canada has had a feed ban in place for only 7 years (1 year less than provided for by OIE), this time period may be conservative because of the variability in the incubation period for BSE. Based on an analysis of data collected in the United Kingdom, the Harvard-Tuskegee Study (Ref 17) estimates that the variability distribution for the BSE incubation period in cattle has a median (50th percentile) of approximately 4 years and a 95th percentile of approximately 7 years. Based on the best-fit parameter values provided in the Harvard-Tuskegee Study (Ref 18), the mean (expected value) of the incubation period distribution is estimated at 4.2 years, and 7.5 years (August 1997 through January 2005) represents the estimated 97.5th percentile of the incubation period. We determined that the duration of the feed ban in Canada adequately addresses the expected BSE incubation period, taking into consideration all of the actions Canada has taken to prevent the introduction and control the spread of BSE (*e.g.*, import controls, level and quality of surveillance, effectiveness of feed ban, epidemiological investigation of detected cases, and depopulation of herds possibly exposed to suspected feed sources). We, therefore, concluded that a feed ban of less than 8 years' duration was appropriate for Canada. Canada, in fact, meets all OIE guidelines for a minimal-risk region, except for the duration of its feed ban.

We also note that OIE's guidelines for BSE include not just guidelines for classifying regions according to risk, but corresponding guidelines for trade in cattle, meat, and meat products from regions, according to the region's BSE risk classification. Our rule is consistent with this two-part OIE approach of considering a region's overall BSE risk status in combination with appropriate import restrictions for specific commodities.

Issue: A few commenters said that adopting criteria less stringent than OIE guidelines could result in other countries' perceiving the United States as having a greater BSE risk status and, therefore, prohibiting or restricting imports of cattle and beef from the United States. One commenter observed that OIE has five risk classifications for regions and said that, while some countries may choose to trade with high-risk regions, the United States should trade only with countries determined to be free of BSE.

Response: We are working diligently on an international level to ensure that BSE-related trade restrictions are based on sound science and a realistic understanding of the risks presented by the commodities we are proposing for trade. We do not believe it is appropriate to limit trade in cattle, meat, and meat products only to regions determined to be free of BSE if there are measures that can be applied to mitigate the risk of those commodities introducing BSE into the United States. There are such mitigation measures, consistent with those we have proposed. In fact, OIE guidelines provide for trade in cattle of any age, as well as beef and many other cattle products, even from countries that are considered high risk for BSE.

Issue: One commenter said that he was not opposed to APHIS' adopting criteria for minimal-risk regions that differ from OIE guidelines, but that APHIS' criteria put too much emphasis on import controls and epidemiological investigations and not enough on risk management measures in a country under consideration. The commenter mentioned a variety of risk mitigation measures in place in the European Union, including removal of SRMs; a ban on the feeding of mammalian meat-and-bone meal (MBM) to cattle, sheep, and goats; a suspension on the use of processed animal protein in feeds for any animals farmed for the production of food since January 2001, with the exception of fish meal for pigs and poultry; high processing standards for the treatment of ruminant animal waste; surveillance measures in accordance with the OIE Code; an ongoing awareness program for veterinarians; compulsory notification of all cattle showing clinical signs of BSE; testing of risk animals (fallen stock, emergency slaughtered animals, and animals with clinical signs at post-mortem inspection) over 24 months of age and healthy slaughtered animals over 30 months of age; culling policy for animals with a high probability of receiving the same potentially infected feed as a BSE case and offspring of female BSE cases; approval of rapid tests with the same sensitivity as the confirmatory methods.

Response: We agree with the commenter regarding the effectiveness of an integrated BSE risk management approach, and APHIS' standards for minimal-risk regions consider risk management measures such as those mentioned by the commenter. As discussed above, the standards we proposed for a BSE minimal-risk region included the need for risk mitigation measures to have been in place even before detection of BSE. These would be considered under the broad criteria that form our definition of minimal-risk region. Specifically, those standards include: (1) Having in place risk mitigation measures adequate to prevent widespread exposure and/or establishment of the disease, including import restrictions, surveillance for BSE at levels that meet or exceed OIE recommendations, and a ban on the feeding of ruminant protein to ruminants; (2) conducting, in regions where BSE has been detected, an epidemiological investigation sufficient to confirm the adequacy of measures to prevent the further introduction or spread of BSE; and (3) taking additional risk mitigation measures, as necessary, in regions where BSE has been detected.

We emphasize, in this final rule, import controls as actions to avoid the introduction of the BSE infectious agent, and epidemiological investigations as action to promptly determine the extent of introduction. However, we also place value on risk management actions that were already in place in cases where BSE is detected.

Issue: Several commenters stated that APHIS' proposed standards for a minimal-risk region were relatively ambiguous compared to the corresponding provisions of the OIE Code. One such commenter stated this is partly because the proposal did not have an objective acceptable threshold regarding the extent of BSE infection in the country and a minimum enforcement period of effective measures, including a feed ban. Consequently, recommended the commenter, the United States should either: (1) Prepare objective guidelines that would allow exporting countries to determine their status with a certain level of predictability; or (2) investigate and approve more than one country. The commenter stated that the latter option would give other countries a much clearer idea of what is acceptable.

Response: As explained previously, while there are differences between the APHIS standards and the OIE guidelines, these differences reflect the different purposes and uses of the OIE guidelines and our standards. The OIE guidelines are designed to provide a science-based reference document for international trade in animals and animal products. Articles adopted by the OIE membership provide guidance for use by veterinary authorities, import/export services, epidemiologists and all those involved in international trade. OIE guidelines are not, however, intended to be prescriptive; each member nation may determine its own appropriate level of protection and, therefore, establish its own import requirements.

In contrast, regulations, which may be based on the OIE guidelines, are prescriptive, as they are intended to be enforced through an appropriate enforcement and compliance program. Furthermore, as rulemaking may take considerable time, the most successful regulations must also be flexible enough to allow a country to consider individual circumstances among its existing and potential trading partners, as well as advances in science, without undergoing constant revisions.

As explained previously, specific numeric recommendations in the OIE guidelines have changed over time and can be expected to change further in the future. Rigid adherence to each specific standard would disqualify some regions that present an overall minimal risk for BSE, despite not quite meeting one standard, as a result of exceeding certain other guidelines. We do not consider the suggested approach to provide a sufficient level of flexibility to allow consideration of the nature of BSE and the need to acknowledge and address varying permutations of risk among different regions on a case-by-case basis. Under the Animal Health Protection Act (AHPA) (7 U.S.C. 8301–8317), ''the Secretary may prohibit or restrict the importation or entry of any animal, article, or means of conveyance * * * if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into or dissemination within the United States of any pest or disease of livestock'' (7 U.S.C. 8303(a)). However, neither the AHPA nor the Secretary (or officials delegated by the Secretary) has delineated through regulations all the specific conditions that might be considered necessary to protect against the introduction of animal diseases or pests. This flexibility is necessary for APHIS to evaluate situations involving specific animal diseases or pests of concern and impose specific importation conditions necessary to mitigate the risk of the introduction of such diseases and pests.

The use of rigid criteria may limit the scope of acceptable alternatives for mitigating risk. This is particularly critical for trade-related issues. The situations in individual regions differ significantly, and each region defines its own particular spectrum of control measures. An equivalent level of risk might be reached using various combinations of different control measures. In this context, it is quite possible that a region that does not meet a particular numeric standard could compensate for any risk with other control measures. A case in point is Canada. Although Canada does not precisely meet the OIE guideline for duration of a feed ban, its control measures in other areas (such as surveillance and import restrictions) more than compensate for this. In some cases, holding a country to a rigid criterion without consideration of compensatory risk reduction measures may inappropriately discriminate against regions where the overall conditions indicate minimal BSE risk. In other cases, uniformly applying a numeric criterion without a thorough consideration of qualitative factors (*e.g.*, the quality of a country's surveillance program and the supporting veterinary infrastructure) could result in trade with a region that presents an undue risk of BSE introduction. In order to make rational decisions, APHIS needs the flexibility to make case-by-case determinations regarding the animal health status of particular regions. In fact, the OIE guidelines state that risk assessment should be flexible, in order to deal with the complexity of real-life situations. Specifically, the OIE Code states that risk assessment must be able to accommodate the variety of animal commodities, the multiple hazards that may be identified with an importation, the specificity of each disease, detection and surveillance systems, exposure scenarios, and types and amounts of data and information (Ref 19).

With regard to investigating and recognizing additional countries as BSE minimal-risk regions, that process begins with a request by the country interested in being considered, along with submission by that country of the necessary information. Several countries, in fact, submitted data in conjunction with their comments on our proposed rule. In those cases where the information exchange between the requesting country and the United States is at a very preliminary stage, it will likely be some time before we have all of the information needed and can complete our evaluation. Once an evaluation is completed, we will provide an opportunity for public comment through a proposed rule to

add the region to our list of minimal-risk regions for BSE.

Issue: Two commenters questioned why we did not include the preparation of a risk analysis as a criterion for minimal-risk status, pointing out that a risk analysis is a basic requirement for OIE country classification for BSE under the OIE guidelines. One of these commenters said that the OIE guidelines regarding BSE minimal-risk require that a risk analysis be conducted and appropriate measures be taken to manage any risk identified. In contrast, said the commenter, instead of focusing on a region's total risk analysis process (as the OIE guideline does), APHIS focuses only on whether the region's risk mitigation strategies are adequate to prevent ''widespread exposure and/or establishment of the disease.'' The commenter questioned whether this approach would allow a region's potential BSE risk to be adequately assessed and addressed before the region was considered minimal-risk.

Response: We consider an analysis of risk to be an inherent and integral component of the evaluation of a particular region with regard to BSE. Further, such an analysis is required under the WTO–SPS Agreement and the North American Free Trade Agreement. We encourage any region proposing trade to conduct such a risk analysis and include it with the documentation and data that APHIS requires. However, we did not include the preparation of a risk analysis by a region in our standards for minimal-risk status because APHIS itself intends to assess the BSE risk of a region using the criteria that were listed. APHIS routinely performs a risk analysis when proposing to allow imports, not just regarding BSE, but also with regard to other diseases of concern. A case in point is the risk analysis we prepared for this rulemaking. The standard mentioned by the commenter-whether a region's risk mitigation strategies are adequate to prevent widespread exposure and/or establishment of the disease—is only one factor that will be considered in the risk analysis. That factor itself has subsets concerning import restrictions, surveillance for BSE at levels that meet or exceed OIE guidelines, and a ban on the feeding of ruminant protein to ruminants. In addition, our risk analysis would assess whether, in regions where BSE has been detected, the region: (1) Had conducted an epidemiological investigation sufficient to confirm the adequacy of measures to prevent the further introduction or spread of BSE and (2) had taken, and was continuing to take, additional risk mitigation measures, as necessary, such as, for example, increased surveillance. With regard to Canada, our risk analysis assessed both the risk mitigation measures in place before the diagnosis of BSE in that country and the actions Canada took after the detection.

Issue: Two commenters recommended that we provide more specificity about how APHIS would evaluate whether a region meets the criteria for minimal-risk status. One of the commenters called the proposed standards for minimal-risk regions ''a series of ill-defined factors'' and complained that no mechanisms for enumerating or weighing these factors were set forth in the proposal. The other commenter agreed with the approach of evaluating a region for minimal-risk status using a combined and integrated evaluation tool, rather than basing the evaluation on single-factor values such as OIE recommendations on feeding. However, the commenter suggested that how a region meets APHIS' standards should be quantitatively as well as qualitatively evaluated and that the results should be measured in terms of the relative importance to the combined and integrated overall evaluation (*e.g.*, surveillance might need to be different from the OIE recommendation and weighted more heavily than some other standards). The commenter suggested further that, in evaluating regions beyond Canada, APHIS should publish for public comment detailed risk assessments, as well as the results of the combined and integrated evaluation of the factors used to determine risk for establishing any BSE minimal-risk region.

Response: We consider it necessary and appropriate not to specify in the regulations mechanisms for enumerating or weighing the standards for a minimal-risk region. As discussed above under the heading ''More Focused Regulatory Restrictions,'' holding a country to a rigid criterion without consideration of compensatory risk reduction measures may, in some cases, unfairly discriminate against regions where the overall conditions indicate equivalence with minimal BSE risk. In other cases, uniformly applying a numeric criterion without a thorough consideration of qualitative factors (*e.g.*, the quality of a country's surveillance program and the supporting veterinary infrastructure) could result in trade with a region that presents an undue risk of BSE introduction.

Application of Standards to Other Countries

Issue: A number of commenters raised questions regarding how the proposed standards for BSE minimal-risk regions would be applied to countries other than Canada. Some commenters stated it appeared the standards were tailored to meet the situation in Canada. Several commenters proposed additional countries for classification as BSE minimal risk and suggested that those countries be included in this rulemaking. One commenter requested that APHIS publish for public comment evaluations done for regions beyond Canada. One commenter recommended that applications for BSE minimal-risk recognition from regions with similar status as Canada be rejected. Conversely, another commenter recommended that any countries that currently have standards that equal or exceed those of Canada should be included as BSE minimal-risk regions in this final rule.

Response: We stated in our proposed rule that we would consider requests from other countries for recognition as minimal-risk regions once the regulatory framework defining a BSE minimal-risk region had been established through this rulemaking. We will evaluate other countries using the same standards we used for evaluating Canada. Countries wishing to be recognized as minimal-risk regions by APHIS need to apply for such recognition by following the procedures set forth in 9 CFR part 92, ''Importation of Animals and Animal Products: Procedures for Requesting Recognition of Regions.'' Although the 11 factors listed in part 92 are not the same as the standards listed in this rule for BSE minimal-risk regions, they are broadly applicable to any change in disease status and are compatible with the BSE minimal-risk standards in this rule. As noted above, several countries submitted data in conjunction with their comments on our proposed rule. Once all of the necessary information is received, we will conduct an evaluation of the request and, if a proposal appears warranted, provide an opportunity for public comment through a proposed rule to add the region to our list of minimal-risk regions for BSE. A final rule based on the proposed rule would need to be issued before imports could begin.

Issue: One of the standards for minimal-risk status was that a region in which BSE has been detected must have had in place, prior to the detection of BSE in the region, risk mitigation measures adequate to prevent widespread exposure to and/or establishment of the disease. Several commenters asked how, according to that criterion, countries that reported cases of BSE before scientific studies had determined appropriate risk

mitigation requirements would be able to be considered BSE minimal-risk regions.

Response: We agree that countries that were among the first to diagnose BSE will, under the standards in this rule, not qualify as BSE minimal-risk regions. Because of the lengthy incubation period of the disease, by the time BSE was diagnosed in such countries and control measures were implemented, the chances that the disease had significantly spread were great. However, individual regions may apply to APHIS to be able to export to the United States specific products under conditions that could differ from those in our current regulations. Such applications should be submitted in accordance with 9 CFR part 92 and will be considered when received by APHIS.

Measures to Prevent Widespread Exposure or Establishment

Issue: In our proposed definition of *BSE minimal-risk region* in § 94.0, we provided that such a region must maintain, and, in the case of regions where BSE was detected, must have had in place prior to the detection of BSE, risk mitigation measures adequate to prevent widespread exposure and/or establishment of the disease. One commenter asked the following questions: (1) What exactly are the risks to be addressed and mitigated by the country seeking minimal-risk status; (2) what risk mitigation measures are deemed adequate; and (3) what are the standards to be used to judge whether the measures are adequate?

Response: As discussed in the preamble to our proposed rule, in evaluating whether a country had in a place risk mitigation measures adequate to prevent widespread exposure or establishment of BSE, we would consider whether the country had in place:

- Restrictions on the importation of animals sufficient to minimize the possibility of infected ruminants being imported into the region, and on the importation of animal products and animal feed containing ruminant protein sufficient to minimize the possibility of ruminants in the region being exposed to BSE;
- Surveillance for BSE at levels that meet or exceed OIE recommendations for surveillance for BSE; and
- A ban on the feeding of ruminant protein to ruminants that appears to be an effective barrier to the dissemination of the BSE infectious agent, with no evidence of significant noncompliance with the ban.

We provided, further, that, in regions where BSE was detected, a minimal-risk region must have conducted an epidemiological investigation following detection of BSE sufficient to confirm the adequacy of measures to prevent the further introduction or spread of BSE, and must continue to take such measures. Additionally, the region must have taken additional risk mitigation measures, as necessary, following the BSE outbreak based on risk analysis of the outbreak, and continue to take such measures.

We did not specify numeric thresholds for each of the above criteria. As discussed above, because rulemaking may take considerable time, the most successful regulations must also be flexible enough to allow a country to consider individual circumstances among its trading partners, as well as changes in science, without undergoing constant revisions. Further, in some cases, holding a country to a rigid criterion without consideration of compensatory risk reduction measures may not be scientifically justified and may unfairly discriminate against regions where the overall conditions indicate minimal BSE risk. In other cases, rigidly applying a numeric criterion without a thorough consideration and evaluation of relevant factors (e.g., the quality of a country's surveillance program and the supporting veterinary infrastructure) could result in trade with a region that may meet numeric criteria but, nonetheless, present, in our view, an undue risk of BSE introduction. Therefore, APHIS chose to base its evaluation on OIE guidelines in a way that allows us to consider an individual country's specific situation and to analyze risk based on the overall effectiveness of actions taken by the country to prevent the introduction and spread of BSE.

Issue: As noted above, one of the proposed standards for a BSE minimal-risk region was that, in regions where BSE was detected, the region ''had in place prior to the detection of BSE, risk mitigation measures adequate to prevent widespread exposure and/or establishment of the disease.'' One commenter asked for clarification of the meaning of ''widespread exposure or establishment,'' of whether moderate exposure or establishment is acceptable, and of how many cases are acceptable in both humans and animals. Another commenter stated that the wording in the definition could create disagreements with regions applying for BSE minimal-risk status as to whether the disease is widespread in a particular region.

Response: APHIS has set no specific thresholds for an acceptable number of cases in humans or animals. Rather, the Agency will conduct an evaluation of the BSE situation in a region according to the factors in that region and define mitigations appropriate for the conditions. APHIS would consider in its evaluations OIE recommendations regarding the recommended maximum number of BSE cases per million at different BSE risk levels.

As an example, APHIS considers the situation that existed in the United Kingdom and certain other European countries in the 1990s to be clearly an example of widespread exposure or establishment, and also one that would clearly contribute to a high-risk categorization under OIE guidelines (Ref 1). Widespread BSE exposure in the United Kingdom was at its peak in the early 1990's, as reflected by the finding of more than 30,000 cases per year in 1992–1993. The situation has improved dramatically with the stringent control measures that have been imposed in the United Kingdom. This has also been the case in other European countries that have had what we consider ''widespread exposure.'' It is important to note that, in each of these situations, BSE was detected and control measures were then instituted, resulting in some delay until the effects of the control measures could become apparent. These situations were very different, for example, from the situation in Canada, where: (1) Control measures were in place before the detection of the disease; (2) only two animals of Canadian origin have been confirmed with BSE; (3) both were born before implementation of Canada's feed ban; and (4) Canada has maintained other protective measures (including import restrictions) that would help preclude a significant level of infectivity from being transmitted to the cattle population.

Surveillance

Issue: One commenter stated that the premise in the proposed rule that prevalence of BSE will be lower in regions with adequate prevention and control measures does not take into account that the level of determined prevalence is dependent on the quality and level of surveillance in each region. The commenter expressed concern that, although a country may say it has low prevalence, its surveillance may be inadequate to accurately measure the prevalence.

Response: We agree with the commenter concerning the importance of a valid and effective surveillance program. One of the first evaluations we make regarding a country or other region seeking a particular animal health status is the effectiveness and

reliability of its veterinary infrastructure, including its surveillance programs.

Issue: One commenter recommended that the specific content of adequate surveillance systems be detailed in the regulations.

Response: In this rulemaking, we require that a region seeking BSE minimal-risk status conduct surveillance for BSE at levels that meet or exceed OIE recommendations for surveillance for the disease. As noted above, in establishing its guidelines, the OIE Terrestrial Animal Health Standards Commission draws upon the expertise of internationally renowned specialists to draft new and revised articles of the Terrestrial Code in light of advances in veterinary science. Therefore, the OIE guidelines are constantly evolving and subject to change. In order to make our regulations flexible enough to allow us to accommodate internationally recognized changes in science without making constant revisions to the regulations, we are basing our requirements for surveillance on OIE recommendations, but are not specifying numeric thresholds in this rule.

Feed Restrictions

Issue: One of the standards we proposed for a BSE minimal-risk was that the region have ''a ban on the feeding of ruminant protein to ruminants that appears to be an effective barrier to the dissemination of the BSE infectious agent, with no evidence of significant noncompliance with the ban.'' Several commenters took issue with this factor. The commenters stated that the absence of evidence of noncompliance is not evidence of compliance and that this standard could be met by countries with no or minimal compliance monitoring. The commenters stated that the feed ban should be enforced by an inspection program, including sampling and testing of feed, as recommended by the IRT. Another commenter took issue with the words ''appears to be,'' recommending instead that the factor should address whether a feed ban is or is not an effective barrier in a particular region. One commenter stated that specific guidelines for compliance, including on-farm compliance, should be provided.

Response: We concur that the lack of evidence of noncompliance may not be evidence of compliance. We did not intend for the proposed rule to produce or allow for the result described by the commenter. For this reason, we are changing the wording of the factor referred to by the commenter to provide instead that ''a ruminant-to-ruminant feed ban is in place and effectively enforced.'' It was, and continues to be, our intent to evaluate all relevant factors thoroughly. Determining whether a feed ban has been effectively enforced will involve a review by APHIS of a number of interrelated factors, including: The existence of a program to gather compliance information and statistics; whether appropriate regulations are in place in the region; the adequacy of enforcement activities (e.g., whether sufficient resources and commitment is dedicated to enforcing compliance); a high level of facility inspections and compliance; accountability of both inspectors and inspected facilities; and adequate recordkeeping. Our individual evaluation of the BSE status of a region will assess these factors and evaluate any contribution to risk.

Issue: Several commenters expressed concern regarding a U.S. recommendation to the OIE that the OIE feed ban duration standard be reduced from 8 to 5 years. One commenter recommended that USDA champion a continuation of the current OIE standard. Commenters stated that shortening the standard from an 8-year feed ban was inadvisable because it is possible some residual ruminant protein feed in some countries would be fed for several years after a feed ban went into effect.

Response: The APHIS recommendation that the OIE standard for the minimum duration of a feed ban be reduced from 8 years to 5 years was based on the estimated average incubation period of the BSE agent in cattle. As discussed above, the Harvard-Tuskegee Study (Ref 17) estimates that the variability distribution for the BSE incubation period in cattle has a median (50th percentile) of approximately 4 years. Based on the best-fit parameter values provided in the Harvard-Tuskegee Study (Ref 18), the mean (expected value) of the incubation period distribution is estimated at 4.2 years. However, the OIE decided not to change the standard.

Epidemiological Investigation

Issue: A commenter expressed concern with the proposed factor for a BSE minimal-risk region related to an epidemiological investigation. This factor stated that, in regions where BSE has been detected, a minimal-risk region must have ''conducted an epidemiological investigation following detection of BSE sufficient to confirm the adequacy of measures to prevent the further introduction or spread of BSE, and continues to take such measures.'' The commenter stated that the standard focuses on the conduct of an investigation and not whether there were definitive findings resulting from such an investigation. The commenter also took issue with our explanation in the preamble that ''an investigation following a detected case would include, among other things, an investigation to determine the most likely source of the animal's exposure to BSE,'' saying that the ''most likely source'' is not a definitive finding.

Response: Certainly, the quality of the investigation and its results and findings must be carefully evaluated. However, definitive findings are not always possible or necessary in an epidemiological or scientific investigation. If a region is able to explain the approach it has taken in its investigation and produce adequate information regarding the most likely source of infection, the lack of a definitive finding can be within normal scientific parameters. Uncertainty may, in many instances, be compensated for in other areas, such as through appropriate mitigations. Depending on the quality of the epidemiological investigation, the absence of definitive findings may be less important than whether there are adequate measures in place to address disease risk.

Additional Measures

Issue: One commenter expressed concern with the proposed factor for a BSE minimal-risk region that requires that, in regions where BSE was detected, the minimal-risk region ''took additional measures, as necessary, following the BSE outbreak based on risk analysis of the outbreak, and continues to take such measures.'' The commenter objected to our explanation in the preamble that additional risk mitigation measures could include ''a broad eradication program, increased surveillance, or additional import restrictions,'' expressing concern that the statement indicates that additional measures either could or could not include those listed by APHIS.

Response: We intended the additional mitigation measures that were listed by the commenter (a broad eradication program, increased surveillance, and additional import restrictions) to be examples of possible additional measures that might be necessary. In pointing to those measures, we did not intend to provide a definitive list of additional mitigation measures we might consider; rather, the examples were intended to provide a sense of the types of measures we might consider. Indeed, in the discussion of OIE standards in the updated risk analysis,

we provide several more examples of additional mitigation measures we are considering, e.g., an ongoing awareness program for veterinarians, farmers, and workers involved in transportation, marketing, and slaughter of cattle; compulsory notification and investigation of all suspected cases of BSE; and examination in an approved laboratory of brain and other tissues collected within the framework of the surveillance and monitoring system. As we stated in the preamble of our proposal, measures will be required that are appropriate depending on the conclusions of the risk analysis that is required following a BSE diagnosis.

Human Health Risks

Issue: Several commenters recommended that the definition of *BSE minimal-risk region* specifically list actions taken to minimize human health risks, which the commenter said should be equal to or more stringent than those in the United States. The commenters stated that the definition should require, for example, that minimal-risk regions do the following: (1) Ban use of non-ambulatory cattle; (2) hold product/carcass until negative results are obtained; (3) prohibit air-injected stunning; (4) remove high-risk tissues; and (5) prevent the inclusion of central nervous system tissue in ''meat'' products.

Response: The issues raised by the commenters relate to the equivalency of standards for the production of meat in countries that export to the United States. The FSIS regulations in 9 CFR 327.2 provide that, to be eligible to export meat and meat products to the United States, a foreign country must be able to certify that it applies to its own meat processing establishments requirements equivalent to those in the United States. Under those regulations, exporting countries are required to provide documentation supporting how their meat inspection system is equivalent to that of the United States. FSIS determines whether the systems are equivalent. The FSIS procedures for evaluating such equivalency are discussed below in more detail, under the heading ''Verification of Compliance in the Exporting Region.'' Each of the requirements recommended by the commenter are currently required of meat processing establishments in the United States and, therefore, are applicable to establishments in foreign countries that wish to export meat and meat products to the United States.

Tracking and Labeling

Issue: One commenter recommended that requirements for a minimal-risk region include existence of a national animal identification and tracking program, adequate and active testing and monitoring programs for all OIE List A animal diseases, and product labeling to enable tracking of the product.

Response: Although the standards for a BSE minimal-risk region in this rule do not specifically require a national animal identification and tracking program, they do include a requirement for an effective epidemiological investigation and the ability of authorities in the region to conduct traceback and trace-forward of animal feed or rendered material. An evaluation of these capabilities will include consideration of animal identification. Although we acknowledge the importance of adequate testing and monitoring for OIE List A diseases with regard to whether and under what conditions animals and animal products should be allowed importation from a particular region, those diseases are already addressed individually in the regulations in 9 CFR 92, 93, 94, 95, 96, and 98. Further, we do not consider List A diseases to fall under the scope of this rulemaking. List A diseases are defined by OIE as transmissible diseases that: (1) Have the potential for very serious and rapid spread, irrespective of national borders; (2) are of serious socioeconomic and/or public health consequences; and (3) are of major importance in the international trade of animals and animal products. BSE is not included as an OIE List A disease but, instead, is categorized as a List B disease. List B diseases are considered to be (1) of socioeconomic and/or public health importance within countries and (2) significant in the international trade of animals and animal products.

With regard to product labeling in the exporting region, it is not clear to us from the comment what type of labeling the commenter is referring to.

Testing of Ruminants

Issue: One commenter stated that, if BSE is diagnosed in a country, the United States should not accept ruminants and ruminant products from that country until the country tests all cattle over 20 months of age at slaughter. Other comments recommended that we require that all cattle slaughtered in such a country be tested for BSE. Some commenters recommended that such testing be carried out by USDA representatives in Canada.

Response: We understand the interest expressed by some commenters in testing certain cattle for slaughter. However, no live animal tests exist for BSE and the currently available postmortem tests, although useful for disease surveillance (i.e., in determining the rate of disease in the cattle population), are not appropriate as food safety indicators. We know that the earliest point at which current testing methods can detect a positive case of BSE is 2 to 3 months before the animal begins to demonstrate clinical signs. We also know that the incubation period for this disease—the time between initial infection and the manifestation of clinical signs—is generally very long, on the average of about 5 years. Accordingly, we know there is a long period during which, using the current methodology, testing an infected animal that has not demonstrated clinical signs of the disease would, incorrectly, produce negative results. If, however, the infected animal is already exhibiting some type of clinical signs that could be consistent with BSE, then the test is not likely to produce false negative results.

Development of reliable food safety indicators will require improved understanding of the pathogenesis of the disease and improved laboratory methods. However, if BSE is present in a country's cattle population, various mitigation measures, such as feed bans and removal of SRMs, are available to prevent the spread of BSE in cattle and to prevent human exposure to the BSE agent. The United States and Canada have already implemented such measures. The results of an enhanced animal surveillance program for BSE, announced by the Secretary on March 15, 2004 (Ref 20), and currently underway, which will help determine the prevalence of BSE in the United States, should the disease exist, and will provide information that will indicate whether these measures should be adjusted. But measures such as SRM removal and the prohibition of the use of non-ambulatory cattle in human food will ensure a safe meat supply. Testing of individual animals, especially if it is performed on clinically normal animals at slaughter, is not in itself an effective risk mitigation measure for protecting public health. The purpose of a surveillance program is to gauge the level of BSE prevalence. This can be achieved through targeted sampling, as is being carried out in the United States and Canada.

For these reasons, we do not consider the testing at slaughter of every bovine over 20 months of age, or the testing of every bovine at slaughter, to be scientifically justified or meaningful in the context of either human or animal health. Making this a criterion for minimal-risk regions would not contribute to human or animal health protection beyond the protection

achieved by a statistically and epidemiologically valid surveillance plan, coupled with the risk mitigations specified in this rule.

B. Recognition of Canada as a Minimal Risk Region

Issue: A number of commenters questioned whether Canada has made improvements to its systems (*e.g.*, surveillance infrastructure, surveillance levels, removal of SRMs, feed ban compliance) sufficient to warrant the resumption of exports of ruminants and ruminant products to the United States. Other commenters contended that Canada has not effectively enforced its feed ban and that further investigation and enforcement is necessary.

Response: Enhancements Canada has made to its surveillance levels are discussed above in section III. B. under the heading ''Additional Measures Taken in Canada'' (Ref 16). Additionally, Canada has added a rapid test as a routine screening tool and has expanded the number of laboratories approved to run BSE tests. These steps should shorten the interval between collection of samples and diagnosis. In July 2003, the Canadian Government issued requirements for the removal, identification, control, and disposition of SRMs (Ref 15). The Canadian SRM requirements for products eligible for importation into the United States are equivalent to requirements in the United States.

Based on the information available to us, including communication with and visits to Canada, we have concluded that Canada has effectively enforced its feed ban. Canada implemented a feed ban in 1997 that prohibits the feeding of most mammalian protein to ruminants. The Canadian feed ban is essentially the same as the feed ban in place in the United States. Canadian Government authorities inspect rendering facilities, feed manufacturers, and feed retailers to ensure compliance with the feed ban. Procedures to reduce the likelihood of cross-contamination are in place at all feed mills that handle both prohibited and nonprohibited feeds. As discussed below under the heading ''Prevalence of BSE in Canada,'' CFIA indicates that compliance with the feed ban is very high.

Issue: Several commenters expressed concern about the 4 months that passed between the death of the BSE-infected Canadian cow in January 2003 and the diagnosis of BSE in May 2003. The commenters stated that this delay in diagnosis indicates that disease surveillance and laboratory disease diagnostic capabilities in Canada are not equal to those in the United States.

Response: It is true that the May 2003 case of BSE in Canada was not confirmed until 4 months after the death of the animal. This delay was due to a combination of factors, primarily the fact that the sample was not identified as ''suspect'' for BSE. Samples were taken from the cow at slaughter because it was non-ambulatory. The animal passed ante-mortem inspection but was condemned on post-mortem inspection for pneumonia. Because the cow did not display classic clinical signs of BSE, samples were tested as they would be for any routine surveillance sample. Also, because the sample was identified as part of routine surveillance, the laboratory did not place a high priority on it for testing. In order to address the delay, Canada has changed its surveillance approach, primarily by using rapid screening tests for BSE. We consider BSE surveillance and diagnostic capabilities in Canada to be equivalent to and as effective as those in the United States.

Issue: One of the standards we proposed for qualification as a BSE minimal-risk region was that a region conduct surveillance for BSE at levels that meet or exceed OIE guidelines. One commenter objected to that standard with regard to Canada, stating OIE surveillance recommendations are intended for countries that have not diagnosed a case of BSE in native cattle. A number of commenters stated that Canada should not be considered a BSE minimal-risk region until that country increases its surveillance levels for BSE, so that the disease situation in Canada is better understood. Some commenters raised concerns that Canada's proposed level of testing was much lower than what the United States has proposed for U.S. testing. One commenter recommended that a surveillance program test all high-risk cattle in Canada during a period of at least 12 to 18 months.

Response: The commenter's suggestion that OIE surveillance recommendations are intended for countries that have not diagnosed a case of BSE in native cattle is incorrect. The OIE testing guidelines apply to any country or zone, whether or not BSE has been diagnosed in a native animal. As discussed above, Canada has an adult cattle population of approximately 5.5 million cattle older than 24 months of age. The current OIE Code, Appendix 3.8.4, references adult cattle populations as those greater than 30 months and recommends examining at least 300 samples per year from high-risk animals in a country with an adult cattle population of 5 million, or 336 samples per year in a country with an adult cattle population of 7 million. Even though the adult cattle population in Canada is defined as greater than 24 months of age and OIE defines it as greater than 30 months of age, Canada has met or exceeded this level of surveillance for the past 7 years, thus exceeding the OIE guidelines. Additionally, OIE recommends sampling of target cattle that display clinical signs compatible with BSE and cattle that have died or been killed for reasons other than routine slaughter. Canada again exceeds OIE guidelines by conducting active targeted surveillance that, in addition to sampling animals that display clinical signs that could be considered consistent with BSE, includes sampling animals with risk factors for BSE.

Also, in May 2004, the Canadian Government initiated enhancements of its BSE surveillance program. This enhanced surveillance program focuses on determining a maximum prevalence of BSE in Canada and will allow the Canadian Government to improve further, if necessary, the effectiveness of Canada's BSE risk management measures. Under the plan, Canada is progressively increasing the number of animals tested annually to be able to detect BSE at a level as low as 1 in 1 million animals. During 2004, through December 1, a total of more than 15,800 samples had been obtained. Testing may reach 30,000 animals in 2005. This level of testing represents a significant increase over previous testing levels; surveillance levels in Canada have increased to current levels from under 500 animals per year in 1996. Canada's testing program, like that in the United States, focuses on those animals most at risk of BSE. Because the cattle population in Canada is much smaller than the cattle population in the United States, Canada does not need to test the same number of animals as the United States (where testing of over 200,000 animals has been announced) to reach high levels. Surveillance testing of 30,000 animals in Canada is equivalent to the U.S. target of sampling 240,000 to 300,000 animals. With the import requirements APHIS is establishing for live animals and products from Canada, there is simply no scientific basis to wait until Canada has completed 12 to 18 months of enhanced surveillance before allowing imports from that country.

Issue: In the preamble to our proposed rule, we discussed the epidemiological investigation that Canada conducted after the diagnosis of a BSE-infected cow in Canada in May 2003. Among other things, the investigation focused on rendered material or feed that could

have been derived from the carcass of the infected cow. CFIA traced the potential movement of material from the infected cow to rendering facilities and then to feed mills and determined that the risk of the material having been mislabeled as ruminant feed was extremely low. As noted below under the heading ''Other Comments Related to the Risk Basis for the Rule,'' as part of that investigation, a survey was conducted of approximately 1,800 sites that were at some risk of having received such rendered material or feed. The survey suggested that 99 percent of the sites surveyed experienced either no exposure of cattle to the feed (96 percent of the sites) or only incidental exposure (3 percent of the sites). We stated in our proposal that the remaining 1 percent represented limited exposures, such as cattle breaking into feed piles, sheep reaching through a fence to access feed, and a goat with possible access to a feed bag. One commenter recommended that all cattle that were part of the 1 percent limited exposures be slaughtered before Canada is classified as a BSE minimal-risk region.

Response: As discussed above, depopulation of Canadian herds possibly exposed to the feed or in question was carried out by the Canadian Government, which conducted a wide-ranging investigation of possible exposure to the feed in question and carried out depopulation of Canadian herds possibly exposed to the feed. On each of those farms where the investigation could not rule out the possibility of exposure to feed that may have contained rendered protein from the infected animal, the herds were slaughtered and tested, in each case with negative results.

Issue: One commenter asked whether APHIS consulted with or sought the opinion of leading international scientific experts with regard to the proposed mitigation measures and, if so, whether those experts considered those risk mitigation measures adequate.

Response: The risk mitigation measures in this rulemaking are equivalent to those measures considered appropriate by the OIE, which are guidelines developed by teams of international veterinary and other scientific experts. Additionally, following the diagnosis of BSE in Canada in May 2003, a review team of international experts evaluated the situation and reported favorably on the measures being taken in that country with regard to BSE. Those measures are equivalent to those set forth in this rulemaking.

Issue: One commenter asked whether the epidemiological investigation conducted by Canada following the diagnosis of BSE in May 2003 was the only information from Canada used in developing the proposed rule.

Response: As we note above, APHIS was able to effectively evaluate the animal disease situation in Canada and risk mitigation measures taken by that country based on information such as the 2002 Canadian assessment of BSE risk in that country, the epidemiological investigation that Canada conducted following the diagnose of BSE in Canada in May 2003, and on continuing exchanges on multiple animal health issues, as well as on a long history of trade with Canada and close and continued interaction and communication with Canadian authorities. As discussed above in section II. C., under the heading ''*Update to APHIS'' Risk Analysis and Summary of Mitigation Measures and Their Applicability to Canada as a BSE Minimal-Risk Region,*'' APHIS has developed an update to the risk analysis that APHIS conducted for the November 2003 proposed rule. The update elaborates on the available scientific information and on the analysis supporting the rule. It is also designed to make the process APHIS followed in evaluating the risk of imports from Canada more transparent (Ref 21).

C. Risk Mitigation Measures for Importation of Ruminants

How the Rule Applies to Camelids, Cervids, Bison, and Water Buffalo Alpacas and Other Camelids

Issue: In § 93.436 of our proposed rule, we provided that the importation of any ruminant from a BSE minimal-risk region would be prohibited unless the animal met the conditions we proposed for various types of live ruminants from the region. The types of ruminants for which we provided import conditions in § 93.436 were bovines, ovines (sheep and goats), and cervids (*e.g.*, deer, elk). The proposed provisions did not include conditions for the importation of camelids (llamas, alpacas, guanacos, and vicunas).

A number of commenters stated that prohibiting the importation of camelids because of BSE was not justifiable. The commenters cited a number of reasons why camelids should be allowed importation from BSE minimal-risk regions, including, said the commenters, the following:

- Camelids are physiologically distinct from ruminants and are not true ruminants. For instance, camelids have a three-compartment stomach, whereas other animals considered ruminants have a four-compartment stomach;
- Camelids are traditionally used for fiber, recreation, and show, rather than for food;
- Purebred registries for camelids ensure the animals' health and identification;
- Camelids are not fed high-protein feeds;
- Camelids are resistant to the BSE agent and do not transmit the disease to other camelids or any other species; and, in fact, no camelid has been diagnosed with a TSE;
- Prohibiting camelids from a BSE minimal-risk region would not be consistent with OIE guidelines, both because the OIE guidelines on BSE relate only to bovines, and because OIE recommends that an importing country not be more trade-restrictive than necessary to achieve the desired level of protection.

Other commenters recommended ways of tracking the location of camelids in the United States if they were allowed importation from BSE minimal-risk regions. One commenter requested that camelids that had been exported from the United States to Canada for breeding purposes before the May 2003 diagnosis of BSE in Canada be allowed to be returned to their original U.S. premises.

Response: Although we agree that taxonomic differences exist between camelids and ruminants such as cattle, sheep, and goats, we do not consider those differences to be sufficient to exclude camelids from being regulated as ruminants with regard to most diseases of concern. Regardless of their taxonomic classification, camelids meet the definition of ruminants and are susceptible to ruminant diseases, including foot-and-mouth disease and tuberculosis. However, with regard to BSE, we agree it is not necessary to prohibit the importation of camelids from minimal-risk regions. Although we recognize there are unknowns with regard to susceptibility to BSE, given the mitigation measures that must be in place for a region to be recognized as minimal risk for BSE, and the facts that there have been no diagnosed cases of BSE in camelids and that camelids are not typically fed ruminant byproducts, we agree it would be highly unlikely BSE would be introduced into the United States through the importation of camelids from BSE minimal-risk regions.

Therefore, in this final rule, we are providing in § 93.436(f) that camelids from a BSE minimal-risk region may be imported into the United States without any restrictions related to BSE. However, such animals will continue to be subject to all other applicable import

requirements in part 93, subpart D, for ruminants imported into the United States. We are also amending § 93.400 of the regulations to add a definition of *camelid* to mean all species in the family *Camelidae*, including camels, llamas, alpacas, guanacos, and vicunas.

Issue: One commenter questioned why we proposed restricting the importation of alpacas because of BSE but not the importation of mink, felines, and mice, which are also susceptible to certain TSEs. Another commenter questioned why the restrictions regarding BSE in the regulations apply only to four-stomached animals, despite the fact that certain single-stomached animals have been be shown to be susceptible to BSE and that certain other animals, such as horses, also eat animal byproducts. One commenter asked whether the occurrence of the disease in single-stomached animals suggests that the root cause of BSE may be the environment and that the disease has not been adequately defined.

Response: Although BSE belongs to the family of diseases known as TSEs, and certain species other than those classified as ruminants have been known to be infected with some form of TSE, natural infections of BSE have been confirmed only in cattle, other bovines, some zoo animals including exotic felines, and domestic cats. Experimental infections of BSE can be induced in certain other species, such as mice and sheep. Animals that have been experimentally inoculated with BSE are prohibited entry into the United States except for entry under permit for research. Zoological animals are restricted to entry under permit to recognized zoological parks. Research indicates that BSE spreads primarily through the ingestion of ruminant feed containing protein and other products from ruminants infected with BSE. Because domestic felines (1) are rarely infected with BSE, even in BSE high-risk regions, (2) are generally not rendered for animal feed, and, (3) if rendered, are precluded from ruminant feed by the FDA feed ban, the importation of domestic felines from BSE-affected regions is not considered a significant risk. We do not have any evidence to suggest that it is necessary to establish prohibitions or restrictions on the importation of non-ruminant animals because of BSE.

Cervids

Issue: In our proposed rule, we included provisions for the importation of live cervids from a BSE minimal-risk region, but only if such cervids were to be moved directly to slaughter in the United States and met other conditions, including that the cervids not be known to have been fed ruminant protein, other than milk protein, during their lifetime. One commenter stated that it would be impossible to verify the feeding practices for cervids. Conversely, a number of commenters stated that our proposed provisions regarding cervids were too stringent. A number of commenters stated that live cervids should be allowed importation for any reason from BSE minimal-risk regions. Several pointed out that BSE has not been identified in cervids. Several commenters recommended specific conditions for the importation of live cervids for any reason from a BSE minimal-risk region. One recommended that the cervids be farmed animals originating from herds that have participated for at least 3 years in a CWD surveillance program. Another commenter recommended that it be required that the cervids were born after implementation of the required feed ban, were not known to have been fed ruminant proteins prohibited under the feed ban, are identified by permanent identification enabling tracing of the animal back to the herd and dam of origin, and were members of a herd that participates in a TSE surveillance program and that is not known to have been affected with a TSE.

Response: In this final rule, we are not including restrictions on the importation of cervids from a BSE minimal-risk region for reasons relating to BSE. The import restrictions we proposed took a conservative approach in that they were based on evidence of cervid susceptibility to CWD, rather than susceptibility to BSE. We extrapolated from CWD susceptibility of cervids to predict a theoretical risk that cervids might also be susceptible to BSE. However, APHIS, like many of the commenters, is aware of no epidemiological data indicating cervids are naturally susceptible to the BSE agent. Published observations indicate that, during the height of the BSE outbreak in 1992 and 1993 in the United Kingdom, exotic ruminants of the *Bovidae* family in zoos were affected with BSE, while cervids, which are members of the *Cervidae* family, were not (Ref 22). Therefore, even in regions that have high levels of circulating infectivity and that should be considered high risk for BSE, BSE susceptibility in cervids was not observed.

Although specific challenge studies have not been conducted to evaluate the experimental infectivity of BSE in cervids, natural infection has not been observed. At least some of the certification requirements for cervids in the proposed rule were focused on TSEs in general rather than BSE specifically. For example, the proposed requirements included certification that the cervids had been members of a herd that was subject to TSE surveillance and that was not known to be infected with or exposed to a TSE. Upon reconsideration, APHIS concluded that restrictions relating to general TSE-related factors in the absence of demonstrated BSE in cervids would be outside the scope of this regulation, which was intended to focus on BSE.

In addition, it should be noted that Canada, as a BSE minimal-risk region, is not likely to have high circulating levels of the infectious agent. Since no infected cervids were observed in captive zoo cervids (unlike in other bovine species) in the United Kingdom at a time when there were high levels of circulating infectivity, it is unlikely that infected cervids will be detected in a BSE minimal-risk region. Therefore, the available information suggests that importation of cervids from Canada does not pose a risk of importing BSE into the United States.

APHIS considers these observations to be evidence suggesting that cervids from BSE minimal-risk regions should not be restricted for BSE, even in view of the fact that no controlled studies have been conducted on cervid susceptibility to BSE. Although APHIS is not restricting cervids for BSE, it will maintain requirements related to cervids for other diseases, including CWD. General surveillance for CWD will detect any TSE exposure, thus providing additional assurances.

We are adding a definition of *cervid* to § 93.400 to mean all members of the family *Cervidae* and hybrids, including deer, elk, moose, caribou, reindeer, and related species. This definition is the same as the definition of *cervid* used in 9 CFR part 55 with regard to CWD. Additionally, we are amending the definition of *cervid* in § 94.0 to also be consistent with the definition in § 55.1.

Issue: One commenter recommended that the regulations require that all cervids imported into the United States from Canada be tested for TSEs such as CWD.

Response: We are making no changes based on the comment. There is no evidence that cervids affected with CWD pose a risk for BSE and we do not consider such testing warranted.

Bison and Water Buffalo

Issue: Many of the provisions in our proposed rule had to do with the importation of bovines and bovine products from a BSE minimal-risk region. Several commenters asked that

the regulations include a definition of *bovine* and that such a definition make it clear whether ''bovine'' includes bison and water buffalo.

Response: We are adding a definition of *bovine* to the definitions in §§ 93.400, 94.0, and 95.1 to mean *Bos taurus* (domestic cattle), *Bos indicus* (zebu cattle), and Bison bison (American bison). These types of bovines were those for which our risk assessment determined whether the proposed risk mitigation measures would be appropriate. Water buffalo may not be imported into the United States under this rule.

Issue: Several commenters recommended that the restrictions and prohibitions for bovines in this rule not apply to bison because of husbandry and feeding practices within the bison industry. At the least, said the commenters, bison should be allowed entry into the United States from Canada if they were born after the required feed ban and were fed no ruminant protein. The commenters stated that, among other factors, there has never been a reported case of BSE in bison in North America, farmed bison are not fed high-levels of protein and are not fed animal byproducts under industry association codes, and bison in Canada have been under a disease surveillance program since 1992.

Response: We are making no changes based on these comments. The reference to bovines in the proposed rule included bison. As such, live bison may be imported from BSE minimal-risk regions subject to the same conditions as other bovines. Published information from the United Kingdom (Ref 22) indicates that, along with other bovines, bison are susceptible to BSE. Because such susceptibility has been demonstrated, we do not consider it prudent to assume that voluntary industry practices will be sufficient safeguards against the disease.

Issue: Another commenter wanted to eliminate obstacles to importing wood bison from Canada for conservation and restoration projects in Alaska.

Response: We will consider this comment in developing our planned rulemaking regarding the importation from BSE minimal-risk regions of live bovines other than those addressed in our November 2003 proposed rule.

Identification of Bovines, Sheep, and Goats From BSE Minimal-Risk Regions

Issue: In § 93.436(b)(3) and (d)(3) of our proposed rule, we included the requirement that for bovines, sheep, and goats imported from a BSE minimal-risk region for feeding and then slaughter, the inside of one ear on each animal be permanently and legibly tattooed with letters identifying the exporting country, and that animals exported from Canada be tattooed with the letters ''CAN.'' Several commenters said tattoos were not sufficient to permanently identify animals because such markings can become illegible over time and cannot be effectively monitored without restraining the animal. Other commenters stated that ear tattoos can be obscured by dirt and hair, are not readily visible—particularly on animals with dark-skinned ears—and are difficult to apply under winter conditions. A number of commenters recommended that identification of country of origin by hot iron branding be required for cattle imported for feeding from BSE minimal-risk regions.

Response: We agree that tattoos might not provide effective, readily visible, permanent identification of the country of origin of bovines. Therefore, we are requiring in § 93.436(b)(3) that bovines imported for feeding and then slaughter from a BSE minimal-risk region be permanently and humanely identified before arrival at the port of entry with a distinct and legible mark identifying the exporting country, properly applied with a freeze brand, hot iron, or other method, and easily visible on the live animal and on the carcass prior to skinning, unless the bovine is imported for immediate slaughter in accordance with § 93.429. The mark must not be less than 2 inches or more than 3 inches high, and must be applied to each animal's right hip, high on the tail-head (over the junction of the sacral and first cocygeal vertebrae). Animals exported from Canada must be so marked with ''CAN''.

We are also requiring in this final rule that a brand or other specified form of permanent identification be used to mark sheep and goats that are imported for feeding and then slaughter. We are providing in § 93.419(d)(1) that sheep and goats imported for feeding and then slaughter from a BSE minimal-risk region be permanently identified before arrival at the port of entry. We will require humane identification with a distinct, permanent, and legible mark identifying the exporting country, properly applied with a freeze brand, hot iron, or other method before arrival at the port of entry, and easily visible on the live animal and on the carcass prior to skinning. The mark must be not less than 1 inch or more than 1¼ inches high. In all cases, the permanent identification must identify the country of export. Animals exported from Canada must be so marked with ''C''.

Additionally, we are providing that other means of permanent identification may be used upon request if deemed by the APHIS Administrator as adequate to humanely identify the animal in a distinct and legible way as having been imported from the BSE minimal-risk region.

Issue: One commenter recommended that the regulations provide that cattle requiring the identifying mark be branded on the left cheek.

Response: Although we agree that branding should be required for cattle imported for feeding from a BSE minimal-risk region, we disagree it is necessary to require that the brand be applied to the cheek of the animal. Facial branding is more stressful for cattle than branding the hind quarters. We consider a brand on the right hip to be adequate for quick identification of the animal as an export from a BSE minimal-risk region.

Issue: Several commenters recommended that all live cattle that have been imported into the United States from Canada be permanently identified with a hot iron brand.

Response: We do not consider the action requested by the commenters necessary. Canada, like the United States, was proactive in implementing a BSE prevention program. Canada has had a ruminant feed regulation in place since 1997. Canada prohibited the importation of live cattle from the United Kingdom and the Republic of Ireland starting in 1990, and subsequently applied the same prohibitions to additional countries as those countries identified native cases of BSE. In 1996, Canada made this policy even more restrictive and prohibited the importation of live ruminants from any country that had not been recognized as free of BSE. Canada has also conducted surveillance in high-risk cattle to monitor the effectiveness of these measures. The combination of these factors makes Canadian-origin cattle currently located in the United States a very low risk for infection with BSE and, in combination with the safeguards in place in the United States, makes them very unlikely to cause the amplification of BSE in U.S. cattle or pose a health risk to U.S. consumers.

The identification recommended by the commenters would require the use of significant resources of time, personnel, and funding, and would provide in return information that is of minimal value. The question that must be answered is whether BSE is present in the U.S. cattle population. This can be done only through the extensive targeted surveillance program underway in the United States. Canadian-origin animals will be included in targeted

surveillance efforts being carried out in this country. Attempting to track Canadian imports—animals that are not contributing significantly to increased risk at this time—will serve only to draw resources away from the targeted surveillance efforts.

Issue: One commenter recommended that the regulations require that cattle imported from a BSE minimal-risk region for immediate slaughter be electronically identified as part of a recognized national system.

Response: We are making no changes based on this comment. We consider the sealing requirements for the means of conveyance transporting the animals adequate to ensure immediate slaughter of the animals.

Issue: One commenter stated that the requirement for permanently identifying sheep and goats probably violates international agreements that forbid a country from applying health or food safety standards to foreign products that are not met by domestically produced products. The commenter stated that, because the BSE statuses of Canada and United States are now similar, similar standards should be adopted.

Response: We are making no changes based on the comment. BSE has been detected in two cows indigenous to Canada, whereas a BSE-infected animal indigenous to the United States has not be detected to date. The domestic animal health regulations that govern interstate movement in the United States are based on differences in disease status among States. Because the United States makes no distinctions among States with regard to BSE, a tattoo requirement would be meaningless for interstate movements.

Issue: One commenter recommended that permanent marking with a brand or tattoo be required for all livestock imported into the United States, unless the animals are moved in a sealed conveyance to immediate slaughter.

Response: We do not consider it necessary to apply the permanent marking requirements of this rule to all livestock imported into the United States. The purpose of the branding requirement in this rule for cattle, sheep, and goats is to allow for quick and easy identification of the animals as having been imported from a BSE minimal-risk region, not to track the animals.

Issue: A number of commenters recommended that, to be able to more effectively maintain identity of animals imported from a BSE minimal-risk region for feeding and then slaughter, and to be able to trace the animals back to the premises of origin, some form of individual identification should be required, such as an eartag. Some commenters stated that the identification should allow for tracing back to the animal's dam.

Response: We agree that it is important to be able to trace cattle, sheep, and goats that are imported from a BSE minimal-risk region for feeding and then slaughter back to the animals' premises of origin, and concur that an eartag can be an effective method of individual animal identification. Therefore, we are requiring in § 93.436(b)(4) for bovines and in § 93.419(d)(2) for sheep and goats that an eartag of the country of origin that is determined by the Administrator to meet the standards for official eartags in the United States and to be traceable to the premises of origin (which we are defining in § 93.400 as the premises where the animal was born) be applied to bovines, sheep, and goats imported for feeding and then slaughter, before the animals' entry into the United States. We do not, however, consider it necessary to require that the eartag make it possible to trace the animal back to its dam. If an infected animal is diagnosed, epidemiological investigation and, if necessary, depopulation will involve all animals of potential concern in the herd of origin.

Issue: Several commenters recommended that we require maintenance of individual identification of imported animals throughout the lifetime of each animal.

Response: We agree that removal of the animal's individual identification would prevent USDA from reconciling the required APHIS movement forms to confirm that all animals are slaughtered as required. Therefore we are requiring in § 93.436(b)(4) for feeder bovines, and § 93.419(d)(2) for feeder sheep and goats, that no person may alter, deface, remove, or otherwise tamper with the individual identification placed on each animal that is in the United States or moving into or through the United States and that such identification may be removed only at slaughter.

Issue: One commenter recommended that APHIS require electronic identification for cattle, sheep, and goats, in addition to the permanent identification.

Response: As discussed above, we are requiring individual identification of bovines, sheep, and goats imported from BSE minimal-risk regions for feeding and then slaughter. However, the national animal identification plan announced by the Secretary of Agriculture on March 15, 2004, does not mandate the use of any particular technology, including electronic identification, and we are not requiring that the individual identification under this rule be electronic. Further, there is little infrastructure for reading electronic identification devices in the United States. Therefore, individual identifications would still require visual reading.

Issue: One commenter recommended that, for bovines less than 30 months of age, we require eartags that allow traceback to the producer of origin with verification for ownership history, movement history, and compliance with the ruminant feed ban. This commenter and other commenters recommended that we require that the eartags be a form of electronic identification.

Response: As we discussed above for cattle imported into the United States from a BSE minimal-risk region for feeding and then slaughter, we are requiring that an official eartag of the country of origin that is determined by the Administrator to meet the standards for official eartags in the United States and to be traceable to the premises of origin be applied to the animal before its entry into the United States. With regard to cattle from Canada, since January 1, 2001, Canada has required all cattle to be identified with machine-readable eartags (radio frequency identification or bar coded) that would allow them to be traced to their herd of origin within Canada. With regard to verification of feed ban compliance, this rule requires that such verification accompany cattle exported to the United States in the form of a certificate issued either by a full-time salaried veterinary officer of the national government of the region of origin, or by a veterinarian designated or accredited by the national government of the region of origin and endorsed by a full-time salaried veterinary officer of the national government of the region of origin. We do not consider it necessary or practical for the individual animal identification to also be a means of verifying individual on-farm compliance with the feed ban regulations. As discussed above, we also do not consider it practical at this time to require that the identification be electronic, due to the fact that such identification would require availability and general use of readers, which is currently not the case.

Issue: Several commenters requested that the proposed requirement for an ear tattoo be replaced in the case of bison with a requirement for an electronic eartag.

Response: As discussed above, we agree with the need for an eartag as a means of tracing animals to their premises of origin. However, we consider it necessary that the animal also be marked in some permanent and

easily visible way as having been imported from a BSE minimal-risk region. In the case of bison from Canada, this would be a brand or other permanent ''CAN'' mark on the right hip. The hip brand is necessary so that bovines from a BSE minimal-risk region that are not imported for immediate slaughter can be easily identified as such in feedlots and at slaughter or if they are illegally diverted from the feeder/slaughter chain. The purpose of the mark is to provide permanent identification and eartags cannot be relied upon to be permanent identification.

Issue: Several commenters recommended that APHIS allow the use of forms of individual identification other than those specified in the regulations, provided such means of identification are deemed acceptable by the APHIS Administrator. One commenter stated that APHIS should not limit the use of acceptable technologies to identify animals from BSE minimal-risk regions. Instead, APHIS should establish standards for animal identification and traceability systems.

Response: We agree that there may be acceptable means of identifying animals in addition to those we are specifying and, as stated above, have provided for approval by the Administrator of other adequate means of identification. At this time, U.S. standards for animal identification and traceability are under development and will be made available for public comment in future rulemaking.

Issue: One commenter stated that we should allow retinal vascular imaging as a form of animal identification.

Response: At this time, we do not consider retinal scanning alone to provide adequate identification of animals because the scans cannot be performed more than a few hours after death. Due to tissue deterioration, it is extremely difficult to obtain a valid scan.

Movement to Feedlots and Then to Slaughter

Issue: We proposed to require that bovines, sheep, and goats imported from a BSE minimal-risk region for feeding and then slaughter be moved directly from the port of entry to a designated feedlot. We proposed to define *designated feedlot* in § 93.400 as ''a feedlot indicated on the declaration required under § 93.407 as the destination of the ruminants imported into the United States.'' Paragraph (b) of § 93.407 requires presentation by the importer of a declaration for imported ruminants that includes, among other information, the name of the person to whom the ruminants will be delivered and the location of the place to which such delivery will be made. Several commenters asked how APHIS will verify that imported cattle moved to a feedlot were not moved from the feedlot other than to slaughter. Many commenters requested that the regulations include criteria for approval of a feedlot as a designated feedlot. A number of commenters recommended specific criteria for such approval.

Response: Based on these comments, we consider it necessary to clarify our intent as to what we meant by a designated feedlot in the proposal and where and how we are using that term in this final rule.

In this final rule, we are still requiring, as proposed, that cattle from a BSE minimal-risk region imported into the United States for feeding and then slaughter (which we refer to as feeder cattle) must be moved from the port of entry to an identified feedlot, but we are not calling that feedlot a ''designated feedlot.'' In our proposal, it was our intent that a feedlot for cattle be ''designated'' only in the sense that it was identified as the location to which the cattle would be moved for feeding and then movement to slaughter. We did not specify criteria for designated feedlots for either cattle or sheep and goats and did not require that cattle from BSE minimal-risk regions be segregated from other cattle at feedlots. Because there has been no demonstrated lateral transmission of BSE from bovine to bovine (the most likely cause or transmission in bovines appears to be through ingestion of infected ruminant protein), we considered it sufficient to ensure that the imported cattle be clearly marked as to country of origin.

FSIS's January 2004 SRM rule, discussed above under the heading ''Measures Implemented by FSIS,'' which requires that SRMs be removed from all cattle at slaughter—both from cattle born and raised in the United States and from imported cattle—further supports the conclusion that it is not necessary to require segregation of imported feeder cattle from U.S. feeder cattle while at a feedlot before slaughter. Individual identification, permanent marking indicating the country of origin, and movement only under an APHIS-issued movement permit (the physical destination of the cattle must be identified on all documents described in § 93.407 and on APHIS Form VS 17–130) will allow monitoring and tracking of the imported cattle as they move from the port of entry to the identified feedlot and then to a recognized slaughtering establishment. This process is as follows.

Movement of cattle to feedlots and then to slaughter. Means of conveyance containing cattle for feeding and then slaughter will be presented to an APHIS port veterinarian at a border port listed in § 93.403(b) or as provided in § 93.403(f). These cattle must be accompanied by the health certificate from the region of origin (in this case Canada) that is required under § 93.405. The health certificate must list the eartag number of each of the animals in the shipment. Additionally, the animals must be accompanied by the certification required from the country of origin under § 93.436(b)(5) regarding the age, feeding history, and identification of the cattle. The means of conveyance must have been sealed in the region of origin with seals of the national government of the region of origin. (The requirement for sealing of the vehicle is discussed below under the heading ''Sealed Means of Conveyance.'')

The APHIS port veterinarian will review the paperwork and inspect the shipment to ensure that it is being imported in compliance with the regulations. The APHIS port veterinarian will then complete and sign APHIS Form VS 17–30, ''Report of Animals, Poultry, or Eggs Offered for Importation.'' (This is a standard form completed by APHIS port veterinarians as certification of the inspection and release of animals offered for importation from any region.) The APHIS port veterinarian will also complete and sign APHIS VS Form 17–130, ''Permit for Movement of Restricted Animals,'' which will authorize the movement of the animals to a feedlot. The APHIS VS Form 17–130, which must identify the physical location of the feedlot and the individual responsible for the movement of the animal, must also be signed by the owner or the shipper of the animals, to certify that the livestock will be delivered to the consignee without diversion.

The cattle must be moved as a group to the feedlot indicated on the APHIS VS Form 17–130. When the cattle arrive at the feedlot, the seal must be broken only by an accredited veterinarian or by a State or USDA representative or his or her designee. The person breaking the seal will indicate on the APHIS VS Form 17–130 where and when the animals were received and the number of animals received, as well as the date and time the seal was broken. The form will be signed by the person breaking the seal and a copy sent to the APHIS Area Office or Regional Office. APHIS or

State officials may spot-check this process at the feedlot. (In this final rule, we are adding a definition of *State representative* to the definitions in § 93.400 to mean a veterinarian or other person employed in livestock sanitary work of a State or a political subdivision of a State who is authorized by such State or political subdivision of a State to perform the function involved under a memorandum of understanding with APHIS. This definition is consistent with the definition of *State representative* as used elsewhere in the APHIS regulations. Section 93.400 already includes a definition of *accredited veterinarian*.)

Once at the feedlot designated on the import documents and the movement permit, the cattle must remain there until transported to a recognized slaughtering establishment and must not be moved to different feedlots, onto range, or to cattle sales. As provided in § 93.436(b)(4) regarding individual identification by eartag of each animal, the eartag required under this rule must not be removed from any of the animals. The feedlot operator must be able to account for all incoming cattle from BSE minimal-risk regions—those sent to slaughter and those that die at the feedlot.

When the cattle are to be sent to slaughter, an accredited veterinarian or a State or USDA employee must complete APHIS VS Form 1–27 at the feedlot and seal the means of conveyance. The APHIS VS Form 1–27, which must identify the physical location of the recognized slaughtering establishment and the individual responsible for the movement of the animal, must also be signed by the owner or the shipper of the animals, certifying that the livestock will be delivered to the consignee without diversion. This APHIS Form VS 1–27 must accompany the cattle to the slaughtering establishment, along with a copy of the APHIS VS Form 17–130 and the health certificate that accompanied the animals from the port of entry to the feedlot. Upon arrival of the means of conveyance at the slaughtering establishment, a USDA representative will break the seal, complete the APHIS VS Form 1–27, and return all the paperwork that accompanied the animals to either the APHIS Area Office or Regional Office. Although we acknowledge that this process will involve time and costs for the importer and the feedlot owner, it will provide APHIS with a means of monitoring the movement of these shipments. However, following implementation of the National Animal Identification System currently under development, we will evaluate the effectiveness of tracking these shipments by the national identification system compared to tracking by means of the documents required by this rule. In recognition of the possibility that alternative effective means of monitoring movement may be developed, we are providing in this final rule that the animals shipped must be accompanied by the movement documentation described above or other movement documentation deemed acceptable by the Administrator.

Movement of sheep and goats to feedlots and then to slaughter. The requirements in this final rule for the movement of feeder sheep and goats from a BSE minimal-risk region from the port of entry to a feedlot and then to slaughter are the same as those described above for the movement of cattle. However, provisions regarding the feedlots themselves for sheep and goats are more detailed than those for cattle, due to the fact that transmission of BSE among sheep and goats could potentially differ from transmission among bovines. In this final rule, we are using the term ''designated feedlot'' for the feedlot of destination of the sheep and goats. We discuss the criteria and rationale for designated feedlots for sheep and goats below under the heading ''Designated Feedlots for Sheep and Goats.''

Issue: With regard to ruminants moved to a U.S. feedlot and then to slaughter, one commenter asked whether APHIS or FSIS would verify that the animals are properly permanently identified.

Response: The accredited veterinarian who issues the APHIS VS Form 1–27 for movement to slaughter will verify that the required identification is on the animal and record it on the form.

Issue: Several commenters recommended that the regulations require that means of conveyance carrying livestock from BSE minimal-risk regions to feedlots (*i.e.*, feeder cattle) in the United States be sealed at the border. Several commenters questioned why cattle for immediate slaughter must be moved as a group, but those going to a designated feedlot will be allowed to be moved to slaughter at varying times and to different slaughter facilities. The commenters said this defeats the purpose of control over and traceback of imported animals. Another recommended that the rule clarify how bovines from BSE minimal-risk regions sent to designated feedlots will be kept separate from U.S. bovines. Several commenters expressed concern that the potential diversion of feeder cattle would result in their being over 30 months of age when slaughtered. A number of commenters recommended that the possibility of the diversion of feeder cattle for breeding use could be eliminated by requiring that feeder cattle from BSE minimal-risk regions be neutered before importation. Other commenters recommended that feeder cattle from Canada be required to be moved to quarantined feedlots.

Response: All of the above comments were in response to our proposal to allow feeder cattle to be imported from BSE minimal-risk regions provided they were moved to a designated feedlot as a group, then were moved directly to slaughter. These comments were made based on the premise that, to be in accord with the proposed requirements, Canadian feeder cattle needed to be segregated from U.S. feeder cattle. However, because of the identification and movement requirements discussed above and the recent FSIS requirements for the removal of SRMs from all cattle at slaughter in the United States, we do not consider it necessary to segregate Canadian and U.S. feeder cattle.

However, as an added safeguard that the animals are moved directly from the port of entry to a feedlot and from the feedlot to a recognized slaughtering establishment, we are requiring in this final rule that means of conveyance carrying feeder cattle from the U.S. port of entry to a feedlot have been sealed in the region of origin with seals of the national government of the region of origin. We are providing that such seals must be broken only at port of entry by the APHIS port veterinarian or at the feedlot by an accredited veterinarian or a State or USDA representative or his or her designee. If the seals are broken by the APHIS port veterinarian at the port of entry, the means of conveyance must be resealed with seals of the U.S. Government before being moved to the feedlot. We are also requiring that means of conveyance carrying cattle from the feedlot to a slaughtering establishment be sealed with seals of the U.S. Government before leaving the feedlot.

Issue: One commenter stated that neutered male animals should be allowed to utilize range resources without having to go directly to confined feedlots.

Response: This rule requires that the physical location of the cattle be identified. Because of the inherent difficulties involved in identifying and gathering those cattle on range that were imported from a BSE minimal-risk region and must be slaughtered before they are 30 months of age, we are not providing that feeder cattle imported from a BSE minimal-risk region may be placed on range. They must be put into

the feedlot identified on the APHIS movement permit and other accompanying documentation to help ensure they are slaughtered in a timely manner.

Maximum Age of Cattle, Sheep, and Goats Imported From a BSE Minimal-Risk Region

Issue: APHIS proposed to limit live cattle imported from a BSE minimal-risk region to those that would be less than 30 months of age at slaughter. A number of commenters expressed concerns regarding that maximum age. The commenters stated that, because there have been multiple detections of BSE in cattle less than 30 months of age in Europe and Japan, APHIS should decrease the maximum age for imports. Recommended maximums ranged from 18 to 28 months of age. Several commenters requested that APHIS more comprehensively state and validate the scientific basis for determining that cattle in the 20 to 30 month age range do not present a risk of BSE. Another commenter cited evidence from Britain that the commenter said indicates some cattle may be fast incubators of the disease and, therefore, have the potential to introduce detectable levels of BSE into the food chain. One commenter expressed concern that, because bulls are routinely slaughtered at 19 to 22 months old, they may be too young to test positive for the disease, even though those animals may be infected with BSE. One commenter stated that with prion diseases, the incubation time tends to become shorter the longer a specific prion has been circulating within a species.

Response: As discussed in our proposal, pathogenesis studies—where tissues obtained from orally infected calves were assayed for infectivity—have illustrated that levels of infectious BSE agent in certain tissues vary with the age of an animal. Infectivity was not detected in most tissues in cattle until at least 32 months post-exposure. The exception to this is the distal ileum (a part of the intestines), where infectivity was confirmed in the experimentally infected cattle as early as 6 months post-exposure, and the tonsils, where infectivity was confirmed at 10 months post-exposure.

Research demonstrates that the incubation period for BSE in cattle is linked to the infectious dose received—*i.e.,* the larger the infectious dose received, the shorter the incubation period. While some cases of BSE have been found in cattle less than 30 months of age, these are relatively few and have occurred in countries with significant levels of circulating infectivity (*i.e.,* where infected ruminants are used for feed for other ruminants, which in turn become infected).

In our proposal, we set out a list of standards we will use to evaluate the BSE risk from a region and determine whether it is appropriate to classify that region as a region of minimal-risk for BSE. We stated that we would use these standards as a combined and integrated evaluation tool, basing a BSE minimal-risk classification on the overall effectiveness of control mechanisms in place (*e.g.,* surveillance, import controls, and a ban on the feeding of ruminant protein to ruminants). Given the low level of circulating infectivity in minimal-risk regions, we proposed a 30-month age limit for cattle and proposed that the intestines be removed from those imported cattle. As discussed already, following the detection of a BSE-positive cow in Washington State in December 2003, FSIS implemented additional measures to protect the human food supply in the United States—including a requirement that SRMs be removed from all cattle—and prohibited the use of SRMs in human food.

Under these circumstances, we continue to consider 30 months of age to be the appropriate age threshold for removal of most SRMs. We are evaluating whether cattle over 30 months of age could be safely imported into the United States from a BSE minimal-risk region under the same conditions as younger cattle, since SRM removal is now standard operating procedure for all cattle 30 months of age and older that go to slaughter in the United States. However, we are not making a change with regard to live cattle over 30 months of age in this final rule, because, as stated in our March 8, 2004, notice, we are currently evaluating the appropriate approach regarding live cattle other than those specified in our proposal and intend to address that issue in a supplemental rulemaking proposal in the **Federal Register.**

Issue: Several commenters asked why we proposed that live sheep and goats 12 months of age and older would not be allowed importation into the United States. One commenter noted that we said in our proposal that we would allow cattle less than 30 months of age to be imported from BSE minimal-risk regions because BSE infectivity was not detected in most tissues in cattle until at least 32-months post-exposure to the agent. In contrast, said the commenter, although we stated BSE infectivity has not been demonstrated in most tissues in sheep and goats until 16 months post-exposure, we proposed to prohibit the importation of live sheep and goats 12 months of age or older from a BSE minimal-risk region. The commenter noted that APHIS was establishing a safety margin of 2 months for cattle (6.25 percent) (32 months/30 months), but 4 months (25 percent) for sheep and goats. The commenter requested that APHIS provide the scientific basis for determining whether this distinction is significant.

Response: As noted above, research has indicated that the levels of infectious agent in certain tissues vary with the age of an animal. Infectivity in cattle was not detected in most tissues until the animal was at least 32 months post-exposure. In sheep and goats, infectivity has not been demonstrated in most tissues until 16 months of age post-exposure. The 30-month age limit for cattle imported from minimal-risk regions is accepted internationally in BSE standards set by various countries and is consistent with OIE guidelines and target surveillance (Ref 23). We proposed a 12-month age limit for sheep and goats based on the research regarding infectivity in such animals and, practically speaking, because 12 months is consistent with the age at which lambs are generally sent to slaughter.

Issue: Several commenters recommended that, rather than using the age of an animal as a risk mitigation measure, APHIS should follow OIE guidelines that allow the movement of cattle born after an effective feed ban was implemented, provided appropriate risk mitigation measures are applied during slaughter and processing.

Response: The import conditions proposed by APHIS for importation of bovines for immediate slaughter from BSE minimal-risk regions included several restrictions, including both age of the animal and the requirement that the animal not be known to have been fed ruminant protein. Those conditions were analyzed together in our risk analysis, which did not differentiate among the efficacy of the alternative risk mitigation options. Based on that analysis of risk, we are including both conditions in this final rule.

Issue: One commenter asked if, since the May 2003 diagnosis of a BSE infected cow, CFIA has tested a statistically ''responsible'' number of brains of cattle less than 30 months of age in order to state with confidence that the region does not have younger animals that would test positive, as has happened in the United Kingdom and Japan.

Response: APHIS published a risk assessment in November 2003 that discussed the risks and identified

mitigation measures necessary for the import of certain live cattle and products from minimal-risk countries, and does not consider such testing on the part of Canada to be necessary before importation of these commodities. Experience in the United Kingdom and other parts of Europe in dealing with widespread BSE outbreaks, unlike the limited number of infections in Canada, has shown that testing cattle that are non-ambulatory, dead on the farm, or showing clinical signs consistent with BSE is the method most likely to disclose BSE if it is present in the cattle population. If BSE is not detected through testing of such ''high-risk'' animals, there is little or no benefit to testing other cattle populations. It should be noted that CFIA, like APHIS, has conducted active surveillance since 1992 and implemented an expanded surveillance program on June 1, 2004. As of December 1, 2004, a total of more than 15,800 samples had been obtained in Canada, all with negative results for BSE.

Verification and Enforcement of Age Limits

Issue: For ruminants entering the United States from a BSE minimal-risk region for immediate slaughter, one commenter recommended that U.S. border officials and the receiving slaughtering establishment accept the age verification prepared by accredited Canadian veterinarians in order to expedite movement of the animals from the source feedlot to the slaughtering establishment. The commenter stated that such expeditious movement is important both from an animal welfare perspective and a product quality perspective. Conversely, another commenter indicated that USDA veterinarians should have the option of refusing entry to any cattle that appear to be 30 months of age or older.

Response: As with the importation of all livestock into the United States, APHIS port veterinarians will be responsible for assuring that shipments of animals presented for import fulfill all necessary import requirements before their release from the border port. However we agree with the commenter who stated that verification of the animals' age can be made based on review of the certificate that is required by this rule to accompany the shipment of live bovines, sheep, and goats from BSE minimal-risk regions. Further, we agree that verification by means of the certificate will expedite movement of the animals to their destination.

Therefore, instead of requiring, as we proposed in § 93.436(a)(4) and (c)(4) for bovines and sheep and goats, respectively, that means of conveyance that are used to move the animals to immediate slaughter be sealed with seals of the U.S. Government at the port of entry, we are requiring in § 93.436(a)(4) for bovines and § 93.420(a) for other ruminants that the means of conveyance be sealed in the region of origin with seals of the national government of the region of origin. Such animals will undergo visual inspection by U.S. inspectors at the port of entry while they are in the means of conveyance. However, we are also providing in those sections that if U.S. inspectors at the port of entry consider it necessary to unseal the means of conveyance, the means of conveyance must be resealed with seals of the U.S. Government.

Also, as discussed below under the heading ''Sealed Means of Conveyance,'' we are requiring that bovines, sheep, and goats imported from a BSE minimal-risk region for movement to a feedlot be moved in a means of conveyance that is sealed with seals of the national government of the region of origin. As with animals imported for immediate slaughter, such animals will undergo visual inspection by U.S. inspectors at the port of entry while they are in the means of conveyance and, as with animals imported for immediate slaughter, if U.S. inspectors at the port of entry consider it necessary to unseal the means of conveyance, the means of conveyance must be resealed with seals of the U.S. Government.

Issue: Several commenters stated that determining the age of animals is not an exact science and that USDA should more clearly set out how it expects to enforce the 30-month age limit for slaughter.

Response: Under this rule, cattle imported from a BSE minimal-risk region must be accompanied by certification by an authorized veterinary representative of the region of origin that the animals entering the United States are less than 30 months of age. In its January 2004 SRM rule, FSIS explained that the Agency's inspection program personnel will confirm the age of cattle, both of U.S. and foreign origin, that are slaughtered in official establishments, by means of documentation that identifies the age of the animal and, where necessary, by examination of the dentition of the animal to determine whether at least one of the second set of permanent incisors has erupted (the permanent incisors of cattle erupt from 24 to 30 months of age).

Issue: A number of commenters asked what will be done with imported feeder cattle if they are determined to be over 30 months of age when received for slaughter.

Response: If FSIS concludes the animals are 30 months of age or older, or if it cannot be determined that the animals are less than 30 months of age, all SRMs will be removed, which would include brain and central nervous system tissue, along with the animal's tonsils and the distal ileum of the small intestine. FSIS will notify APHIS when such situations arise and APHIS will initiate enforcement action as appropriate. As we noted in APHIS'' March 2004 notice reopening the comment period on the proposed rule, APHIS is currently evaluating the appropriate approach regarding live cattle 30 months of age and older and intends to address that issue in a supplemental rulemaking in the **Federal Register.** (Please note: Although the wording we used in our notice did not specifically state the live animals we would evaluate for potential future rulemaking would be cattle and other animals other than those already included in the proposal, we consider our intent to have been clear in the context of the issues discussed in that notice.)

Importation of Cattle Other Than Those Going to Slaughter

Issue: Our proposed rule provided that all ruminants would be prohibited importation from a BSE minimal-risk region, except for those imported in accordance with the provisions of the proposed rule. The only bovines for which conditions for importation were included in the proposed rule were those being moved either directly to slaughter or to a designated feedlot for further feeding before slaughter. In both cases, the proposed provisions limited importation to bovines that would be less than 30 months of age at slaughter. Similar provisions were proposed for sheep and goats that would be less than 12 months of age at slaughter. In effect, this provided for the continued prohibition on the importation of breeding cattle, sheep, and goats from Canada that APHIS imposed following the diagnosis of a BSE-infected cow in that country in May 2003.

Several commenters supported a continued prohibition on the importation of breeding cattle from Canada. One commenter stated that such animals should not be allowed into the United States from Canada until the year 2012, 15 years after the implementation of the feed ban in that country.

Many commenters, however, stated that the regulations should allow the importation from a BSE minimal-risk

region of cattle intended for other than immediate slaughter or slaughter after further feeding. One commenter recommended that APHIS open the border to breeding stock under 36 months of age. Another commenter recommended that cattle born after 2000 be allowed importation. A number of commenters stated that live cattle born after implementation of the feed ban in the BSE minimal-risk region should be allowed importation. Others said that cattle that were born before implementation of the feed ban, but other than in a high-risk area of the BSE minimal-risk region, should be allowed importation. Several commenters stated that no importation measures over and above the exporting country's being a BSE minimal-risk region would be necessary if the United States requires the removal of all SRMs upon slaughter in this country.

A number of commenters recommended more specific conditions under which breeding cattle should be allowed importation from BSE minimal-risk regions generally or from Canada specifically. One commenter requested that the importation be allowed for cattle that are temporarily brought to the United States for livestock expositions. Some of the other conditions recommended by commenters are the same ones we proposed to apply to the importation of ''feeder'' or ''fed'' cattle, such as that the animal was born after implementation of the feed ban and was not known to have been fed prohibited ruminant protein. In addition, several commenters recommended that the animal have permanent identification traceable back to the dam and herd of origin and not be progeny of a BSE suspect or confirmed animal. One commenter recommended that identification be in the form of an electronic eartag. Another commenter expressed confidence that breeding cattle imported from a BSE minimal-risk region could be adequately monitored using a permit process along with health certification before importation and by requiring recordkeeping by importers of animal transfers or disposal, including use in the food chain.

Another commenter requested that the regulations allow the importation of registered cattle that were born in the United States and were taken to Canada at least 1 year following implementation of the ruminant feed ban in Canada, and also their offspring. The commenter provided suggested means of verifying the origin of the animal, including a tattoo of the breed registration number and accompaniment by the animal's registration certificate. Another commenter requested that U.S. origin cattle that are stranded in Canada be allowed to return to the United States if accompanied by a certification by the Government of Canada that, in accordance with Canada's feed ban, the animals have been not been fed ruminant protein while in that country.

One commenter recommended that cattle over 30 months of age be allowed importation if the animals have tested negative for BSE. One commenter recommended allowing the importation of breeding stock that are found to be negative to a new BSE test.

One commenter stated that pregnant heifers should be allowed importation if, after calving in the United States, the heifers are slaughtered before reaching 30 months of age. One commenter recommended allowing the importation of breeding cattle under 30 months of age or, alternatively, donor dams born in the United States and owned by U.S. producers. At the minimum, stated the commenter, such donor dams should be eligible to be returned to the herd of the owner, along with offspring resulting from embryo transfer.

One commenter stated that, because BSE is not transmitted horizontally, the regulations should allow for the temporary importation of cattle into the United States for purposes such as livestock shows and rodeos, breeding, and semen collection, as long as the animal has permanent identification and tracking is carried out that the Administrator deems appropriate to ensure that the animal is returned to its country of origin.

Response: We have carefully reviewed and considered the commenters' requests to allow the importation of cattle other than cattle less than 30 months of age for immediate slaughter and cattle imported for feeding and then slaughter at less than 30 months of age. As we stated in our March 8, 2004, notice, we are currently evaluating the appropriate approach regarding other live cattle and intend to address that issue in a separate proposed rule in the **Federal Register.** We are taking the information provided by commenters into consideration in conducting the evaluation. However, at this time, we are making no changes in this final rule to allow the importation of cattle from BSE minimal-risk regions other than those for immediate slaughter, or for feeding then and slaughter, at less than 30 months of age.

There is no BSE test for live animals at this time. The risk assessment made available by APHIS in conjunction with the November 2003 proposed rule assessed the risk of resuming trade in designated ruminants and ruminant products from Canada. The analysis was conducted primarily in the context of feeder animals imported for slaughter. Special circumstances that might relate to breeding animals were not addressed. The analysis considered various risk factors associated with feeder animals for slaughter and mitigations of those risks. The age of the animal and the effect of a feed ban were two of the most significant factors. APHIS determined that cattle that are less than 30 months of age are unlikely to have infectious levels of the BSE agent and that animals born after the feed ban was implemented are unlikely to have been exposed to the infectious agent. The combination of these factors caused us to conclude that we could safely import cattle for feeding and slaughter or for immediate slaughter that (1) were less than 30 months of age; (2) were subject to a ruminant feed ban; (3) were imported through designated ports of entry and, if moved directly to slaughter, were moved in a sealed means of conveyance; (4) were accompanied from the port of entry to a recognized slaughtering establishment by VS Form 17–33, or were accompanied by an APHIS Form VS 17–130 for movement to the feedlot designated on the import documents and by APHIS Form VS 1–27 for movement from the feedlot; (5) were moved as a group to either a designated feed lot or recognized slaughtering establishment and (6) had their intestines removed at slaughter.

The assessment did not consider the effects of these risk mitigation measures individually. Because we did evaluate the individual effects of these mitigation measures and the fact that we did not address the special circumstances related to breeding animals in our risk analysis, at this time we are not providing for the importation of such animals from BSE minimal-risk regions.

Request for Bans on Imports of Live Animals

Issue: Several commenters expressed concern regarding the importation of any live cattle from Canada and requested that the importation of such animals continue to be prohibited. One commenter questioned how we can be certain that live animals from Canada are not affected by BSE, given there is currently no method available for testing live animals for the disease.

Response: We acknowledge there are currently no approved live animal tests for BSE. However, our comprehensive analysis and evaluation leads firmly to the conclusion that the conditions specified in this rule for the importation of ruminants and ruminant products from BSE minimal-risk regions will be

effective and will protect against the introduction of BSE into the United States. In our proposal, we set out a list of standards we would use to evaluate the BSE risk from a region and determine whether it is appropriate to classify that region as a region of minimal-risk for BSE. We stated that we would use these standards as a combined and integrated evaluation tool, basing a BSE minimal-risk classification on the overall effectiveness of control mechanisms in place (*e.g.,* surveillance, import controls, and a ban on the feeding of ruminant protein to ruminants).

In addition, we proposed individual risk mitigation measures for specific commodities, including live animals intended for importation from BSE minimal-risk regions, to further protect against the introduction and transmission of BSE in the United States. For live animals, such measures include: Maximum age requirements, movement restrictions and use within the United States, identification requirements, and removal of SRMs. As noted, our proposed rule specified removal of the intestines. However, FSIS has since issued regulations regarding SRM removal in all cattle slaughtered in the United States, including the removal of the tonsils and distal ileum in cattle of any age.

Canada has implemented strong measures to guard against the introduction, establishment, and spread of BSE among cattle in that country, to detect infected animals through surveillance, and to protect the Canadian animal and human food supplies. Among other things, Canada has taken the following actions: Maintenance of stringent import restrictions since 1990; prohibition of the importation of live ruminants and most ruminant products from countries that have not been recognized as free of BSE; surveillance for BSE since 1992; implementation of a feed ban in 1997 that prohibits the feeding of most mammalian protein to ruminants; and extensive epidemiological investigations after the case of BSE in May 2003 and the Canadian origin case in Washington State in December 2003. Given these and other measures taken by Canada (*e.g.,* requirements for removal of SRMs), and the conditions in this rule for the importation of ruminants and ruminant products from BSE minimal-risk regions, it is highly unlikely BSE would be introduced through the importation of live cattle for immediate slaughter or for feeding and slaughter under this rule.

Issue: One commenter stated that, because every infected cow in North America has been a Holstein cow from Canada, APHIS should specifically prohibit the importation of dairy (in general, Holstein) cows. Another commenter stated that the differences between the risk profiles of dairy and beef cattle should be taken into account; that the feeding practices of dairies are more risky than those used by beef producers. The commenter requested that APHIS increase BSE testing for dairy cattle.

Response: We are making no changes based on these comments. (It should be noted that, contrary to the commenter's statement, the cow that was diagnosed as BSE-infected in Alberta Canada in May 2003 was a beef cow and not a Holstein cow.) BSE is spread primarily through the use of ruminant feed containing protein and other products from ruminants infected with BSE. In cattle, oral ingestion of feed contaminated with the BSE is the only documented route of field transmission of the disease (Ref 24). Although there is no evidence to indicate that the breed of cattle is a risk factor for BSE, there is some evidence that the use of BSE-contaminated ruminant protein results in an increased risk of BSE in dairy cattle compared to beef cattle. However, this is most likely due to the differences in feeding practices between dairy and beef producers, because dairy cattle routinely receive high-protein feeds during milk production. In regions with an effective feed ban on ruminant protein, the differences in feeding practices should not significantly increase the level of risk, given that no ruminant protein is fed to either beef or dairy cattle.

Issue: One commenter stated that APHIS should prohibit the importation for slaughter of any foreign animal born before the feed ban that is intended for human consumption or rendering. Another commenter stated the cattle born in Canada in a high-risk area before implementation of that country's feed ban should be prohibited importation.

Response: From the context of the first comment, it appears the commenter is referring only to the importation of bovines. Practically speaking, the guidelines of both commenters will be met by the combination of the required feed ban and the provision limiting the importation of bovines to those less than 30 months of age.

Importation of Cattle for Subsequent Export of Meat

Issue: One commenter stated that we should allow the importation of live cattle for slaughter through eastern U.S./Canadian border ports and allow the meat to be exported to Canada for use at fast food outlets.

Response: We are making no changes based on the comment. We consider it necessary to apply the same risk mitigation measures regarding the importation of cattle from Canada for slaughter regardless of the intended destination of the meat derived from the animals. With regard to exportation of beef to Canada, this rule does not place any restrictions on the export to Canada of meat from cattle slaughtered in the United States. Those meat commodities that can be exported to Canada from the United States can be found at *http://www.inspection.gc.ca.*

Cattle Importations From Any Region

Issue: One commenter stated that all beef cows imported into the United States from any country should be processed as a group.

Response: Our proposal concerned the importation of live ruminants and ruminant products from regions that present a minimal risk of introducing BSE into the United States. Requirements regarding the importation of beef cows from elsewhere in the world are beyond the scope of this rulemaking.

Importation of Veal Calves

Issue: Several commenters recommended that veal calves not be subject to the ban on the importation of live ruminants from Canada that the United States established in May 2003, because veal calves are a low-risk commodity due to their diet and their age at slaughter.

Response: Veal calves are eligible for importation into the United States under this rule.

Basis for Restrictions on Sheep and Goats

Issue: In § 93.436(b) and (c) of our proposed rule, we proposed to allow the importation of sheep and goats from a BSE minimal-risk region for either immediate slaughter or for feeding and then slaughter, provided specified conditions were met. These conditions included, among others, the requirements that the sheep or goats be less then 12 months of age when slaughtered and not have been known to have been fed ruminant protein, other than milk protein, during their lifetime. Additionally, we proposed to require that sheep and goats imported for feeding and then slaughter be moved directly from the port of entry to a designated feedlot and then to slaughter.

A number of commenters recommended that, because the OIE guidelines do not specifically address

sheep or goats with regard to BSE, the importation of sheep and goats from BSE minimal-risk regions not be restricted.

Response: We are making no changes based on this comment. Of the family of TSE diseases, one that has been known to occur naturally in sheep and goats is scrapie. With regard to sheep and goats and scrapie, the OIE guidelines recommend that all animal TSEs be considered when doing a risk assessment for the scrapie status of a country. There is currently less than complete understanding of the exact nature of TSEs and, in particular, their capability to cross species lines or adapt to new species; however, one theory is that BSE originated from scrapie (Ref 25). The OIE *Terrestrial Animal Health Code* (the OIE Code) discourages the importation of breeding animals from countries with scrapie or risk factors for TSEs in small ruminants, unless the animal originated from a scrapie-free flock. Because Canada is not free of TSEs, it is appropriate under the OIE Code to restrict the importation of breeding sheep and goats from Canada or any region that is not free of TSEs in sheep and goats or that has not conducted adequate surveillance to establish freedom. It is also appropriate to establish measures to prevent the diversion of imported feeder sheep or goats into breeding flocks in the United States. Since natural scrapie and the TSE in sheep caused experimentally by the BSE agent can't be differentiated by current routine diagnostic tests, APHIS intends to develop proposed rulemaking that would regulate for all TSEs in sheep and goats in this manner. In order to reestablish trade in low-risk sheep and goat commodities from BSE minimal-risk regions in a timely manner, we are addressing sheep and goats imported for immediate slaughter and for feeding and then slaughter in this rulemaking.

Issue: A number of commenters recommended that breeding, feeder, and slaughter sheep and/or goats of any age, or feeder sheep and/or goats of any age be allowed unrestricted entry from a BSE minimum-risk region. Other commenters recommended that such animals be allowed entry if they were born after the implementation of a ruminant feed ban in the region, were not known to have been fed protein prohibited by the required feed ban, and are permanently identified in such a way that would allow tracing back to the dam and flock of origin. Several commenters recommended that breeding sheep and goats under 12 months of age be allowed importation. One commenter recommended that any sheep from a scrapie-monitored premises or sheep of any age that have been genotyped for scrapie resistance be allowed entry into the United States from a BSE minimal-risk region.

Response: Sheep and goats over 12 months of age, such as breeding sheep and goats, were addressed in our risk assessment as animals with the potential to have infectious levels of the BSE agent. We consider it necessary to require risk mitigation measures to ensure that such animals do not introduce BSE into the United States. We are currently evaluating the type of mitigation measures needed to control risks associated with these animals and may conduct rulemaking in the future regarding the requirements necessary for the safe importation from BSE minimal-risk regions of such animals.

Issue: One commenter questioned the advisability of allowing the importation from BSE minimal-risk regions of live sheep and goats younger than 12 months of age, stating that BSE infectivity has been shown to be more widely distributed in sheep tissue than in that of cattle.

Response: Although the commenter is correct that results from experimental infections of sheep have shown that the BSE prion is more widely distributed in sheep tissues than in cattle, infectivity could not be demonstrated in most tissues until at least 16 months post-exposure to the agent.

Sheep and Goats and Other TSEs

Issue: Several commenters questioned how the proposed requirements for the importation of sheep and goats from BSE minimal-risk regions relate to other sections of APHIS animal import regulations, particularly those with regard to scrapie, a TSE for which there are import restrictions in part 93 and for which an eradication program exists in the United States. One commenter recommended that Canada be required to implement a country-wide scrapie eradication program identical to the U.S. system, along with an active surveillance system that meets or exceeds U.S. criteria and numbers. The commenter stated that such an eradication and surveillance system would reduce risk and eventually eradicate scrapie in the Canada, as well as any other variant TSE expressed in a manner clinically similar to scrapie, thereby reducing the risk of BSE entering the United States through the importation of sheep from Canada.

Response: We agree with the commenter that a strong scrapie program in Canada will mitigate scrapie and possibly BSE risks for the United States. Historically, the United States has not significantly restricted the movement of sheep and goats into the United States from Canada with regard to TSEs because our ongoing bilateral trade relationship made it likely that our countries shared the same scrapie types and because both countries have maintained similar control and eradication programs for scrapie and prevention programs for BSE. Since the occurrence of BSE in two native Canadian cows, there is a now a very small risk that Canadian sheep and goats might have been exposed to BSE in feed and that BSE or a variant scrapie type may have been transmitted to sheep or goats, and an even more remote risk that BSE or a variant of BSE has become established through lateral transmission to other sheep and goats. We note that strong, although not mandatory, programs exist in Canada for surveillance and certification of sheep and goats with regard to scrapie. Although the proposed rule did not address the possible relationship of these programs in Canada to requirements for importing sheep and goats from minimal-risk regions for BSE, we consider it appropriate to restrict the importation of sheep and goats from BSE minimal-risk regions if certain conditions exist for those animals with regard to BSE or scrapie.

Because of the differing nature of the BSE risk in sheep and goats as compared to that in bovines, we have reconsidered placing the import conditions for live sheep and goats from BSE minimal-risk regions in § 93.436 as proposed (''Ruminants from regions of minimal risk for BSE''). The parallel construction of that section—two paragraphs addressing requirements for bovines, followed by two paragraphs addressing requirements for sheep and goats—may give the impression that sheep, goats, and bovines all present the same risk profile and require exactly parallel restrictions. In fact, the risks associated with importing sheep and goats include a very small risk that some sheep and goats may have naturally contracted, and might theoretically laterally spread, BSE or a variant of BSE, and a somewhat larger risk that sheep and goats affected by scrapie variants may spread these diseases. The primary risks presented by sheep and goats are related to scrapie and laterally transmissible variants that may or may not be related to BSE, not classic BSE.

To correct this erroneous impression, we are moving the requirements for sheep and goats out of § 93.436 and into other sections of the CFR that more generally address importation of sheep and goats (§§ 93.419 and 93.420). While these changes will implement the

requirements necessary for the current situation, because Canada is the only listed BSE minimal-risk region in § 94.18(a)(3), we will need to reexamine these changes in the future if other countries are added to the list.

One of the other changes we are making in this final rule is to amend § 93.405, which has exempted sheep and goats from Canada that are not imported for immediate slaughter from restrictions that apply to sheep and goats from most regions of the world due to scrapie. Under this final rule, those restrictions will also apply to feeder sheep and goats from Canada.

We are amending §§ 93.419 and 93.420. Under the existing regulations, § 93.419 has included provisions specifically for the importation of sheep and goats from Canada, other than those for immediate slaughter. In this final rule, we are including in § 93.419 most of the conditions for the importation of sheep and goats from Canada that we set forth in § 93.436 of our proposal. However, those conditions that apply exclusively to sheep and goats from Canada for immediate slaughter, as opposed to feeding and then slaughter, we are including in § 93.420, which currently includes conditions for the importation of ruminants from Canada for immediate slaughter.

The existing provisions in § 93.420 for the importation of ruminants from Canada for immediate slaughter require that the ruminants be consigned from the port of entry directly to a recognized slaughtering establishment and there be slaughtered within 2 weeks from the date of entry. Additionally, § 93.420 provides that such ruminants will be inspected at the port of entry. In this final rule, we are retaining those provisions in § 93.420 and are adding in that section the requirements we proposed for sheep and goats from BSE minimal-risk regions for immediate slaughter that the ruminants be moved as a group to the slaughtering establishment in sealed means of conveyance. However, as discussed above under the heading ''Verification and Enforcement of Age Limit of Ruminants,'' we are requiring that the means of conveyance be sealed in the region of origin. As we proposed for sheep and goats for immediate slaughter, we are also specifying that the seals may be broken at the recognized slaughtering establishment only by a USDA representative. The shipment must be accompanied from the port of entry to the recognized slaughtering establishment by APHIS Form VS 17–33, which shall include the location of the recognized slaughtering establishment. By including these provisions in § 93.420, they will be applied to sheep, goats, and other ruminants from Canada. This change to § 93.420 represents a codification of conditions that APHIS has already been requiring by policy. (Please note: These same provisions with regard to bovines for immediate slaughter from BSE minimal-risk regions, including Canada, are included in § 93.436 as proposed.)

Additionally, we are providing in § 93.420 that sheep and goats may not be imported from Canada for immediate slaughter if any one of the following conditions exists:

- The animals have tested positive for or are suspect for a TSE;
- The animals have resided in a flock or herd that has been diagnosed with BSE; or
- The animals' movement is restricted within Canada as a result of exposure to a TSE.

These prohibitions preclude the entry of sheep and goats most likely to pose a risk for TSE transmission. For the reasons described above, we are also requiring in § 94.19(c) and (d) of this final rule that meat, meat byproducts, meat food products, and carcasses of ovines and caprines from BSE minimal-risk regions not be derived from animals that were positive, suspect, or susceptible for TSEs. We are adding definitions of positive for a *transmissible spongiform encephalopathy* and *suspect for a transmissible spongiform encephalopathy* to §§ 93.400 and 94.0.

Designated Feedlots for Sheep and Goats

Issue: One commenter recommended that we include in the regulations specific criteria for designated feedlots for sheep and goats and methods and criteria according to which inventory control and traceability can be achieved once feeder lambs are imported.

Response: Because of the uncertainty regarding BSE infectivity and transmissibility in sheep and goats, we concur that it is appropriate to establish criteria for designated feedlots for sheep and goats from BSE minimal-risk regions to ensure that such animals from are not commingled with U.S. sheep and goats not going to slaughter or U.S. sheep and goats older than those eligible for entry from a BSE minimal-risk region. Scrapie, the best-studied TSE in sheep and goats, is laterally transmitted from sheep/goats to sheep/goats (most frequently either through exposure to an infected placenta or placental fluids or to environments contaminated with these tissues and fluids). Because experimental BSE in sheep has a tissue distribution that closely mimics that of scrapie in sheep, it is reasonable to conclude that BSE, if transmitted to sheep in feed, might be laterally transmitted. Until the risk of lateral transmission is better defined, we consider it prudent to ensure that sheep and goats of unknown TSE status are not commingled with U.S. sheep and goats not being moved to slaughter.

Therefore, in § 93.400, we are adding a definition of *designated feedlot* to mean a feedlot that has been designated by the Administrator as one that is eligible to receive sheep and goats imported from a BSE minimal-risk region and whose owner or legally responsible representative has signed an agreement to adhere to, and is in compliance with, the requirements for a designated feedlot. We are also adding specific requirements for a designated feedlot to § 93.419, ''Sheep and goats from Canada.'' Under these requirements:

- The owner of the designated feedlot or the owner's representative must monitor sheep and goats entering the feedlot to insure that all sheep and goats imported from a BSE minimal-risk region have the required ''C'' brand.
- Records must be kept at the feedlot of the acquisition and disposition of all sheep and goats imported from a BSE minimal-risk region that enter the feedlot. Such records must include the official eartag and all other identifying information; the date the animal was acquired by the feedlot and the animal's age at the time; the date the animal was shipped to slaughter and the animal's age at the time; and the plant where the animal was slaughtered. For sheep and goats imported from a BSE minimal-risk region that die in the feedlot, the eartag must be removed and be kept on file at the feedlot, along with a record of the disposition of the carcass.
- Copies must be maintained at the feedlot of the VS 17–130 forms that indicate the official identification number of the animal and that accompany the animal to the feedlot and then to slaughter.
- Inventory and other records must be kept at the feedlot for at least 5 years.
- The feedlot must allow inspection by and provide inventory records to State and Federal animal health officials upon their request.
- Eartags on animals entering the feedlot must not be removed unless such removal is necessary for medical reasons. In such cases, and in cases where eartags are otherwise detached from the animal, an official scrapie program eartag assigned to the feedlot for this purpose or another form of official identification must be applied to the animals from which the eartags were

removed and must be cross-referenced in the designated feedlot's records to enable matching with the original eartag.

- Either the entire feedlot or designated pens within the lot must be terminal for sheep and goats to be moved directly to slaughter at less than 12 months of age.
- If the inventory cannot be reconciled or if animals are not moved to slaughter as required, the feedlot's status as a designated feedlot will be withdrawn by the Administrator.

Distribution of BSE Agent in Goats

Issue: In our proposed rule, we stated that, in the absence of data regarding distribution of the BSE agent in goats, it is assumed that such distribution would be similar to distribution of the agent in sheep tissues. One commenter stated that in the absence of scientific data such an assumption should not be made.

Response: We disagree. Because distribution of the TSE scrapie is similar in sheep and goats, we consider it more logical to assume similarity of potential BSE distribution in sheep and goats than dissimilarity.

Ovine Embryos and Semen

Issue: One commenter stated that because ovine embryos and semen have not demonstrated BSE infectivity, they should be allowed importation from a BSE minimal-risk region.

Response: We are making no changes based on this comment. Under the existing regulations, semen from sheep and goats is currently not prohibited importation from regions listed in § 94.18(a) as being affected with or at undue risk of BSE and will not be prohibited importation from BSE minimal-risk regions. However, we consider it necessary to prohibit the importation of ovine and caprine embryos from BSE minimal-risk regions. No studies have been conducted to date with regard to the BSE risk of ovine and caprine embryos. In the absence of an assessment of risk from such materials, we consider it prudent to continue to prohibit the importation of ovine and caprine embryos from regions listed in § 94.18(a), which will include, under this rule, BSE minimal-risk regions.

Determining Age by Break Joint Technique

Issue: One commenter recommended that instead of using less than 12 months as the age of eligibility for sheep imported from a BSE minimal-risk region, the maximum age for sheep should be determined by the ''break joint'' technique that is used by FSIS to classify lamb.

Response: We are making no changes based on this comment. The break joint in young lambs and goats is a cartilaginous area of the cannon bone that is not ossified. This joint ossifies with age to become what is called a spool joint. The break joint (or spool joint) method for establishing the maturity of a lamb or goat is not a FSIS regulation, but is instead contained in a guideline pamphlet published by the Agricultural Marketing Service (AMS) entitled ''Official United States Standards for Grades of Slaughter Lambs, Yearlings and Sheep'' (Ref 26). This method was never presented as a truly reliable method for identifying animals of less than 12 months age, but instead was intended to provide general marketing methods and practices for agricultural commodities so that consumers could obtain the quality of product they desire.

The break joint method is not sufficiently accurate to determine the age of sheep or goats for the risk mitigation purposes of this rule. Also, the break joint can not be readily determined in live animals and is therefore not useful in determining the age of slaughter sheep. Therefore, we are making no changes based on this comment.

Sealed Conveyances and Movement to Immediate Slaughter

Issue: In § 93.436 of our proposed rule, we included requirements that bovines, sheep and goats, and cervids imported from a BSE minimal-risk region for immediate slaughter be moved from the port of entry to a recognized slaughtering establishment in conveyances sealed at the port of entry with seals of the U.S. Government. We proposed, further, that the seals could be broken only at the recognized slaughtering establishment by a USDA representative. (As discussed above, we are requiring in this final rule that the means of conveyance be sealed in the region of origin.) One commenter asked what procedures will be followed with regard to the animals if broken seals or missing cattle are discovered at the slaughter plant and what procedures APHIS will follow if a truck cannot be adequately sealed at the port. The commenter also stated that USDA representatives should not include employees of the slaughtering establishment. Another commenter asked what the verification process would be concerning APHIS documents and sealed conveyances.

Response: APHIS has provisions whereby the Agency enters into compliance agreements with the management of approved slaughtering establishments. These have proven to be exceptionally effective across a range of programs. We will work in accordance with these agreements and in close cooperation with FSIS to ensure that animals are accounted for and will take appropriate remedial measures as necessary.

We do not expect, as a practical matter, to encounter situations where a means of conveyance cannot be adequately sealed at the port. As noted, we are requiring in this final rule that the means of conveyance be sealed in the region of origin before reaching the U.S. port of entry. If for some reason the APHIS inspector at the port needs to break the seal, resealing a means of conveyance that had previously been sealed is not expected to be a problem and there are several types of seals that can be used.

Immediate Slaughter

Issue: In our proposal, we noted that, under the definition of *immediate slaughter* in § 93.400, ruminants imported into the United States for immediate slaughter must be slaughtered within 2 weeks of the date of entry into the United States. Several commenters recommended that, in order to better control the movement of the cattle in the United States, the regulations not allow 2 weeks for slaughter,. Another commenter asked which government official will oversee and verify that all animals are sent to slaughter within the 2 weeks following entry into the United States. Other commenters wanted to know what steps will be taken if the cattle are not slaughtered within the required time period.

Response: We continue to consider it appropriate to define immediate slaughter as slaughter within 2 weeks after entry into the United States. Animals imported for immediate slaughter must be moved directly from the port of arrival to the slaughter facility. However, cattle moved into the United States for slaughter are not always slaughtered as soon as they arrive at the slaughtering establishment. Because of the effects of stress and shrinkage during shipment, they are often held at the slaughtering establishment to improve body condition. Also, the date the animals are slaughtered is dependent on the workload at the slaughtering establishment. The 2-week period was established to allow time for arrival, processing, conditioning and slaughter of the animals in a reasonable amount of time. Because recognized

slaughtering establishments must have full-time Federal or State veterinary inspectors on the premises, official government oversight of the arrival and penning of the animals is available. APHIS Form VS 17–33 accompanies every shipment of animals imported for immediate slaughter and must be returned to the APHIS veterinarian at the port of entry after the animals are slaughtered. Any establishment that fails to comply with its agreement with APHIS will have its approval to receive further shipments of restricted animals for slaughter suspended.

Methods of Disposal

Issue: Paragraphs (a)(6) and (b)(10) of § 93.436 of our proposed rule included the requirement that the intestines of bovines imported from a BSE minimal-risk region be removed at slaughter in the United States. Paragraphs (a)(7) and (b)(11) of § 93.436 of the proposed rule required that the intestines be disposed of in a manner approved by the Administrator. Several commenters asked for clarification regarding who we were referring to as the ''Administrator.''

Response: In APHIS'' regulations, including the definitions in § 93.400 regarding the importation of ruminants into the United States, ''Administrator,'' unless otherwise identified, is defined as ''The Administrator of the Animal and Plant Health Inspection Service or any other employee of the Animal and Plant Health Inspection Service, United States Department of Agriculture, to whom authority has been or may be delegated to act in the Administrator's stead.''

However, in this final rule, we are not specifying that SRMs and other tissues removed at slaughter in the United States from bovines imported from a BSE minimal-risk region be disposed of in a manner approved by the Administrator. FSIS regulations governing disposal already exist in that Agency's regulations at 9 CFR 310.22, 314.1 and 314.3, and we consider it appropriate that the FSIS provisions be followed with regard to disposal.

Issue: A number of commenters stated that we should specify the potential means of disposal of removed intestines and verification of such disposal. Several commenters stated that materials requiring disposal under the regulations should be rendered by a licensed rendering company, with materials resulting from rendering being subject to FDA feed rules. In all cases, stated commenters, rendering should be the main option, and any other method must have to conform to the transportation, traceability, and pathogenic reduction requirements currently imposed on the rendering industry. Several commenters stated that disposal options should include only rendering, incineration, or alkaline digestion at an approved and licensed facility. Other commenters stated that burial, landfilling, composting, or burning should not be disposal options. Several commenters asked what FSIS will require of slaughtering establishments to ensure that the intestines are removed and disposed of properly.

Response: In its SRM rule, FSIS established provisions regarding disposal of SRMs. In the explanatory information to that rule, FSIS stated: ''In this interim final rule, FSIS is requiring that establishments that slaughter cattle and establishments that process the carcasses or parts of cattle develop, implement, and maintain written procedures for the removal, segregation, and disposition of SRMs....'' FSIS provided further that the establishments must address their control procedures in their Hazard Analysis and Critical Control Point (HACCP) plans, sanitation standard operating procedures, or other prerequisite programs, and that FSIS will ensure the adequacy and effectiveness of the establishment's procedures. The FSIS SRM rule also requires that establishments that slaughter cattle and establishments that process the carcasses or parts of cattle maintain daily records that document the implementation and monitoring of their procedures for the removal, segregation, and disposition of SRMs. The rule provided in 9 CFR 310.22(c) that SRMs must be disposed of in accordance with the FSIS requirements for disposal in 9 CFR 314.1 and 314.3. Those regulations provide that allowable means of disposing of the materials include tanking (inedible rendering), or-in those establishments that do not have facilities for tanking-incineration or denaturing.

The comment period for the SRM rule closed on May 7, 2004. FSIS is assessing the comments it received on the rule, including those regarding the issue of disposal, and will determine whether to maintain or modify the requirements of the rule. In determining whether to approve a manner of disposal, FSIS will consult with FDA and the U.S. Environmental Protection Agency.

Issue: Some commenters stated that, in addition to being prohibited from the food chain, SRMs should also be prohibited from being rendered.

Response: FSIS considers SRMs to be unfit for human food. Therefore, such materials may be rendered only as inedible (not for human consumption). As discussed above, the allowable means of disposing of the materials include tanking (inedible rendering) or-in those establishments that do not have facilities for tanking-incineration or denaturing.

Issue: Several commenters asked whether proper disposal of intestines includes utilizing intestines in a meat-and-bone meal product that is used as a feed ingredient for nonruminant animals. The commenters stated that the distal ileum should be allowed to be processed into meat-and-bone meal for feeding to nonruminant animals because there is a high level of compliance with mandatory feed restrictions in United States.

Response: We are making no changes based on these comments. FDA regulates the ingredients used in animal feed, including SRMs.

Testing at Slaughter

Issue: A number of commenters recommended testing increased numbers of cattle for BSE at slaughter in the United States. Some commenters stated that determining which cattle are to be tested should depend on the animals' ages. Guidelines ranged from testing all cattle over 24 months of age to all cattle over 30 months of age. One commenter recommended testing all cattle imported from a BSE minimal-risk region that were born before 2000. Some commenters recommended testing all cattle from Canada. Others recommended testing of all cattle sent to slaughter in the United States or all cattle that die in any location. One commenter recommended that the importer be required to have each imported animal that dies other than by slaughter tested at an accredited veterinary diagnostic laboratory.

Response: APHIS, in cooperation with FSIS and FDA, has developed an intensive national BSE surveillance plan. The goal of this plan is to test as many cattle in the targeted high-risk population as possible in a 12-to 18-month period. Experience in the United Kingdom and other parts of Europe has shown that testing cattle that are non-ambulatory, dead on the farm, or showing clinical signs consistent with BSE is the method most likely to disclose BSE if it is present in the cattle population. This enhanced surveillance was begun on June 1, 2004. As of December 7, 2004, 136,153 cattle had been tested, all with negative results.

Over a period of 12–18 months, APHIS will test as many cattle as possible in the targeted high-risk population. Data obtained in this effort will demonstrate whether BSE is actually present in the U.S. adult cattle

population and, if so, help provide estimates of the level of the disease. This data will also help determine whether risk management policies need to be adjusted. The key to surveillance is to look at the population of animals where the disease is likely to occur. Thus, if BSE is present in the U.S. cattle population, there is a significantly better chance of finding the BSE within this targeted high-risk cattle population than within the general cattle population.

Non-Ambulatory Disabled (Downer) Animals

Issue: Many commenters stated that no beef derived from non-ambulatory (''downer'') animals should be allowed either to enter the United States or enter the U.S. food supply. Other commenters stated that meat from any downer animal should be held until the animal is tested for BSE, and should be allowed into the food supply only if the animal tests negative. Some commenters stated that downer animals should be allowed to go to custom slaughtering for the owner's personal use.

Response: The issues raised by the commenters concern the safety for human consumption of beef slaughtered in the United States, which USDA addresses through its food safety agency, FSIS. As discussed above under the heading ''Measures Implemented by FSIS,'' that agency has determined that the carcasses of non-ambulatory disabled cattle are unfit for human food under section 1(m)(3) of the Federal Meat Inspection Act (FMIA), and that all non-ambulatory disabled cattle that are presented for slaughter will be condemned (*i.e.*, not passed for human consumption). With regard to Canada specifically, that country is not allowing non-ambulatory animals to be slaughtered for export.

Issue: One commenter expressed concern that Canada has not adopted the same BSE risk mitigation measures adopted by the United States, such as not prohibiting downer animals from entering the human food chain.

Response: As noted above, Canada is not allowing non-ambulatory animals to be slaughtered for export. All of the FSIS requirements imposed on the U.S. domestic beef supply as a consequence of that agency's January 12, 2004, rulemakings also apply to foreign countries that are eligible to export beef to the United States. The foreign country's inspection program must be deemed by FSIS to be equivalent to the U.S. inspection program before the country can ship beef to the United States. This means that SRMs must have been properly removed in the exporting country consistent with the U.S. requirements, and that non-ambulatory disabled cattle be prohibited for human food purposes. FSIS has an on-going verification system to assess the effectiveness of the equivalency determination made for each foreign country deemed eligible to export meat to the United States, as discussed below under the heading ''Verification of Compliance in the Exporting Region.''

Issue: Several commenters expressed concern that if non-ambulatory animals are excluded from slaughter in the United States, the current targeted surveillance systems will miss the chance to test these animals.

Response: We disagree with the commenter that non-ambulatory animals will not be tested under the U.S. targeted surveillance system. Even before the FSIS determination that all non-ambulatory disabled cattle that are presented for slaughter will be condemned, these types of animals have often moved through channels other than for human consumption. A comparison of testing records before and after the FSIS determination indicates that this category of animals was being tested before that determination and continues to be tested.

Use of Blood in Ruminant Feed

Issue: Several commenters stated that we should continue to prohibit the importation of live cattle from Canada because, according to the commenters, that country allows the feeding of blood and certain other ruminant products to cattle that are banned in the United States. Another commenter expressed concern that the proposal did not contain adequate verification that cattle imported from Canada are not fed animal blood.

Response: The CFIA feed ban was implemented in 1997 to prevent BSE from entering the food chain. The CFIA's feed ban, equivalent to the FDA prohibition on the feeding of most mammalian protein to ruminants, prohibits materials that are comprised of protein, including meat-and-bone meal, derived from mammals such as cattle, sheep and other ruminants, as well as salvaged pet food, plate waste and poultry litter. Products exempt from CFIA's feed ban include pure porcine and equine proteins, poultry and fish proteins, milk, blood, and gelatin, and non-protein animal products such as rendered animal fats (*e.g.*, beef tallow, lard, poultry fat). These are products that are also exempt from the FDA prohibition. (Please note, however, that as discussed above in section III. C. under the heading ''Measures Implemented by FDA,'' in an advance notice of proposed rulemaking issued jointly by FDA, FSIS, and APHIS on July 14, 2004, FDA requested additional information to help it determine the best course of action regarding the feed ban.)

In 2001, the EU Scientific Steering Committee (SSC), a scientific advisory committee for the EU, considered the amount and distribution of BSE infectivity in a typical case of BSE and estimated that, in an animal with clinical disease, the brain contains 64.1 percent of the total infectivity in the animal and the spinal cord contains 25.6 percent. Thus, the brain and spinal cord of cattle with clinical BSE are estimated to contain nearly 90 percent of the total infectivity in the animal. According to the EU SSC, the remaining proportion of infectivity in a typical animal with clinical BSE is found in the distal ileum (3.3 percent), the dorsal root ganglia (2.6 percent), the spleen (0.3 percent), and the eyes (0.04 percent). Similar conclusions on the relative infectivity of specific tissues from an infected cow have been reached by Comer and Huntley in their evaluation of the available literature (Ref 27).

We have noted that recent scientific studies have indicated that blood may carry some infectivity for BSE; however, those studies have concerned blood transfusions in animals. Additional research is necessary to determine which animals may become infected with BSE via blood, as well as the amount of infectivity contained in blood. We continue to consider it appropriate to recognize Canada as a minimal-risk region because that country has taken a number of measures that would make it unlikely that BSE would be introduced from that country into the United States. The measures include a feed ban equivalent to that in effect in the United States.

In addition to CFIA's feed ban on ruminant protein, Canada has taken additional measures to protect against the importation and possible spread of BSE. Such measures include: Import restrictions on live ruminants and ruminant products from countries that have not been recognized as free of BSE, surveillance and monitoring for BSE, and epidemiological investigation following the detection of BSE sufficient to confirm the adequacy of measures to prevent the further introduction and spread of the disease. Because of the mitigation measures taken by Canada to guard against the introduction and spread of BSE, we consider there to be minimal risk of infected blood entering the food chain from that region. However, to ensure the adequacy of feed restrictions for ruminants imported from Canada and other regions that may be

recognized as minimal-risk regions for BSE in the future, we require in this rule that ruminants must have been subject to a ruminant feed ban that is equivalent to the requirements established by the U.S. Food and Drug Administration. That provision replaces the condition in our proposal that required that ruminants not be fed ruminant protein, other than milk protein, during their lifetime.

Animal Inventories

Issue: One commenter recommended that the regulations require that cattle and other ruminants imported from a BSE minimal-risk region be accompanied by certification of the exact number of animals being shipped and the individual identification of the animals.

Response: Section 93.407 of the existing regulations requires a declaration of, among other information, the number of ruminants presented for import. Additionally, on a working basis, we have interpreted the requirement in § 93.405 that ruminants imported into the United States from Canada for other than immediate slaughter be accompanied by certification to include official identification of the ruminants. However, in order to make clear our intent, we are amending § 93.405 by adding a new paragraph (a)(4) to specify that the information on the certificate required by that section must include the following: (1) The name and address of the importer; (2) the species, breed, number or quantity of ruminants or ruminant test specimens to be imported; (3) the purpose of the importation; (4) individual ruminant identification, which includes the eartag required by this final rule and any other identification present on the animal, including registration number, if any; (5) a description of the ruminant, including name, age, color, and markings, if any; (6) region of origin; (7) the address of or other means of identifying the premises of the herd of origin and any other premises where the ruminants resided immediately prior to export, including the State or its equivalent, the municipality or nearest city, or an equivalent method, approved by the Administrator, of identifying the location of the premises, and the specific physical location/destination of the feedlot where the ruminants are to be moved after importation; (8) the name and address of the exporter; (9) the port of embarkation in the foreign region; and (10) the mode of transportation, route of travel, and port of entry in the United States.

We are also specifying in § 93.436 that an official identification and any other identification on bovines imported for feeding and then slaughter from a BSE minimal-risk region must be listed on the APHIS Form VS 17–130 that must accompany the animals from the port of entry and on the APHIS Form VS 1–27 that must accompany the animals to slaughter. For sheep and goats, that requirement is in § 93.419. With regard to ruminants imported from a BSE minimal-risk region for immediate slaughter, the requirement that the animals be accompanied to slaughter by APHIS Form VS 17–33 for movement to slaughter will enable tracking of the animals following importation. Additionally, ruminants moved directly to slaughter must be moved in means of conveyance that was sealed in the region of origin and that is opened only by a USDA representative. We consider these requirements adequate to ensure immediate slaughter of such ruminants.

Transiting of Live Ruminants Through the United States

Issue: One commenter stated that there would be little risk in allowing the transiting through the United States of products and live animals that have been recognized as low-risk by another country and in accordance with OIE standards. Several commenters expressed concern that the current prohibition on the importation of sheep and goats from Canada has unnecessarily eliminated the transiting of sheep and goats from Canada through the United States to Mexico and other Latin American countries. The commenters noted that the regulations as proposed would allow live sheep and goats imported from a BSE minimal-risk region to be moved to designated feedlots in other than a sealed means of conveyance, and that, therefore, the regulations should also allow the transiting of lambs to Mexico.

Response: We agree that the issue of the transiting of live sheep, goats, and bovines through the United States from a BSE minimal-risk region should be considered. As we noted in our March 2004 notice reopening the comment period on the proposed rule, we are currently evaluating, and intend to address in a supplemental rulemaking in the **Federal Register,** the importation of live animals under conditions other than those specified in our proposed rule.

Issue: One commenter asked how APHIS will ensure that cattle are not exported from Canada to Mexico, then re-exported from Mexico into the United States.

Response: As noted above, in this final rule we are codifying our interpretation that, under the requirements of § 93.405, live cattle imported into the United States, including cattle from Mexico, must be accompanied by a certificate that includes, among other information, the region of origin of the animals.

Movement Forms

Issue: One commenter stated that FSIS policies need to be established to ensure that agency's inspectors return the VS Form 17–33 (which must accompany imported livestock to immediate slaughter) to the APHIS Port Veterinarian in a timely manner.

Response: We agree that close collaboration and timely coordination between APHIS and FSIS is necessary, and both agencies are committed to establishing the most appropriate mechanism to achieve that result. APHIS is in the process of developing written instructions for FSIS personnel at approved slaughtering establishments and will submit those instructions to FSIS before this rule is implemented.

Issue: One commenter recommended that the rule not be implemented until certain Veterinary Services forms and a memorandum are updated.

Response: The documents referred to by the commenter are periodically reviewed and updated. As currently written, the forms provide sufficient information regarding the number and species of animal, as well as the seal numbers that are applied to the means of conveyances.

Issue: Several commenters recommended that importers be required to account for all cattle, whether dead or sold.

Response: The necessary accountability regarding the location, movement and disposition of animals will be provided by the requirement that movement permit APHIS Form VS 17–130, which identifies the physical destination of the animals and the person responsible for the movement of the animals, accompany all movements in the United States of feeder cattle imported from BSE minimal-risk regions.

Age and Feed Verifications

Issue: Several commenters asked whether FSIS will verify the following information: (1) That animals are less than 30 months of age at slaughter; (2) that CFIA is using the same procedure for determining animal age as FSIS; and (3) that ruminants imported from BSE minimal-risk regions for slaughter were not fed ruminant protein.

Response: Countries eligible to export meat to the United States must have a meat inspection system equivalent to the U.S. meat inspection system (as discussed below in section IV. D. under the heading ''Verification of Compliance in the Exporting Region''), including a system for verifying that SRMs are properly identified and removed from the human food supply. FSIS has an ongoing verification system to assess the effectiveness of the equivalency determination made for each foreign country deemed eligible to export meat to the United States. For live cattle, the FSIS-inspected slaughtering establishment is required by FSIS to implement procedures to determine the age of cattle in order to properly deal with SRMs. FSIS verifies that the establishment is meeting the regulatory requirements. Any cattle deemed to be 30 months of age and older must have those tissues that are considered SRMs in such animals, as well as the small intestine, removed and disposed of as inedible material.

Regarding verification procedures for ensuring that an animal has not been fed ruminant protein during its lifetime, APHIS will not recognize a region as a BSE minimal-risk region unless APHIS has first determined that the region has in place and is effectively enforcing a ruminant-to-ruminant feed ban and that the region has a reliable veterinary infrastructure that can certify that the requirements of this rule with regard to individual shipments have been met. For FSIS, part of that agency's equivalency determination is based on the total system for ensuring that the BSE-infective agent is appropriately controlled. FSIS would rely upon certifications made by the government of the exporting country in order to assess compliance with these requirements.

Certification of Feed Ban Compliance

Issue: Several commenters requested that the regulations require that the owner of ruminants imported from BSE minimal-risk regions be responsible for certifying that their animals have not been fed ruminant protein. One commenter further recommended that all imported cattle, regardless of their region of origin, be accompanied by an affidavit stating the animals have not been fed ruminant-derived protein.

Response: One of the requirements in this rule regarding the importation of feeder and slaughter cattle from a BSE minimal-risk region is that they have been fed in compliance with the ruminant feed ban of the region of origin and, further, that the ruminant feed ban is equivalent to the requirements established by the FDA. That provision will replace the requirement in our proposal that such animals not have been fed ruminant protein, other than milk protein, during their lifetime. Certification for import must be provided by the government of the exporting country—in this case, CFIA. For the purposes of international trade, the country of export is required to issue the official health certification required by the importing country.

We do not consider it necessary to require that all imported cattle, regardless of their region of origin, be accompanied by an affidavit stating the animals have not been fed ruminant-derived protein. Cattle are not permitted importation from those regions listed in § 94.18(a)(1) as regions in which BSE exists, nor are they permitted importation from regions listed in § 94.18(a)(2) as those that pose an undue risk of BSE. For regions that are included in neither of these categories, except for those regions listed in § 94.18(a)(3) as BSE minimal-risk regions, we do not consider it warranted based on risk to require certification that ruminants imported into the United States were subject to a feed ban.

Issue: One commenter recommended that, because the United States already considered the scope and application of a feed ban in Canada before proposing to designate that country as a BSE minimal-risk region, the required certification for live ruminants and ruminant products from Canada not include a statement concerning compliance with the feed ban for individual commodities. The commenter requested that the certification be required to address only any additional measures taken to prevent against the introduction of BSE into the United States, such as verification of age for live animals and removal of SRMs for beef. Another commenter stated that a broad certification addressing the feed ban established in the region of origin would be more appropriate than certification based solely on the knowledge of the certifying officer.

Response: We are making no changes based on these comments. We consider it necessary for possible traceback efforts that the verification statement regarding compliance with the feed ban requirements be included on the documentation that is provided when animals or commodities are presented for entry at U.S. border stations. Such certification for individual commodities will require that the certifying individual have knowledge of the origin of the commodities.

Border Stations

Issue: Several commenters expressed concern that cattle are being imported into the United States illegally after dark on back roads. One commenter stated that border ports should be open 24 hours a day, 7 days per week. Another commenter asked whether APHIS or FSIS will verify CFIA procedures to ensure that cattle were imported into the United States through an APHIS-designated port of entry.

Response: U.S. Customs and Border Protection (CBP), Department of Homeland Security, monitors every port of entry with officers, 24 hours per day, 7 days per week, to ensure security at America's borders and ports of entry and, among other things, protect our agricultural and economic interests from harmful pests and diseases. Because CBP monitors every port of entry around the clock, we are confident that all shipments of live animals entered through those ports, including cattle imported from Canada, will be referred to APHIS and meet all applicable laws and regulations before importation into the United States. The issue of attempts at illegal smuggling is one that must be dealt with at any country's borders. APHIS' regulations in § 93.408 explicitly require that all live cattle imported into the United States be inspected by APHIS' Veterinary Services at designated ports of entry. Any individual who violates the regulations is subject to civil and criminal penalties in accordance with the AHPA.

Issue: Several commenters expressed concern that our proposal did not designate a sufficient number of U.S./Canadian land border ports for the importation of live ruminants and ruminant products from Canada and requested that we establish additional land border ports in Minnesota, Montana, and North Dakota. Commenters specifically requested that we designate Dunseith, ND, as a port of entry. One commenter said that if our proposal were made final, a significant portion of renewed trade from Canada would be in the form of live animals. The commenter expressed concern that, because the proposal listed only three designated ports of entry convenient to the Canadian prairie Provinces, any delays at the ports of entry could become a serious animal welfare issue.

Response: Section 93.403(b) of the regulations lists 20 designated ports of entry for the importation of live ruminants from Canada. Seven of those ports are in either Minnesota, Montana, or North Dakota. Dunseith, ND, is listed as a designated port of entry for live

ruminants. The remainder of the designated ports are in Idaho, Maine, New York, Vermont, and Washington.

With regard to meat and edible products derived from ruminants in Canada, we proposed that such commodities from Canada could be imported into the United States from Canada only through the border ports we listed in § 94.19(k) of our proposal. Proposed § 94.19(k) listed fewer ports of entry for meat and edible products from Canada than are listed in § 93.403(b) for the importation of live animals. This is because the number of ports designated for meat and edible products is limited by the availability of facilities for FSIS personnel trained in the inspection of such commodities to conduct their required inspections.

We do not have any evidence to suggest that the land border ports listed in §§ 93.403(b) and 94.19(g) (redesignated from § 94.19(k) of the proposal) will be inadequate to provide inspection and import-related services for ruminant products and live ruminants entering the United States from Canada. Therefore, we are not making any changes in response to the comments. However, if, in the future, we add other countries to the list of BSE minimal-risk regions, or if the volume of imported commodities warrants it, we will adjust the list of designated ports accordingly.

Timing of Health Inspections

Issue: One commenter recommended that the regulations require that animals intended for importation into the United States be inspected by an accredited veterinarian within 24 hours before shipment and be accompanied with a certificate of veterinary inspection.

Response: We are making no changes based on this comment. The regulations in § 93.408 explicitly require that all live cattle imported into the United States from Canada be inspected at the port of entry. Animals imported into the United States under this rule will be visually inspected by a U.S. inspector while on the means of conveyance at the port of entry. (Also, as noted above under the heading ''Verification and Enforcement of Age Limit of Ruminants,'' U.S. inspectors at the port of entry will, if they consider it necessary, unseal the means of conveyance at the port of entry.) Section 93.418 requires certificates of veterinary inspection for cattle other than for immediate slaughter. Requiring that such inspection be conducted within 24 hours of export would not be consistent with our current requirements for health certificates that require issuance of such certificates by the exporting region within 30 days of export, and would be unnecessary because the animals would be reinspected at the border 24 hours or less after inspection in the exporting region. From the standpoint of ensuring animal health and detecting disease, it is preferable to have two inspections up to 30 days apart.

D. Risk Mitigation Measures for Importation of Ruminant Products and Byproducts

Age of Animals From Which Meat Is Derived

Issue: In § 94.19 of our proposed rule, we provided that meat derived from bovines slaughtered in a BSE minimal-risk region could be imported into the United States under certain conditions. One of the conditions was that the meat be derived from bovines that were less than 30 months of age when slaughtered. One commenter stated that the OIE and Canada prohibit the importation of meat products and carcasses from bovines less than 30 months of age; therefore, the United States should do the same. Conversely, a number of commenters stated that, provided all SRMS were removed from the animals, it was unnecessary to require that the animals from which the meat was derived were less than 30 months of age at slaughter. With the removal of the SRMs, said the commenters, the risk of BSE would be sufficiently mitigated.

Response: We consider the commenters' recommendation to allow the importation of meat from bovines of any age under certain conditions to have merit. As we discussed in our March 8, 2004, extension of the comment period on our November 2003 proposed rule, and as we discuss above in section III. C. under the heading ''Measures Implemented by FSIS,'' the FSIS SRM rule designated the following tissues in cattle as SRMs and prohibited their use in human food: The brain, skull, eyes, trigeminal ganglia, spinal cord, vertebral column (excluding the vertebrae of the tail, the transverse processes of the thoracic and lumbar vertebrae, and the wings of the sacrum) and dorsal root ganglia of cattle 30 months of age and older, and the tonsils and distal ileum of the small intestine of all cattle. To ensure effective removal of the distal ileum, FSIS requires removal of the entire small intestine and prohibits its use in human food.

These prohibitions do not restrict the slaughter of cattle in the United States based on age. The only role the age of the cattle plays in FSIS actions is in determining whether certain tissues (*e.g.,* central nervous system tissues) in the animal should be considered SRMs due to the animal's age.

Under FSIS regulations, meat inspection systems and processing requirements in Canada and in any country authorized to export meat and meat products to the United States must be equivalent to those in the United States in order for meat and meat products to be eligible for importation. Under these circumstances, we no longer consider it necessary to require that meat from bovines that is imported from a BSE minimal-risk region be derived only from animals less than 30 months of age, or that the animals were slaughtered in a facility that either slaughters only bovines less than 30 months of age or has in place a process adequate to segregate the meat from other meat slaughtered at the facility.

With regard to meat from sheep, goats, and other ovines and caprines, neither the proposed rule nor this final rule identifies SRMs in ovines and caprines that could be removed to eliminate any potential infectivity from products derived from the animals. Therefore, this final rule will require, as proposed, that meat from sheep or goats or other ovines or caprines from a BSE minimal-risk region be derived from animals that were less than 12 months of age when slaughtered, and we are adding the same condition for the importation of meat byproducts and meat food products derived from ovines or caprines. We discuss the issue of meat byproducts and meat food products below.

We disagree with the commenter who stated that international guidelines preclude the importation of meat products and carcasses from bovines less than 30 months of age from countries that OIE would consider to be minimal risk for BSE. The OIE guidelines recommend allowing the importation of meat from cattle of any age from such minimal-risk regions, provided the necessary risk mitigation measures are taken (*e.g.,* the meat contains no part of the brain, eyes, spinal cord, skull or vertebral column, or protein products derived from such materials).

What Constitutes Meat

Issue: In our proposed rule, we stated that, to be considered meat that is eligible for importation into the United States from a BSE minimal-risk region, a product would have to meet the FSIS definition of *meat* in 9 CFR 301.2. The FSIS regulations provided that, to be considered meat, product that undergoes mechanical separation and meat recovery from the bones of livestock must be processed in such a way that the processing does not crush,

grind, or pulverize bones, so that bones emerge comparable to those resulting from hand-deboning and the meat itself meets the criteria of no more than 0.15 percent or 150 mg/100 gm of product for calcium (as a measure of bone solids content) within a tolerance of 0.03 or 30 mg. We noted in the preamble of our proposal that, except where the FSIS definition of *meat* was specifically referenced in our proposal, when we used ''meat'' we meant the standard dictionary definition of the term. One commenter stated that ''meat,'' as defined according to its common usage, could mean several different things. The commenter recommended that how we intend to use the term in the regulations should be specific to its purpose.

Response: In order to avoid confusion, in this final rule we are using the term ''meat'' in all cases to mean *meat* as defined by FSIS. In its AMR rule, FSIS revised the definition of *meat* in 9 CFR 301.2 to mean, ''The part of the muscle of any cattle, sheep, swine, or goats that is skeletal or that is found in the tongue, diaphragm, heart, or esophagus, with or without the accompanying and overlying fat, and the portions of bone (in bone-in product such as T-bone or porterhouse steak), skin, sinew, nerve, and blood vessels that normally accompany the muscle tissue and that are not separated from it in the process of dressing. * * *'' FSIS provided further that meat does not include the muscle found in the lips, snout, or ears, and that meat may not include significant portions of bone, including hard bone and related components, such as bone marrow, or any amount of brain, trigeminal ganglia, spinal cord, or dorsal root ganglia.

Additionally, in this final rule, we are clarifying that meat, meat byproducts, and meat food products from bison qualify as meat, meat food products, and meat byproducts under this rule, even though such commodities derived from bison are not included under the FSIS definitions.

Meat Byproducts and Meat Food Products

Proposed § 94.19 prohibited the importation of fresh (chilled or frozen) meat, meat products, and edible products other than meat (excluding gelatin, milk, and milk products) from ruminants that have been in a BSE minimal-risk region, unless conditions allowing for the importation of a specified commodity were included in that section or in § 94.18. In § 94.19, we proposed conditions for the importation of the following commodities: Fresh (chilled or frozen) bovine whole or half carcasses or other meat; fresh (chilled or frozen) bovine liver; fresh (chilled or frozen) bovine tongues; fresh (chilled or frozen) carcasses or other meat of ovines and caprines; fresh (chilled or frozen) meat or dressed carcasses of hunter-harvested wild sheep, goats, cervids, or other ruminants; fresh (chilled or frozen) meat of cervids either farm-raised or harvested on a game farm or similar facility; fresh (chilled or frozen) meat from specified wild-harvested musk ox, caribou or other cervids; and gelatin.

Issue: A number of commenters expressed concern that the proposed rule did not specifically include conditions for the importation of processed meat products. The commenters stated that products processed for edible use from boneless cuts of beef and other parts of the carcass from cattle of any age should be allowed importation, provided SRMs were removed from the cattle from which the products were derived. One commenter stated that, by incorporating FSIS's regulatory description of meat from 9 CFR 301.2, APHIS excluded from importation from a BSE minimal-risk region meat food products that are separately defined by FSIS as ''any article capable of use as human food which is made wholly or in part from any meat or other portion of the carcass of any cattle.'' The commenter stated that this prohibits the importation of a wide range of products for which there is no discernible risk factor.

Response: We agree it is not necessary to prohibit the importation of processed meat products and byproducts from ruminants that meet the conditions in this rule for the importation of meat. Therefore, we are providing in § 94.19 of this final rule that, along with meat as defined by FSIS, the importation conditions in this rule also apply to those products that are included in the FSIS definitions of *meat food product* and *meat byproduct* in 9 CFR 301.2.

In those definitions, *meat byproduct* is defined as ''any part capable of use as human food, other than meat, which has been derived from one or more cattle, sheep, swine, or goats. * * *'' *Meat food product* is defined as ''any article capable of use as human food which is made wholly or in part from any meat or other portion of the carcass of any cattle, sheep, swine, or goats, except those exempted from definition as a meat food product by the [FSIS] Administrator in specific cases or by the regulations in * * * [9 CFR part 317], upon a determination that they contain meat or other portions of such carcasses only in a relatively small proportion or historically have not been considered by consumers as products of the meat food industry, and provided that they comply with any requirements that are imposed in such cases or regulations as conditions of such exemptions as to assure that the meat or other portions of such carcasses contained in such articles are not adulterated and that such articles are not represented as meat food products. * * *''

Additionally, we are not specifying in this final rule that the meat and meat commodities imported into the United States under this rule must be chilled or frozen. Chilling or freezing meat and meat products does not affect the BSE risk from those commodities.

Cervid Products

Issue: A number of commenters addressed the issue of the importation of products derived from cervids, including meat, antlers, trophies, and urine. One commenter objected in general to the importation of any hunter-harvested wild ruminant products. Most of the other commenters who addressed the issue of cervid products recommended that they be eligible for importation from a BSE minimal-risk region. Some commenters said such products should be eligible for importation without restriction. Others suggested specific conditions for importing such products. Several commenters recommended that we prohibit the importation of offal derived from cervids from BSE minimal-risk regions, because of the susceptibility of cervids to CWD.

Response: As we discuss above under the heading ''Cervids,'' in this final rule we are not prohibiting or restricting the importation of cervids from BSE minimal-risk regions because of BSE. APHIS is aware of no epidemiological data indicating that cervids are naturally susceptible to the BSE agent. Published observations indicate that, during the height of the BSE outbreak in 1992 and 1993 in the United Kingdom, exotic ruminants of the *Bovidae* family in zoos were affected with BSE, while cervids, which are members of the *Cervidae* family, were not (Ref 22). Therefore, even in regions that have high levels of circulating infectivity and that should be considered high risk for BSE, BSE susceptibility in cervids was not observed. Therefore, in this final rule, we are not imposing any restrictions on cervid products from BSE minimal-risk regions because of BSE.

Issue: Several comments recommended that products from wild cervids, especially from the United Kingdom, be allowed importation into the United States regardless of the exporting region's BSE status. The commenters stated that wild deer by

their nature are not fed ruminant protein, that no TSE has ever been recorded in the deer population in the United Kingdom, and that surveillance of wild deer is ongoing in the United Kingdom, with no evidence of prion.

Response: We are making no changes based on the comments, other than those we are making in this final rule with regard to cervid products from BSE minimal-risk regions. The provisions we proposed, and the risk analysis we conducted in conjunction with this rulemaking, concerned ruminant imports from BSE minimal-risk regions. We consider the issue of the importation of ruminant products from BSE-affected regions to be outside the scope of this rulemaking.

What SRMs Should Be Removed

Issue: One commenter stated that we said in our proposal that a region we might classify as minimal risk for BSE could, strictly speaking, be classified as a moderate-risk country or zone under OIE guidelines. The commenter stated that OIE recommends, for moderate-risk countries or zones, that meat and meat products for export not contain brain, eyes, spinal cord, distal ileum or mechanically separated meat from skull and vertebral column from cattle over 6 months of age. The commenter expressed concern that, for cattle under 30 months of age from BSE minimal-risk regions, we proposed to require only the removal of the intestines at slaughter.

Response: In our proposal, we did not make a general statement that BSE minimal-risk regions by our guidelines might be classified as BSE moderate-risk countries by OIE guidelines. Our discussion was particular to the situation in Canada. Our evaluations concluded that, according to our proposed standards, Canada qualified as a BSE minimal-risk region. We indicated that, although a strict reading of the OIE standards relative to the duration of a feed ban would classify Canada as a moderate-risk country until 2005, our integrated approach to evaluating the BSE status of a country considers the length of a feed ban within the context of all control measures in place. Further, 7 years represents the 95th percentile of the incubation period distribution; therefore, there is a rational basis for departing from the OIE guideline of 8 years. We considered the sum total of the control mechanisms in place at the time of diagnosis (e.g., effectiveness of surveillance, import controls, and feed ban) and the actions taken after it (e.g., epidemiological investigations, depopulation), thereby allowing the actions CFIA took in other elements to compensate for a shorter feed ban duration than recommended by OIE. Consistent with OIE guidelines, we consider the 30-month age standard for SRMs-except for tonsils and the distal ileum, as discussed below-to be adequate for regions such as Canada that we consider to be minimal-risk for BSE. If countries (or other regions) other than Canada apply for a BSE minimal-risk designation under this rule, we will evaluate such requests on a case-by-case basis, and consider, as we did for Canada, the combination of factors affecting the risk of BSE being introduced into the United States from such countries or other regions.

According to OIE guidelines, in a minimal-risk region, all of the tissues listed by the commenter except the distal ileum need be removed only from cattle over 30 months of age. The distal ileum need not be removed from cattle of any age. FSIS regulations define tonsils and the distal ileum as SRMs regardless of the age of cattle and require their removal. These definitions are applicable to meat from cattle slaughtered in the United States, as well as to meat imported from eligible foreign sources. To be consistent with the FSIS requirements, we are requiring in § 94.19(a)(2) and (b)(2) that meat and other bovine products imported into the United States from a BSE minimal-risk region be derived from cattle that have had SRMs and the small intestine removed in accordance with the FSIS regulations.

Issue: Several commenters recommended that not just intestines, but also brains, eyes and spinal tissue be prohibited from the food chain or rendering.

Response: As discussed above in section III. C. under the heading ''Measures Implemented by FSIS,'' that agency's SRM rule applies to meat from cattle slaughtered in the United States, as well as to meat from eligible foreign sources. As noted, we are requiring that meat and other bovine products from a BSE minimal-risk region be derived from animals that have had SRMs removed in accordance with the FSIS regulations.

Removal of SRMs

Issue: One commenter stated that an exporting region would generally be unable to accurately certify that ''SRMs have been removed,'' and that APHIS should require instead certification that ''a majority of the known SRMs have been removed.'' For example, said the commenter, when a carcass-splitting band saw is used to split a carcass through the spinal cord, bone dust mixed with spinal cord tissue is left on the exposed cut surfaces of the vertebral column before removal of the spinal cord. Also, said the commenter, captive bolt pistols, when penetrating the skull during the stunning procedure, provide a source of hematogenous spread of central nervous system tissue to the carcass, although not as much as when air stunning devices are used. The commenter also stated that if BSE is anything like scrapie, perhaps steam is not an adequate means of sterilizing equipment after being used on BSE-contaminated tissues, given the heat-resistant nature of the scrapie agent. Another commenter raised similar issues, stating that the U.S. Government should discontinue contamination of beef with prions from the central nervous system and change allowable methods of slaughter and processing. The commenter recommended that captive bolt stunning be replaced by electrical stunning, that immobilization of the animal by a pithing rod be prohibited, and that no sawing through the spinal cord be permitted.

Response: On January 12, 2004, FSIS published an interim final rule prohibiting the use of penetrative captive bolt devices that deliberately inject air into the cranial cavity of cattle, because that method of stunning has been found to force visible pieces of central nervous system tissue (known as macro-emboli) into the circulatory system of stunned cattle. The comment period on that interim final rule closed on May 7, 2004, and FSIS is assessing the comments on this issue. At this time, FSIS considers the current stunning methods allowable for use in the United States to be practical and effective, based on a review of published studies on stunning methods.

Regarding the cross-contamination issues identified by the commenter, FSIS has developed procedures to verify that cross-contamination of edible tissue with SRMs is reduced to the maximum extent practical in facilities that slaughter cattle or process carcasses or parts of carcasses of cattle, both animals younger than 30 months of age and 30 months of age and older. If an establishment uses dedicated equipment to cut through SRMs, or if it segregates cattle 30 months of age and older from cattle younger than 30 months of age, then the establishment may use routine operational sanitation procedures (*i.e.*, no special sanitation procedures are required). If the establishment does not segregate cattle 30 months of age and older from younger cattle, equipment used to cut through SRMs must be cleaned and sanitized before it is used on carcasses or parts from cattle less than 30 months of age. FSIS believes

that, due to the multiple risk mitigation measures implemented in the United States to prevent the spread of BSE, these procedures will reduce to the extent possible cross-contamination of carcasses with high-risk tissues. However, to assist in determining whether it should strengthen the measures required of establishments, on March 31, 2004, FSIS issued a press release during the comment period for its SRM rule that specifically requested public comment on methods to prevent cross-contamination of carcasses with SRMs. The type of measures described above have also been implemented in Canada.

Advanced Meat Recovery Systems

Issue: Several commenters stated that AMR systems (a technology that enables processors to remove the attached skeletal muscle tissue from livestock bones without incorporating significant amounts of bone and bone products into the final meat product) are notorious for containing tissue derived from the dorsal root ganglia (an SRM) in the final product, and recommended that the use of AMR be prohibited in the United States when slaughtering animals of Canadian origin. Additionally, the commenters recommended that products that contain AMR meat should not be allowed into the United States from BSE minimal-risk regions.

Response: In its AMR rule, FSIS amended its description of meat to make it clear that, to be considered meat, AMR product may not include significant portions of bone or related components, such as bone marrow, or any amount of central nervous system-type tissues. Additionally, FSIS'' AMR rule provided that AMR systems may not use bones classified as SRM (vertebral column and skull of cattle 30 months of age and older). The AMR rule states that, if skulls or vertebral column bones from cattle 30 months of age and older are used in AMR systems, the product exiting the AMR system is adulterated, and the product and the spent bone materials are inedible and must not be used for human food. FSIS stated that the potential for human exposure to the BSE-infective agent is prevented in products prepared from cattle 30 months of age and older using AMR systems because the AMR product cannot include source materials from the skull or vertebral column or contain any amount of brain, trigeminal ganglia, spinal cord or dorsal root ganglia. AMR systems can be used to prepare meat from the skull and vertebral column of cattle under 30 months of age. However, these source materials from cattle under 30 months of age are not designated as SRMs. The FSIS requirements are applicable to domestic beef as well as to beef from a foreign country deemed eligible for export to the United States.

Request for Clarification of Intent

Issue: One commenter stated that the proposed rule seemed to allow the importation of some products containing bone or even SRMs. The commenter requested that APHIS clarify whether this was the intent, and, if so, provide the scientific justification for that decision.

Response: It is not clear to us what provisions in the proposed rule the commenter is referring to. It is not APHIS' intent to allow the importation of any SRMs from BSE minimal-risk regions. SRMs must be removed from imported cattle at slaughter in the United States and must have been removed from cattle in the exporting country from which meat and meat products are derived. The skull and vertebral bones are included in the definition of SRMs (both according to the Canadian regulations and those of the United States because of the possibility that those bones might contain dorsal root ganglia) so ''bones of concern'' as far as BSE are concerned are not allowed importation. Other bones have not been shown to pose a risk of BSE infectivity.

Tonsils and Third Eyelid

Under our proposed rule, intestines would have been the only tissues required to be removed at slaughter from cattle less than 30 months of age from a BSE minimal-risk region. We also proposed that beef imported from a BSE minimal-risk region be derived only from bovines less than 30 months of age from which the intestines had been removed.

Issue: One commenter stated that the EU SSC recommends also that tonsils of bovines of any age be regarded as a BSE risk. Several other commenters stated that, although our proposed rule required removal of only the intestines, Canada requires removal of all SRMs from animals at slaughter, and that U.S. citizens should be afforded the same level of protection as Canadian citizens. The commenters stated that because tonsils and third eyelid lymphoid tissue have been demonstrated to have possible BSE infectivity in animals as early as 10 months post-inoculation, USDA should not only require removal of all SRMs from animals and products imported from minimal-risk regions, but also from all cattle slaughtered in the United States.

Response: We are assuming that the commenters who referred to ''animals'' in these comments were referring to bovines and bovine products from BSE minimal-risk regions. As discussed above in this document under the heading ''Age of Animals from Which Meat is Derived,'' requirements for removal of SRMs in Canada for meat and meat products eligible to be imported and U.S. requirements are currently equivalent. All of the requirements that were imposed by FSIS'' SRM rule on cattle slaughtered in the United States also apply to meat imported into the United States from foreign countries eligible to export the beef to the United States. FSIS'' SRM rule identified tonsils as SRMs. Tonsils of all cattle, regardless of age, must be removed. Based on FSIS's requirements, all regions intending to import meat and meat products into the United States will also have to remove the tonsils from cattle of all ages from which the meat and meat products are derived. As noted, we are providing in this rule that we consider SRMs to be those identified as such by FSIS.

With regard to the third eyelid, there is no evidence that the third eyelid lymphoid tissue is a tissue at risk of infectivity for BSE in bovines. The only TSE agents that have been found in the third eyelid are scrapie in sheep and CWD in deer and elk. PrP^{res} (the pathological form of the prion protein) has not been found in the third eyelid of cattle. There have been no reports of its presence in goats. Therefore, neither FSIS nor APHIS considers the third eyelid to be an SRM.

Distal Ileum

Issue: A number of commenters took issue with the requirement in our proposal that the intestines be removed from cattle less than 30 months of age from BSE minimal-risk regions, even though we stated in the explanatory information of our proposal that the distal ileum (a part of the small intestine) is the only part of the intestine that is likely to have infectious levels of the BSE agent. Several comments stated that we were incorrect in stating in our March 8, 2004, notice reopening the proposed rule comment period that FSIS classifies the small intestine of cattle of all ages as an SRM. The commenters stated that the FSIS rule classifies only the distal ileum as SRM, but requires removal of the entire small intestine as a means of ensuring the removal of the distal ileum. The commenters stated that APHIS should recommend removal only of the distal ileum. Other commenters stated that, at most, APHIS should require removal of the small intestine. One commenter recommended removal of the last 70

inches of the small intestine, rather than the entire small intestine. Another commenter provided an anatomical description of the bovine small intestine that the commenter said could be used to develop a model of certification for the removal and disposal of the distal ileum.

Response: The commenters are correct that FSIS classified the distal ileum from cattle of all ages as an SRM and not the entire small intestine. FSIS requires removal of the entire small intestine to ensure effective removal of the distal ileum. Canada has the same requirements. This final rule on BSE minimal-risk regions adopts FSIS'' requirements regarding removal of SRMs and the small intestine. In its SRM rule, however, FSIS acknowledged that methods might exist for processors to effectively remove the distal ileum without removing the entire small intestine and requested comments on that issue. The comment period for the FSIS interim final rule closed on May 7, 2004.

Issue: One commenter stated that, although beef casings are currently allowed into the United States from countries not listed as BSE-affected or posing an undue risk of BSE, the FSIS rule requires the removal of the entire small intestine from all cattle of all regions regardless of BSE status. In addition, stated the commenter, the FSIS rule has prevented the importation of the entire intestines of cattle from regions where no BSE exists if the exporting country cannot certify removal of the small intestine. The commenter recommended that exporting countries that do not fall into any of the U.S. BSE risk categories should not be required to remove any SRM, much less certify the removal of the entire small intestine.

Response: In addressing FSIS' application of its regulations to countries other than BSE minimal-risk regions, the commenter is raising an issue that goes beyond the scope of the APHIS rulemaking. In both its SRM rule and the USDA/FDA joint notice, FSIS specifically requested comment on the issue of removal of the distal ileum.

Tongue and Liver

Issue: In § 94.19(d) of our proposed rule, we provided that bovine tongues could be imported from BSE minimal-risk regions if the tongues were derived from bovines that were born after the region implemented an effective ban on the feeding of ruminant protein to ruminants, that are not known to have been fed ruminant protein other than milk protein during their lifetime, and from which the tonsils were removed at slaughter. Several commenters stated that the regulations should prohibit either the importation of all tongues from bovines from BSE minimal-risk regions, or the importation of tongues from bovines 30 months or older. Some of the commenters stated that the risk from tongues is unacceptable because the tongue is attached to the tonsils, which are likely to contain the BSE infectious agent in an infected animal.

Response: We do not consider it necessary to prohibit the importation of bovine tongues from a BSE minimal-risk region, provided the conditions set forth in this rule are met. As we stated above under the heading ''What Constitutes Meat?,'' the tongue (but not the peripheral glandular material) is a muscle included in the FSIS definition of *meat,* and, to date, BSE infectivity has not been detected in muscle meat of cattle. In this final rule, we are not including a separate paragraph that includes the conditions for importing tongues from BSE minimal-risk regions. Tongues will be subject to the same requirements as other meat.

We do acknowledge, however, as we did in our proposed rule, that it is necessary to ensure that the tongues come from bovines from which the tonsils have been removed. As we discuss above under the heading ''Age of Animals from Which Meat is Derived'' and elsewhere, we believe, from an animal health perspective, to consider as SRMs those tissues listed by FSIS as SRMs. Under that listing, tonsils of all cattle, regardless of age, must be removed. Several procedures exist for removal of tongues so that they are effectively separated from the tonsils, including cutting of the tongue at its base and cutting the hyoid bones and associated structures to liberate the tongue from the tonsils.

Issue: Several commenters stated that the proposed rule did not make clear why APHIS would require that bovine tongues or tallow from a BSE minimal-risk region be derived from animals that were born after the implementation of an effective feed ban, while the same requirement was not proposed for liver. Similarly, another commenter questioned why the age of an animal should be a factor regarding some products from a BSE minimal-risk region, such as meat, and not others, such as tongue and liver. Several commenters recommended that the regulations require that bovine liver from BSE minimal-risk regions be from cattle under 30 months of age and that certification be required that this and any other requirements for liver have been met.

Response: Under this rule, tongues, which, as we noted, are included in the FSIS definition of *meat* in 9 CFR 301.2, will be subject to the same requirements as other meat, including the requirement that the tongues be derived from bovines that were subject to a ruminant feed ban during their lifetime equivalent to the requirements established by FDA. Thus it is unnecessary for us to retain the separate conditions for tongues that appeared in § 94.19 of the proposed rule, including the condition that the tongues be derived from bovines that were born after the region implemented an effective ban on the feeding of ruminant protein to ruminants. Also, as discussed in this document under the heading ''Age of Animals from which Meat is Derived,'' we are not including the requirement we proposed that meat from bovines from BSE minimal-risk regions be derived from animals that were less than 30 months of age when slaughtered. Liver, which falls under the FSIS definition in 9 CFR 301.2 of meat *byproducts,* will be subject to the same importation requirements in our rule as meat.

With regard to certification, § 94.19 as proposed and as set forth in this final rule already requires certification that the requirements for liver and other commodities regulated under that section have been met.

Issue: One commenter asked how APHIS could conclude that the intestines of cattle are not safe, but the tongue and liver are.

Response: Our proposed requirement that the intestines of cattle from BSE minimal-risk regions be removed was based on evidence that BSE infectivity could exist in the distal ileum of bovines as young as 6 months of age. Similar infectivity has not been demonstrated in the tongue or liver of bovines of that age.

Milk and BSE Risk

Issue: One commenter stated that milk was a dangerous prion carrier and that milk protein is an unacceptable risk.

Response: At this time, there is no scientific evidence that milk and milk products are sources of BSE infectivity that would pose any BSE risk to public or animal health. Milk and milk products are regulated by the FDA and the safety of milk is discussed in ''BSE Questions and Answers'' that can be accessed on that agency's Web site at *http://www.cfsan.fda.gov/comm/bsefaq.html.*

Verification of Compliance in the Exporting Region

Issue: A number of commenters stated that USDA should conduct monitoring to ensure that imported products meet the FSIS definition of *meat.* One commenter recommended that APHIS specify the methods that will be used to conduct such verification. Several commenters asked whether APHIS or FSIS will verify the CFIA procedures necessary to ensure compliance with this rule. Other commenters questioned whether USDA can verify the practices of Canadian producers and the meat industry in that country. One commenter stated that verification should include the presence of USDA personnel in Canadian beef processing plants.

Response: As required under the FMIA, FSIS ensures that imported meat in the U.S. marketplace is safe, wholesome, unadulterated, and properly labeled by (1) determining if foreign countries and their establishments have implemented food safety system and inspection requirements equivalent to those in the United States and (2) reinspecting imported meat and poultry products from those countries through random sampling of shipments. Countries eligible to export meat to the United States must have a meat inspection system determined by FSIS to be equivalent to the U.S. meat inspection system, including a system for verifying that SRMs are properly identified, segregated, and removed from meat that is exported to the United States. FSIS has a system to verify the ongoing equivalence of each foreign country deemed eligible to export beef to the United States. The FSIS equivalency determination is based on the country's inspection system for appropriately controlling the BSE-infective agent.

FSIS conducts annual system equivalence audits, as required by the FMIA, to verify that the foreign country's inspection system remains equivalent to that required in the United States. This audit includes a sampling of export-certified foreign establishments. FSIS's audit system focuses on two essential components of safe food production that must be present in a foreign food regulatory system: (1) Industry process control, which is executed by establishments through sanitary procedures such as sanitation, HACCP and quality assurance systems, and microbial/chemical testing programs; and (2) government inspection, verification, and enforcement activities exercised in a form and at an intensity appropriate to ensure the effectiveness of industry process controls and detect noncompliance. Foreign food regulatory system audits are conducted in four phases: Planning, execution, evaluation, and feedback. Each of these phases is discussed below:

1. *Planning.* FSIS prepares a consolidated annual plan to audit each country that exports meat, poultry, or egg products to the United States. Individual country audit plans are based, in large part, upon prior experience with the exporting country. For example, all previous FSIS audit reports are reviewed to identify issues for inclusion in the current audit. Port-of-entry reinspection data are also reviewed at this time to determine trends and identify areas of special interest for audit. These documents and data are used by FSIS to develop an audit plan that is customized for each country. The plan includes a list of foreign establishments selected for centralized records review. A subset of these establishments is further selected for on-site audit. FSIS uses a statistical method for establishment selection. Additional establishments may be added for cause.

2. *Execution.* An auditor (or in some cases an audit team) is dispatched to the exporting country's inspection headquarters and/or to sub-offices as agreed in the audit protocol. Opening discussions are held with exporting country officials to determine if the national system of inspection, verification, and enforcement is being implemented as documented, and to identify significant trends or changes in operations. The FSIS auditor examines a sample of program records that provide evidence of the exporting country's regulatory activities and accompanies officials of the exporting country on field visits to a representative sample of establishments eligible to export to the United States. Exporting country officials conduct a review to verify that each selected establishment continues to achieve the U.S. level of sanitary protection. Particular attention is paid to how eligible establishments address food safety hazards, some of which may be different from those encountered in the United States. FSIS auditors observe establishment activities and correlate review findings made by exporting country officials. Selected microbiological and chemical laboratories are also reviewed, and a farm or feedlot is visited to verify animal drug controls. In a closing meeting, the FSIS auditor provides exporting country officials with an overview of conditions observed and ensures that audit observations are clearly understood.

3. *Evaluation.* FSIS conducts a post-audit evaluation of all data collected on-site. When evaluating audit data, FSIS considers how sanitary measures of the foreign food regulatory system compare to those used in the United States and determines whether the foreign system cumulatively provides the same level of protection.

4. *Feedback.* FSIS then sends the exporting country a draft audit report and provides the country an opportunity to respond to the audit's findings. After consideration of comments from the country, a final report is prepared. An action plan is mutually developed to address any issues raised by the audit. These issues are tracked by FSIS until resolution and are automatically included as items of special interest in the next audit.

All reports of initial equivalence audits and equivalence verification audits are posted on the FSIS Web site *(http://www.fsis.usda.gov/regulations/foreign_audit_reports_past/index.asp)* when they are final, which is immediately after the final version is delivered to the audited country.

Meat From Beef vs. Dairy Cattle

Issue: One commenter suggested distinguishing meat obtained from beef cattle from meat obtained from dairy cattle.

Response: We are making no changes based on this comment. We are not aware of any benefits in addressing BSE mitigations or risk that would be derived from identifying meat as having come from beef or dairy cattle.

Request for Import Bans

Issue: A number of commenters requested bans on certain commodities from Canada or other countries. Commenters stated that APHIS should not allow the importation of Canadian beef. Other commenters requested that APHIS not allow the importation of beef (some commenters specified ground beef) or animal feedstuffs from any country. None of these commenters provided data or other information to support their requests.

Response: We are making no changes based on these comments. Under the Animal Health Protection Act, the Secretary of Agriculture (or official delegated in accordance with 7 CFR 2.22 and 2.80) may prohibit or restrict articles if the Secretary determines such prohibition or restriction is necessary to prevent the introduction or dissemination within the United States of any pest or disease of livestock. The Secretary has determined that the

measures in place in Canada relative to BSE, together with the import risk mitigations required by this rule, would be effective in preventing the introduction of BSE into the United States via meat and meat products imported from Canada. Further, the United States, as part of the World Trade Organization, cannot set up arbitrary barriers to trade that would prohibit the importation of animal products if the risk of such products introducing livestock diseases or pests into the United States can be mitigated.

Animal feed containing animal products may currently be imported into the United States under an import permit that sets out the conditions for such importation. Feed containing ruminant protein other than milk protein is prohibited importation into the United States from any region listed in § 94.18(a), which lists regions in which BSE exists, those that pose an undue risk of BSE, and, under this final rule, those that are considered BSE minimal-risk regions.

Offal

Issue: The regulations prior to this rule prohibited the importation of offal from any region listed in § 94.18(a). Prior to this rule, the only regions listed in § 94.18(a) were those in which BSE exists and those that present an undue risk of introducing BSE into the United States. As noted, however, in this final rule, we are including in § 94.18(a)(3) a list of BSE minimal-risk regions.

Paragraphs (a) and (a)(1) of the regulations in § 95.4—which deal with restrictions due to BSE on the importation of processed animal protein, offal, tankage, fat, glands, certain tallow other than tallow derivatives, and serum—prohibit the importation of specified materials from regions listed in § 94.18(a), unless the materials meet conditions set forth in § 95.4.

In § 95.4(g) of our proposal, we set forth risk mitigation measures under which offal derived from cervids from BSE minimal-risk regions could be imported into the United States. However, we did not include provisions in our proposed rule for the importation of offal from ruminants other than cervids. The proposal was limited to cervid offal because cervid offal was among the most commonly imported low-risk commodities from BSE minimal-risk regions. We proposed to define *offal* in § 95.1 to mean the parts of a butchered animal that are removed in dressing, consisting largely of the viscera and trimmings, which may include, but are not limited to, brains, thymus, pancreas, liver, heart, and kidney.

A number of commenters addressed the importation of offal other than cervid offal for edible and inedible purposes. One commenter recommended that the only requirement for the importation of offal from Canada should be certification from the Canadian Government that the fresh offal and other edible by-products are derived from bovines that were slaughtered and processed in a facility approved and inspected by the Government of Canada, and from which SRMs had been removed. Other commenters expressed concern that the proposed definition of *offal* in § 95.1 would preclude the importation of hearts and kidneys from cattle from BSE minimal-risk regions and recommended that such organs be allowed importation provided they do not come in contact with SRMs. Several commenters noted that, although the proposed regulations and definition of *offal* in part 95 would prohibit the importation of liver from cattle from BSE minimal-risk regions, the provisions in proposed § 94.19(c) provided for the importation of bovine liver from BSE minimal-risk regions if no air-injected stunning was used at slaughter. One commenter stated that it was not clear whether our proposed definition of *offal* applied to cervids. The commenter also recommended that the word ''trimmings'' be removed from the proposed definition of *offal* because its inclusion could be construed to prohibit the importation of meat trimmings. One commenter stated that the import prohibitions in part 95 should apply only to tissues that have been proven to potentially harbor the BSE infective agent.

Response: We agree with the commenters that there is no scientific reason to limit the importation of offal from BSE minimal-risk regions to offal derived from cervids and that the criterion for whether products, including offal, derived from ruminants are allowed importation into the United States should be whether those products pose a risk of introducing BSE into the United States. Consequently, in this final rule, we are defining offal to mean ''the parts of an animal that are removed in dressing, including meat, meat byproducts, and organs,'' and, for clarity's sake, are specifying in § 95.4(g) the conditions for the importation of offal from BSE minimal-risk regions. The conditions for importation of offal from ruminants from BSE minimal-risk regions are the same as those set forth in § 94.19 of this final rule for the importation of meat, meat byproducts, and meat food products. We are providing in § 95.4(g) that offal derived from ruminants from BSE minimal-risk regions is allowed importation into the United States if the offal is derived from cervids or if the offal is derived from bovines, ovines, or caprines and the following conditions are met:

1. *If the offal is derived from bovines, the offal:*

- Contains no SRMs and is derived from bovines from which the SRMs were removed;
- Is derived from bovines for which an air-injected stunning process was not used at slaughter; and
- Is derived from bovines that were subject to a ruminant feed ban equivalent to the requirements established by FDA.

2. *If the offal is derived from ovines or caprines, the offal is derived from animals that:*

- Have not tested positive for and are not suspect for a TSE (we are adding definitions of *positive for a transmissible spongiform encephalopathy* and *suspect for a transmissible spongiform encephalopathy* to § 95.1 of the regulations);
- Were less than 12 months of age when slaughtered and that are from a flock or herd subject to a ruminant feed ban equivalent to the requirements established by FDA;
- Have resided in a flock or herd that has not been diagnosed with BSE; and
- Have not had their movement restricted in the BSE minimal-risk region as a result of exposure to a TSE.

As required for meat, meat byproducts, and meat food products in § 94.19, we are requiring certification from the country of origin that the offal meets the above requirements and are requiring that the offal, if arriving at a U.S. land border port, arrives at a port listed in § 94.19(g).

Tallow

Issue: One commenter stated that it does not make sense to prohibit the importation of tallow from Canada but allow the importation of Canadian beef and veal.

Response: The proposed rule did not prohibit the importation of tallow from BSE minimal-risk regions. We provided in proposed § 95.4(f) that tallow could be imported from a BSE minimal-risk region if the tallow is composed of less than 0.15 percent protein and meets certain other conditions specified in the proposal.

Issue: One commenter said there is no scientific basis for requiring that tallow eligible for importation contain no more than 0.15 percent impurities. The commenter stated that research

conducted by Dr. D.M. Taylor, *et al.,* of the Animal Health Institute, Edinburgh Scotland, failed to find an association between the occurrence of BSE and the consumption of tallow by cattle, and that in studies using BSE-spiked tallow, no infectivity was found in crude, unfiltered tallow extracted from rendered meat-and-bone meal. The commenter stated that the study was validated by injecting spiked BSE tallow intracerebrally into experimental mice without resulting demonstrated changes associated with TSEs. The commenter stated further that, in 1991, the World Health Organization (WHO) assembled consultants who determined tallow not to be a risk to animal or human health. Additionally, stated the commenter, the Harvard-Tuskegee Study refers to the safety of tallow.

Response: The research referenced by the commenter documents the results of mouse assays. We are unaware of any studies that have been performed using cattle experimentally fed tallow infected with BSE with resulting absence of infectivity. Based on the scientific evidence currently available, it is not possible to dismiss the possibility that ingestion of tallow infected with BSE creates a risk of the transmission of BSE. This conclusion is consistent with the OIE Code, Article 2.3.13.1., which recommends that one of the conditions for the importation of tallow from any country, regardless of its BSE status, be that the tallow is protein-free (*i.e.*, have a maximum level of insoluble impurities of 0.15 percent in weight).

While WHO concluded that because of the proteinaceous nature of TSE agents, they will tend to remain with the cellular residues of meat-and-bone meal during the extraction process rather than being extracted with the lipids of tallow, the EU SSC considers that possible TSE risks associated with tallow will result from protein impurities that may be present in the end product, because it is expected that TSE agents, if present in the product, would be associated with those impurities (Ref 28).

Issue: One commenter specifically supported the proposed provisions regarding edible tallow. Another commenter supported the proposed conditions except for the requirement that the intestines of the bovine had been removed at slaughter and the requirement that the bovine not have been fed ruminant protein other than milk protein. Instead, said the commenter, the requirement regarding feeding should refer instead to adherence to the CFIA and FDA feed bans. Another commenter stated that importation of all tallow should be prohibited. Several commenters stated that tallow should be accepted from BSE minimal-risk regions only if all SRMs were removed from the bovines from which the tallow was derived, segregation of the tallow from potentially risky materials is carried out in the region of origin, and the tallow is accompanied by certification by the owner of the animal from which the animal was derived that the animal was not fed ruminant protein. Other commenters recommended that there be no restrictions on the importation of tallow from BSE minimal-risk regions. One commenter stated that it was not scientifically defensible to require that tallow not be derived from an animal that died otherwise than by slaughter. Several commenters stated that, under the OIE Code, tallow is considered protein-free if it contains no more than 0.15 percent impurities, and that protein-free tallow should be allowed importation without further restriction. Several commenters said such tallow should be allowed importation no matter what the BSE status of the region of origin. The commenters stated further that, even if tallow intended for food, feed, fertilizers, cosmetics, pharmaceuticals including biologicals, or medical devices is not protein-free, it should be allowed importation if (1) it came from bovines that were subject to ante-mortem inspection with favorable results, and (2) had not been prepared using SRMs. One commenter also recommended that derivatives of non-protein-free tallow intended for the uses listed above be allowed importation without restriction.

Response: In this rule, we are making some changes to the requirements we proposed regarding the importation of tallow from BSE minimal-risk regions. We agree that protein-free tallow will not pose a risk of introducing BSE into the United States. As noted above, this conclusion is consistent with the recommendation in the OIE Code that protein-free tallow (maximum level of insoluble impurities of 0.15 percent in weight) be considered a commodity that may be imported without restriction, regardless of the BSE status of the exporting country. Therefore, we are removing the restrictions we proposed for the importation of protein-free tallow from BSE minimal-risk regions that could be used in animal feed, except for the requirements that the tallow be accompanied by certification that it is protein-free and, if arriving at a land border port, that it arrive at a port listed § 94.19(g). Additionally, with the commenter who recommended segregation of the tallow from any other risky products for BSE. We are also adding language to § 95.4(f) to indicate that the listed importation requirements for tallow are for tallow imported into the United States from BSE minimal-risk regions as listed in § 94.18(a)(3).

Therefore, in this final rule, § 95.4(f) authorizes the importation of tallow from BSE minimal-risk regions that could be used in animal feed, provided the tallow is accompanied by official documentation certifying that: (1) The tallow is protein-free tallow (maximum level of insoluble impurities of 0.15 percent in weight); and (2) after processing, the tallow was not exposed to or commingled with any other animal origin material. The requirements of our proposal pertaining to the port of arrival of the shipment and the requirement that each shipment be accompanied by an original certificate will remain. We intend to address the importation of tallow from regions other than BSE minimal-risk regions in future rulemaking.

Under the existing regulations in § 95.4, tallow derivatives are allowed importation from regions listed in § 94.18(a) as regions affected with BSE or that pose an undue risk of BSE. Likewise, under this rule, tallow derivatives from BSE minimal-risk regions will be eligible for importation into the United States.

Tallow and Offal Testing and Inspection

Issue: One commenter requested that our rule include the methods that will be used to test or inspect at the border any tallow or offal intended for importation into the United States from a BSE minimal-risk region to ensure that BSE-contaminated tallow or offal does not enter this country.

Response: For tallow or offal subject to the FMIA to enter the United States, it must originate from a country where the inspection system has been determined by FSIS to be equivalent to the U.S. meat inspection system. As part of its equivalence determination, FSIS requires that certified establishments in foreign countries eligible to export meat product to the United States develop, implement, and maintain written procedures for the removal, segregation, and disposition of materials identified by FSIS as SRMs, to ensure that such materials are not used for human food. Thus, the use of SRMs in the production of edible tallow and offal imported into the United States is prohibited. When shipments reach the U.S. border, they are subject to reinspection by FSIS. Such reinspection can include review of documentation, product examination, and laboratory testing. If the product is not covered under the FMIA, FDA

enforces its import restrictions applicable to those products.

Issue: One commenter recommended that the importation of any organ meat into the United States from a BSE minimal-risk region be prohibited.

Response: We are making no changes based on this comment. Some bovine tissues have demonstrated infectivity, whereas others have not. Tissues that have demonstrated infectivity are designated as SRMs and must be removed and disposed of as inedible. The small intestine of all cattle must also be removed and disposed of as inedible to ensure effective removal of the distal ileum. There is no BSE basis for prohibiting the importation of other tissue, including other tissue that is organ meat.

Sheep Casings

Issue: As discussed above, in this rule we are adding the category of BSE minimal-risk regions to the existing categories in § 94.18(a) of regions where BSE exists or that present an undue risk of BSE. Several commenters stated that, although our proposed rule would allow the importation of live sheep from BSE minimal-risk regions under certain conditions, there was no mention of amending part 96, which, among other things, prohibits the importation of casings (bovine or other ruminant casings) from any region listed in § 94.18(a). Because BSE minimal-risk regions will be listed in § 94.18(a), said the commenters, this will preclude the importation of sheep casings from BSE minimal-risk regions. The commenters stated that APHIS should address this inconsistency by amending § 96.2(b) to allow the importation of casings from BSE minimal-risk regions such as Canada.

Response: The commenters are correct that we did not address the importation of sheep casings from BSE minimal-risk regions in the proposed rule. We agree that sheep casings imported from a BSE minimal-risk region that are derived from sheep that were less than 12 months of age when slaughtered and that were from a flock subject to a ruminant feed ban equivalent to the requirements of FDA pose no more of a BSE risk than live sheep that meet the same conditions imported from such a region. Therefore, we are providing in § 96.2(b) that sheep casings from a BSE minimal-risk region that are derived from animals less than 12 months of age when slaughtered and that were from a flock subject to a feed ban equivalent to FDA's may be imported into the United States from a BSE minimal-risk region, provided the casings are accompanied by an original certificate stating those conditions have been met. The certificate must be written in English. The certificate must be issued by an individual authorized to issue such a certificate under the provisions of current § 96.3, which contains provisions for the issuance of certificates of animal casings from any foreign region. Upon arrival of the sheep casings in the United States, the certificate must be presented to an authorized inspector at the port of arrival. We are also adding a new paragraph (d) to § 96.3 to provide that the required certification for sheep casing imported from BSE minimal-risk regions must be included on the certification required by that section.

Bile

Issue: One commenter expressed concern that our proposed rule did not include provisions for the importation of bile from BSE minimal-risk regions. The commenter stated that bile is synthesized in the liver and recycled from the intestines back to the liver before being stored in the gall bladder. In addition, said the commenter, bile has very low protein content, has never been found to contain any BSE agent, and has been classified by the EU in the same low-risk category as milk and liver. The commenter stated that if APHIS will allow the importation of bovine liver without regard to the age of the animal from which it was derived, then the importation of bile should also be allowed, because the process of collecting bile includes removing the gall bladder from the liver before emptying it.

Response: The opinion of the European Union Scientific Steering Committee (Ref 29) includes bile in category IV—no detectible infectivity in a BSE-infected animal. However, because we did not address the importation of bile from a BSE minimal-risk region in our risk analysis for the proposed rule, we are not including bile in this final rule as a product eligible for importation from a BSE minimal-risk region. However, we intend to address the importation of ruminant bile from such regions in separate rulemaking.

Blood Products

Issue: One commenter recommended that APHIS allow the importation of blood products, including serum and products derived from serum, from a BSE minimal-risk region, provided the product is accompanied by certification by the exporting country that the blood was collected at the time of slaughter in a hygienic manner from either (1) a fetus or an animal that is less than 30 months of age; or (2) an animal older than 30 months of age that was either a live animal or stunned with a non-penetrating stunning device. The commenter noted that APHIS stated in its proposed rule that infectivity has not been detected in bovine tissues apart from the distal ileum until at least 32 months post-exposure. As a result, said the commenter, the probability that blood collected from animals less than 30 months of age at slaughter might be contaminated with BSE is negligible. The commenter stated that, for animals older than 30 months, the potential that blood might be contaminated with BSE infectivity following stunning can be effectively mitigated by ensuring that blood is collected either from animals slaughtered with a non-penetrating stunning device or from live animals.

Response: We did not address the importation of blood and blood products from BSE minimal-risk regions in the risk analysis we conducted for this rulemaking. Currently, conclusive science is lacking regarding the risk of BSE transmission by blood and blood products. Scientific studies researching TSE infectivity and blood have to date been limited to mouse bioassay. In those studies, infectivity in mice was not demonstrated (Ref 30). However, in studies with sheep, TSE infectivity in blood was demonstrated. To date, there are no known cattle studies researching TSE/BSE infectivity and blood.

Fetal Bovine Serum

Issue: A number of commenters recommended that APHIS allow the importation of fetal bovine serum (FBS) from BSE minimal-risk regions. Commenters stated that FBS is collected from fetuses, which, if allowed to develop into calves, would meet the under-30-months-of-age criterion of our proposal. Further, it is collected under a controlled system that ensures that it is not exposed to SRMs. One commenter stated that there have been no documented cases of transmission of BSE from cow to fetus during pregnancy.

Response: We are making no changes based on the comments. There is no conclusive data to indicate whether BSE is transmitted by blood or blood products such as FBS. The commenters did not identify the uses to which FBS would be applied. Were serum to contain infectious levels of the BSE agent, it might pose a risk for livestock if used in certain applications such as bovine vaccine production or bovine embryo transfer, or for other products brought into direct exposure with ruminants. Unless and until there is conclusive data to demonstrate that BSE is not transmitted by blood and would

not be a contaminant of FBS, we consider it necessary to prohibit the importation of FBS from BSE minimal-risk regions. However, we realize that more information is necessary on this subject, and we are working with FDA to assess the risk from FBS and related materials and their various uses.

Issue: One commenter recommended that, because of the need for FBS and the potential serious consequences of BSE in FBS, APHIS should pursue rulemaking to allow the importation of FBS under certain conditions from countries affected with foot-and-mouth-disease.

Response: We have taken the commenter's guideline under consideration, but consider it outside the scope of this rulemaking, and are making no changes based on the comment in this final rule.

Gelatin and Collagen

Issue: In § 94.19(j) of our proposal, we proposed to allow the importation of gelatin from BSE minimal-risk regions, provided the gelatin was derived from the bones of bovines that were less than 30 months of age when slaughtered and that were not known to have been fed ruminant protein other than milk protein during their lifetime. One commenter stated that those restrictions on the importation of gelatin were unnecessary and that the only requirement for the importation of gelatin from a BSE minimal-risk region should be that the bones used in the production of gelatin did not include the skull or vertebral columns from animals older than 30 months of age.

Response: Consistent with the changes we discuss above under the heading ''Age of Animals from which Meat is Derived'' regarding the effectiveness of the removal of SRMs in mitigating BSE risk, we are removing the proposed requirement that the gelatin be derived from the bones of bovines less than 30 months of age when slaughtered and are requiring instead that the gelatin be derived from the bones of bovines from which the SRMs were removed. Also, consistent with the changes we discuss above under the heading ''Certification of Feed Ban Compliance,'' we are revising our provisions regarding gelatin from BSE minimal-risk regions to require that the bovines from which the gelatin was derived were subject to a ruminant feed ban equivalent to that established by FDA.

We are also adding language to the regulations to clarify how the provisions regarding gelatin in § 94.19(f) of this final rule differ from the existing provisions regarding gelatin in § 94.18. The existing provisions in § 94.18 have allowed the importation of gelatin under import permit from regions in which BSE exists or that pose an undue risk of BSE. APHIS issues such a permit only after determining that the gelatin will be imported only for use in human food, human pharmaceutical products, photography, or some other use that will not result in the gelatin coming in contact with ruminants in the United States. We are making no changes to those provisions. The provisions in § 94.19(f) of this final rule regarding gelatin from BSE minimal-risk regions allow for the importation of certain gelatin over and above that eligible for importation under § 94.18(c)—*i.e.*, if the gelatin from a BSE minimal-risk region meets the conditions of § 94.19(f), it will not be limited to uses that will not result in the gelatin coming in contact with ruminants in the United States. To clarify this, we are identifying the gelatin addressed in this final rule in § 94.19(f) as gelatin not allowed importation under § 94.18(c). Additionally, we are making a nonsubstantive wording change to § 94.18(b) to clarify that the only gelatin derived from ruminants from regions listed in § 94.18(a)(1) or (a)(2) as regions in which BSE exists or that pose an undue risk of BSE that is eligible for importation is gelatin that meets the requirements of § 94.18(c).

Issue: One commenter recommended that collagen also be addressed in the regulations and be allowed importation from a BSE minimal-risk region under the same conditions as gelatin.

Response: Collagen derived from hides is not considered a risk (hides are exempt from most restrictions). However, collagen can be derived from bones. In addition, collagen is not subjected to the same extreme conditions of processing as is gelatin. We believe there is a need for more research regarding the risk from bone-derived products that have the potential for direct exposure to ruminants and are making no changes based on the comment.

Issue: One commenter requested that this final rule confirm there will be no restrictions on the importation of gelatin and collagen from hides or skins.

Response: According to the OIE guidelines, hide-derived products should be allowed unrestricted entry because they do not pose a BSE risk. At this time, we allow the importation of hide-derived gelatin and collagen under permit.

Issue: One commenter stated that all gelatin derived from the bones of bovines should be prohibited importation into the United States because there have been instances of people contracting vCJD from gardening with bone meal.

Response: We are making no changes based on this comment. We assume the commenter linked gelatin and bone meal because both products are derived from bones.

In this rule, we are allowing the importation of gelatin from a BSE minimal-risk region only if the gelatin is derived from bovines from which SRMs have been removed in the exporting region, and, further, that the bovines from which the gelatin was derived were subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration.

To date, there is no known link between bone-derived gelatin and vCJD and we are unaware of any evidence that shows that handling bone meal can cause vCJD. Additionally, on January 9, 2004, the Centers for Disease Control issued a *Morbidity and Mortality Weekly Report* (Ref 31) that confirms that since 1996, surveillance efforts have not detected any cases of indigenous vCJD in the United States.

Importation of Animal Feed From Canada

Issue: Several commenters stated that the importation of feed that contains animal byproducts from Canada should be prohibited. Another commenter addressed the requirements in part 95 of the regulations regarding certification for the importation of products used in animal feed into the United States. The commenter stated that, because obtaining original certifications for each load of feed can be time-consuming and expensive for feed mills not located close to government veterinary certification services, the Canadian regulations allow faxed copies of veterinary certificates to accompany loads of feed, with the understanding that the feed mill will keep a copy of the original on file once it arrives at the mill. The commenter requested that APHIS honor this form of certification for feed containing animal protein, or, at a minimum, for feeds containing only vitamins and minerals as the only animal source of ingredients in the feed.

Response: We are making no changes based on these comments. We did not propose any changes to the provisions in 9 CFR part 95 regarding the importation of meat meal and bone meal for animal feed and consider the comments to be outside the scope of the proposal.

Issue: One commenter recommended a prohibition on the importation of feed and feed byproducts from either of the

two Canadian feed mills that have been associated with BSE-infection in that country, unless such feed is submitted to routine FDA inspection.

Response: We do not consider it practical or necessary to place restrictions on individual feed mills that may have handled high-risk material more than 5 years ago. We consider current USDA and FDA import restrictions on processed animal proteins from BSE countries, including minimal-risk countries, adequate to provide the necessary protection to public and animal health.

Plate Waste and Poultry Litter

Issue: One commenter stated that plate waste and poultry litter have the potential of exposing ruminants to BSE infection and should be among the materials prohibited in feed for ruminants.

Response: This final rule requires that the ruminant feed ban in BSE minimal-risk regions be equivalent to that of FDA in the United States. As discussed above in section III. C. under the heading ''Measures Implemented by FDA,'' in an advance notice of proposed rulemaking issued jointly by FDA, FSIS, and APHIS on July 14, 2004, FDA requested information to help it determine the best course of action with regard to the ruminant feed ban.

Cooperative Service Agreements

Issue: Although § 95.4 restricts the importation of animal protein, tankage, fat, glands, tallow other than tallow derivatives, and serum from regions where BSE is known to exist or that present an undue risk of BSE, § 95.4(c) exempts certain materials from the restrictions under certain conditions. One of the conditions for such an exemption is that the facility where the materials are processed and stored have entered into a cooperative service agreement with APHIS to pay for the costs of an APHIS veterinarian to make annual inspections of the facility. In our proposed rule, we proposed that, for facilities in a BSE minimal-risk region, in lieu of annual APHIS inspections of the facility, such inspections could be carried out by the government agency responsible for animal health in the region, although APHIS would reserve the right to inspect as necessary. One commenter stated that cooperative service agreements should be required for all countries in order to maintain uniformity.

Response: We are making no changes based on the comment. In order for APHIS to consider a region eligible for BSE minimal-risk status, APHIS would have evaluated the region's veterinary infrastructure as well as the risk of BSE in the region. This rule requires that equivalent inspections be performed by the veterinary authorities of such minimal-risk regions, thereby relieving the need for cooperative service agreement cost recovery mechanisms for APHIS to conduct the site inspections. As noted, however, APHIS reserves the right to conduct site inspections as needed.

Issue: Several commenters addressed the fact that the FDA ban on feeding ruminant products to ruminants in this country has included an exemption allowing mammalian blood and blood products to be used in ruminant feed. One commenter, referring to the APHIS proposed requirement that ruminants imported into the United States not have been feed ruminant protein other than milk protein, asked how APHIS will handle cattle that were fed blood meal before FDA announced in January 2004 that it will eliminate the blood and blood product exemption. Another commenter stated that the proposed rule contained inadequate verification that a similar tightening of restrictions will be taken by Canada.

Response: At this time, both the United States and Canada allow the use of bovine blood and blood products in ruminant feed. Therefore, the feeding requirements for ruminants in Canada are currently equivalent to those here in the United States. We are requiring in this final rule that bovines imported from a BSE minimal-risk region have been fed in accordance with the feed requirements that were in effect in the United States at that time. Therefore, herd owners in minimal-risk regions will have to meet any new U.S. feed requirements in order for their animals to be eligible for export to the United States. As discussed above in section III. C. under the heading ''Measures Implemented by FDA,'' FDA has requested additional information to help it determine the best course of action regarding the feed ban.

Importation Based on Origin of Meat

Issue: One commenter recommended that APHIS should allow the importation of (1) meat that originated in the United States and was processed in a BSE minimal-risk region, and (2) meat that originated in a region not listed in § 94.18 (a)(1) or (2) as a BSE-affected or undue-risk region.

Response: Even before this final rule, the regulations in § 94.18 allowed for the situations described by the commenter by allowing the importation into the United States of meat, meat byproducts, and meat food products derived from ruminants that had never been in a region listed in § 94.18(a). That provision would allow the importation of U.S. origin meat that was processed in a BSE minimal-risk region. However, the commodities must meet all other applicable importation conditions in part 94 of the regulations.

E. Risk Basis for the Classification of Canada

Of the 3,379 comments that APHIS received on the proposed rule, approximately 15 questioned the risk basis for the proposed classification of Canada as a minimal-risk region for BSE. These comments focused largely on the nature of our risk analysis; APHIS' use of the Harvard-Tuskegee Study; whether the risk analysis provided sufficient data and adequately considered uncertainties; the prevalence of BSE in Canada; and whether existing regulations should be maintained. The issues raised by these commenters are discussed below by topic.

Nature of the Risk Analysis

Issue: One commenter stated that USDA has not presented an appropriate risk analysis that supports the proposed action to allow the importation of ruminants and ruminant products from Canada. The commenter said that the risk analysis presents opinions, judgments, and conjectures rather than relevant data and the results of transparent and sound quantitative analysis.

Response: We disagree with the comments. We believe that our risk analysis provides a solid basis for action by the Secretary under the Animal Health Protection Act (7 U.S.C. 8301–8317), USDA's statutory authority for animal health regulations, and that it meets Federal guidelines and requirements related to rulemaking, including the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and Executive Order 12866, Regulatory Planning and Review.

Experts in the field of risk analysis generally agree that different methods of risk assessment are appropriate in different circumstances. OIE Guidelines for Import Risk Analysis involving trade in animals and animal products (Ref 19), for example, recognize both qualitative and quantitative risk assessment methods as valid. Likewise, Codex Alimentarius (Ref 32), the international standard-setting organization for food safety, encourages the use of quantitative information in risk analysis to the extent possible, but provides that food safety risk analysis may be either qualitative or quantitative.

APHIS' risk analysis, which relied on both qualitative and quantitative

information, including the Harvard-Tuskegee Study's quantitative analysis of the risk of BSE spreading if introduced into the United States (Ref 3), provided the information necessary to make informed, scientifically sound, well-reasoned decisions for our action with respect to Canada.

Issue: The same commenter maintained that APHIS' risk analysis fails to answer questions about the impacts of the proposed rule on human health, including: What is the probable change to human health risk (*i.e.,* frequency and severity) that would be caused by each alternative risk management option considered (*e.g.,* reopening the border to less restricted imports, importing under different types of restrictions, keeping the status quo), and how certain is the change in health risk caused by each proposed action? Specifically, the commenter stated that the risk analysis does not provide ''any quantitative or substantive qualitative estimation of the frequency and severity of adverse health effects from the different decision alternatives, beyond undefined adjectives such as 'low,' offered without any clear explicit interpretation or any explicit verifiable derivation from data.''

The commenter stated that these questions, and analogous questions for animal health, are usually considered essential components of a health risk assessment. For example, said the commenter, a Joint United Nations Food and Agricultural Organization/World Health Organization Expert Consultation ''defines risk characterization (corresponding approximately to what USDA terms 'risk estimation') as the 'integration of hazard identification, hazard characterization [*i.e.,* dose-response or exposure-response relation] and exposure assessment into an estimation of the adverse effects likely to occur in a given population, including attendant uncertainties.' '' The commenter also pointed to a similar definition used by the Codex Alimentarius Commission: ''The qualitative and/or quantitative estimation, including attendant uncertainties, of the probability of occurrence and severity of known or potential adverse health effects in a given population based on hazard identification, hazard characterization, and exposure assessment.'' The commenter asserted that ''qualitative reassurances do not constitute an adequate risk analysis.''

The commenter also stated that the Harvard-Tuskegee Study found ''available information inadequate'' to assess the risk of U.S. consumers developing vCJD from cows or meat. The commenter said that when maintaining the status quo will have no adverse impact on public health, and a proposed change could have a negative impact on public health, sound public policy dictates that the change not be made until all information needed to adequately assess the public health risk is available.

Response: The commenter suggested that the risk analysis for the rulemaking answer very specific questions about the precise impacts of the rule on human health. As the Harvard-Tuskegee Study noted, the information necessary to quantitatively assess the risk of humans contracting vCJD as a result of consuming BSE-contaminated food products is not available (Ref 33). Thus, the Harvard-Tuskegee Study quantified potential human exposure, but did not estimate how many people might contract vCJD from such exposure. That does not mean, however, that there is insufficient information about the potential impacts of the rule on human health. The Harvard-Tuskegee Study concluded that only a small amount of potentially infective tissues would likely reach the human food supply and be available for human consumption. As explained above, that amount was based on conditions as they existed in 2001, before safeguards implemented recently by FSIS and FDA, including prohibitions on the use of air injection stunning devices at slaughter and prohibitions on the use of nonambulatory cattle and SRMs in human food. These newly implemented safeguards, as well as additional information that indicates that compliance with feed restrictions in the United States is better than had been estimated, makes it far less likely that even small amounts of infective tissue would reach the human food supply and be available for human consumption. Further, we know that, despite estimates that more than 1 million cattle may have been infected with BSE during the course of the epidemic in the United Kingdom, which could have introduced a significant amount of infectivity into the human food supply, only 150 probable and confirmed cases of vCJD have been identified worldwide. This data suggests a substantial species barrier that may protect humans from widespread illness due to ingesting BSE-contaminated meat. This barrier suggests that it is unlikely that there would be any measurable effects on human health from small amounts of infectivity entering the food chain. We believe that this information allows an appropriate assessment of the effects of this rulemaking on human health.

Regarding the commenter's assertion that our risk analysis lacked essential components and provides only qualitative assurances, we disagree. As explained earlier, APHIS analyzed the risk of BSE being introduced into the United States through the importation of live ruminants and ruminant products and byproducts from Canada under the proposed rule. In doing so, we drew on a number of sources of information, including the Harvard-Tuskegee Study, which, as noted, specifically and quantitatively assessed the consequences of an introduction of BSE.

APHIS' risk analysis began with identifying the hazard as ''the BSE risk that might be posed by importation of designated commodities and animals into the United States from Canada.'' Carefully scrutinizing both qualitative and quantitative information, we characterized the hazards to animal health, public health, the environment, and trade and evaluated the likelihood that U.S. livestock would be exposed to infectious levels of BSE from any of the commodities that would be allowed into the United States under the proposed rule.

Based on the hazard identification, hazard characterization (referred to in our risk analysis using the OIE terminology, ''release assessment''), and exposure assessment, APHIS' risk analysis then estimated the adverse effects likely to occur—that is, we characterized the risk. The hazard identification, release assessment, and exposure assessment clearly indicated that it is unlikely that infectious levels of BSE would be introduced into the United States from Canada with any of the commodities included in the assessment, and that, even if the BSE agent were introduced into the United States, it would be extremely unlikely to enter commercial animal feed and thereby infect U.S. cattle or to result in human exposure to the BSE agent.

This conclusion was based on multiple factors, each of which reduces risk. These factors include the low number of infected animals or products that might conceivably be imported into the United States from Canada even without the mitigations applied by this rule, given the import and feed restrictions in place in Canada; the low reported incidence rate in that country coupled with Canada's active surveillance program—both of which satisfy and exceed the OIE guideline for a minimal BSE risk country or zone; the further reduction in risk associated with imports as a result of the mitigation measures imposed by this rule; the very

low likelihood of tissue from an infected animal entering the U.S. animal feed chain or the human food chain as a result of past and recent safeguards imposed by USDA and FDA on slaughter practices, the prohibitions of nonambulatory cattle and SRMs in human food, and animal feed restrictions, both in Canada and the United States; and the very low likelihood that any such tissue would contain infectious levels of the BSE agent, and be present in sufficient quantities in feed consumed by susceptible animals to cause infection.

Issue: The same commenter stated that the Secretary's own advisory committee cautioned against making BSE-related regulatory decisions until a more thorough scientific risk analysis is completed. The commenter cited the Report of the Secretary's Advisory Committee on Foreign Animal Diseases, Measures Related to Bovine Spongiform Encephalopathy in the United States, February 13, 2004.

Response: The February 13 report to the Secretary cited by the commenter (Ref 34) discusses a report prepared by an international review team (IRT) that, at the Secretary's request, reviewed the U.S. response to the case of BSE in Washington State and recommended measures that could be taken to provide additional public or animal health benefits. The IRT, which was established as a subcommittee of the Secretary's Advisory Committee, delivered its report to the Secretary's Advisory Committee on February 4, 2004. The IRT report was titled ''Measures Relating to BSE in the United States'' (Ref 35). The February 13 report said that the IRT's conclusions about the level of BSE likely to be circulating in the United States and North American cattle populations were different from those of the Harvard-Tuskegee Study. The February 13 report stated, ''The Committee must have this issue of risk resolved prior to completing its recommendations to the Secretary. It is imperative that the Secretary has the best available science and more precise risk assessments in order to make appropriate regulatory decisions.'' The regulatory decisions referred to in the report involve decisions by the Secretary about whether and how to respond to recommendations of the IRT, particularly those related to exclusion of SRMs and non-ambulatory cattle from human and animal food supplies in the United States. The IRT also made recommendations related to surveillance of U.S. cattle for BSE, laboratory diagnosis of samples taken for surveillance purposes, animal identification, and other domestic measures, such as educational programs, that could provide additional public or animal health benefits. None of the IRT's recommendations pertained to import restrictions. Accordingly, the specific statement cited by the commenter is not relevant to this rulemaking. We have responded to and are in the process of evaluating the balance of the committee's recommendations. We, of course, agree that sound regulatory decisions must be based on a scientifically sound risk assessment and the best available science, and we believe we have adhered to that standard in this rule.

APHIS' Use of the Harvard-Tuskegee Study

Issue: The same commenter maintained that the Harvard-Tuskegee Study was prepared for purposes other than to serve as support for a decision to allow the importation of live ruminants and ruminant products from Canada. Moreover, said the commenter, it was prepared before the BSE cases in 2003 and, even though the authors have updated their analysis, none of the simulation runs or analyses were specifically appropriate for the action that USDA propose, and none claimed to model the current situation in Canada. The commenter said that USDA does not explain how the Harvard-Tuskegee Study, which did not use Canadian data, can even be used as an analytic tool to support reclassifying Canada's risk status. At best, said the commenter, the Harvard-Tuskegee Study should be viewed as a first-cut ''screening'' risk analysis, whose conclusions suggest the need for additional refined risk analyses.

Response: We agree that the Harvard-Tuskegee model is not appropriate for modeling the situation in Canada. We did not employ the model to that end. Rather, we used the model to evaluate the likelihood that BSE would spread if introduced into the United States from Canada. As explained previously, the Harvard-Tuskegee Study analyzed the risk that BSE would spread if introduced into the United States. The Harvard-Tuskegee model doesn't specify the external source of the infectivity, only its size and timing. Therefore, it is relevant to evaluating the consequences of introducing BSE into the United States from any country. In fact, because of the similarities between the measures in place in Canada and the United States, when CFIA conducted its assessment of the risk of BSE in Canada, it used the Harvard-Tuskegee model as a base.

APHIS conducted a separate analysis to determine the risk of BSE being introduced into the United States through live ruminants or ruminant products or byproducts imported from Canada, and concluded that it is unlikely that infectious levels of BSE would be introduced into the United States from Canada as under the proposed rule. Drawing on the Harvard-Tuskegee Study, then, APHIS also concluded that, even if the BSE agent were introduced into the United States, it would be extremely unlikely to enter commercial animal feed and thereby infect U.S. cattle, or to result in human exposure to the BSE agent. This is where the Harvard-Tuskegee Study is useful and directly applicable to this rulemaking.

As discussed above, USDA commissioned the HCRA and the Center for Computational Epidemiology at Tuskegee University to conduct what we now refer to as the Harvard-Tuskegee Study in 1998. The objective of the Harvard-Tuskegee Study was to analyze and evaluate the measures implemented by the U.S. Government to prevent the spread of BSE in the United States and to reduce the potential exposure of Americans to the BSE agent. The Harvard-Tuskegee Study reviewed available scientific information related to BSE and other TSEs, assessed pathways by which BSE could potentially spread in the United States, and identified measures that could be taken to protect human and animal health in the United States.

The Harvard-Tuskegee Study evaluated the potential for the establishment and spread of BSE in this country if 10 infected cows were introduced into the United States. The Harvard-Tuskegee Study concluded that, if introduced, BSE is extremely unlikely to become established in the United States (Ref 36). This conclusion was based on the estimation that ''the disease is virtually certain to be eliminated from the country within 20 years after its introduction'' under the model's base case assumptions (*i.e.*, the most likely scenario) assuming 10 infected cattle were introduced into the United States. The study's conclusions also were based on the preventive measures already in place in the United States at the time the study was conducted. The Harvard-Tuskegee Study also concluded that, should BSE enter the United States, only a small amount of potentially infective tissues would likely reach the human food supply and be available for human consumption. For the purpose of quantifying both animal and human exposure to the BSE agent, the Harvard-Tuskegee Study expressed the amount of infectivity in terms of cattle oral

ID_{50}s. A cattle oral ID_{50} is the amount of infectious tissue that would be expected to cause 50 percent of exposed cattle to develop BSE. By tracking cattle oral ID_{50}s in the tissues of cattle through slaughter, processing, rendering, animal feeding, and human consumption, the model can evaluate the human exposures and animal health consequences of introducing BSE in imported animals or meat.

The Harvard-Tuskegee Study concluded that, based on conditions as they existed in 2001, the three practices that could contribute most to either human exposure or the spread of BSE, should it be introduced into the United States, were noncompliance with FDA's feed restrictions, rendering of animals that die on the farm and illegal diversion or cross-contamination of the rendered product in ruminant food, and inclusion of high-risk tissue, such as brain and spinal cord, in human food. As noted earlier in section III. C. in the discussion of Federal actions since December 2003, FSIS and FDA have implemented comprehensive safeguards that both agencies have concluded provide exceptionally effective protection to both human and animal health, and a higher level of protection than contemplated in 2001.

Even without these additional safeguards, however, the Harvard-Tuskegee Study concluded that, based on conditions as they existed in 2001, if 10 infected cows were introduced into the United States, only five new cases of BSE in cattle would be expected. In fact, the Harvard-Tuskegee Study predicted that there was at least a 50 percent chance that there would be no new cases at all. The extreme case (95th percentile of distribution) predicted 16 new cases of BSE in cattle and 180 cattle oral ID_{50}s available for potential human exposure over 20 years. Even the highest of these predictions indicate a small number of cases of BSE and extremely small potential for human exposure. With the additional safeguards implemented in the United States in 2004 (*i.e.*, the FSIS requirement that SRMs be removed from all cattle at slaughter and the condemnation of non-ambulatory disabled cattle presented for slaughter), this already small potential is reduced even further. This outcome is dramatically different from the experience in the United Kingdom, where it is estimated that there were nearly 1 million infected animals and millions of cattle oral ID_{50}s were available for potential human exposure (Ref 36).

In all cases, even the most extreme, the Harvard-Tuskegee Study concluded that the United States is highly resistant to the spread of BSE or a similar disease and that BSE is extremely unlikely to become established in the United States (where establishment is defined as continued occurrence after 20 years). Thus, APHIS' statement that the Harvard-Tuskegee Study found that, even if BSE were to enter the United States, it would be unlikely to spread, is an accurate representation of the Study's findings. Again, it must be emphasized that the Harvard-Tuskegee Study did not factor in the additional safeguards in place in the United States today.

As mentioned earlier in connection with our revised risk analysis, the HCRA recently updated its model using updated estimates for some of the model parameters, based on new data about compliance with feed restrictions. The results are even lower estimates of risk than previously predicted. This recent revision is discussed in more detail in the response to the next comment.

Issue: The same commenter maintained that APHIS' risk analysis represented the Harvard-Tuskegee Study as being more definitive and reassuring than it really is by stating that the Study found, even if BSE were to enter the United States, that it would be unlikely to spread. The commenter said that APHIS gave inadequate consideration to worst case scenarios, which the commenter referred to as ''low-frequency, potentially high health consequence events,'' and to the sensitivity analysis in the Harvard-Tuskegee Study.

The commenter stated that the Harvard-Tuskegee Study reports that its sensitivity analysis indicates that the predicted number of additional cattle infected is particularly sensitive to the assumed proportion of ruminant meat-and-bone meal (MBM) that is mislabeled and the assumed proportion of properly labeled MBM that is incorrectly fed to cattle. The commenter stated that the predicted human exposure is likewise sensitive to these parameters. The commenter stated that assigning worst case values to even two of the three sets of parameters (demographic assumptions and MBM production; feed production; and feed practice) is sufficient to shift the conclusion based on the base case scenario that ''imported BSE cases will probably die out'' to ''imported cases will probably start an epidemic.'' The commenter further stated that, even if a subset of the key drivers were assigned values within its allowed uncertainty range, spread of BSE is highly likely, which suggests the need for a much more thorough risk analysis. The commenter stated that the findings of the Harvard-Tuskegee Study should have driven USDA to commission additional refined data gathering, development of more refined models, and consequent refined risk analysis.

Response: APHIS is confident that it appropriately represented the Harvard-Tuskegee Study as demonstrating that BSE would be unlikely to spread even if it were to be introduced into the United States.

Sensitivity analysis evaluates the degree to which changes in the data used in a model affect the model's results. The Harvard-Tuskegee Study used a sensitivity analysis to mathematically evaluate the extent to which variations in input data affected the modeled results, including the likelihood that BSE would spread if introduced, rather than die out. The Harvard-Tuskegee Study evaluated the effects of changes when one model parameter was assigned a worst case value but other model parameters were held at values assigned in the base case, as well as the effects of assigning worst case values to multiple model parameters at the same time. (The base case values represent the Harvard-Tuskegee Study's, and USDA's, best estimates of what is likely to be representative of conditions in the United States. Extreme case scenarios are those in which some or all model parameters are given worst case values; in the worst of the extreme case scenarios, all model parameters are simultaneously assigned worst case values.)

We evaluated the Harvard-Tuskegee Study's sensitivity analysis and extreme case scenarios and used the results as a key factor in reaching our conclusion that the risk from importing Canadian animals and products is very low.

According to the Harvard-Tuskegee Study, changing the value assigned to most model parameters had only a limited influence on results. That is, even when they were assigned their worst case values, the results were not substantially different from what was predicted when all model parameters were assigned their base case values.

The model parameters that had the most significant effects on the Harvard-Tuskegee model results were: (1) The misfeeding rate (proportion of correctly labeled prohibited feed that is incorrectly administered to cattle); (2) the feed mislabeling rate (proportion of prohibited feed incorrectly labeled as nonprohibited); and (3) the render reduction factor (amount by which the rendering treatment reduces the amount of BSE infectivity).

When Harvard-Tuskegee conducted its original analysis in 2001,

establishing realistic bounds for the values of some of these model parameters was complicated by the limited amount of available information. For example, data on feed ban compliance indicated the fraction of facilities out of compliance with the feed ban regulations, but not the fraction of all prohibited material passing through noncompliant facilities. Second, the data did not differentiate between technical violations (*e.g.*, incorrect paperwork) and substantive violations. Harvard-Tuskegee therefore estimated the frequency of violations indirectly (Ref 36).

Simultaneously assigning estimated worst case values to the model's demographic model parameters (*i.e.*, proportion of animals that die on farm that are rendered, relative susceptibility vs. age for BSE in cattle, and the incubation period for BSE in cattle) and all MBM production, feed production, and feed administration model parameters at the same time resulted in a 75 percent chance that BSE would not become established in the United States. The ''upper tail of the distribution'' (*i.e.*, the 25 percent chance that BSE would spread in the worst of the worst case scenarios) is what concerned the commenter.

To reduce uncertainty about the importance of extreme case scenarios, we requested, as the commenter suggested, additional data gathering and refinement of the analysis. Specifically, we asked Joshua Cohen and George Gray at the HCRA in 2004 to refine its risk analysis to incorporate additional, more recent data on the mislabeling of products containing prohibited ruminant protein and the contamination of nonprohibited feeds with ruminant protein. Cohen and Gray ran the model using updated worst case values for model parameters related to ruminant MBM production and feed production. No new information on the rate of misfeeding was available, so Cohen and Gray continued to use the same value for misfeeding as had been used previously. However, because the misfeeding rate has the greatest influence on the predicted number of infected cattle following the introduction of BSE into the United States, Cohen and Gray ran multiple sets of simulations to determine how its value influenced the predicted results. Values tested included the original worst case value of 15 percent, as well as a range of values below that, from 0 percent to 12.5 percent.

Cohen and Gray used the most recent FDA data to estimate probabilities for mislabeling and contamination in MBM production (rendering) facilities and feed production facilities. Mislabeling occurs when a producer fails to label a product with prohibited material (*e.g.*, ruminant material) as ''Do not feed to cattle or other ruminants.'' Contamination may occur when a prohibited product is incorporated into a nonprohibited product, or when prohibited and nonprohibited products are handled by the same facility without proper segregation or cleaning and disinfection.

Since the publication of the 2001 Harvard-Tuskegee Study, FDA has collected and distributed additional information on compliance with its feed restrictions that quantifies the number of facilities out of compliance and provides information on the nature of violations discovered. With respect to the number of noncompliant facilities, FDA's databases do not report the size of the facilities (*i.e.*, amount of material produced), so Cohen and Gray conservatively estimated that noncompliant facilities were the same size on average as compliant facilities. With respect to data on the nature of violations discovered, Cohen and Gray relied on data collected by FDA before September 2003, because it provides better detail on the nature of violations than data collected afterward. Data collected before September 2003 is reported as the total number of firms with at least one violation and designates each violation as a case in which (1) products were not labeled as required; (2) the facility did not have adequate systems to prevent commingling, or (3) the facility did not adequately follow recordkeeping regulations. More recent data do not provide this level of detail.

Cohen and Gray reported their results in a June 18, 2004, memorandum to the Agency (Ref 37). The following table (Table 2 in the analysis) shows the original and revised assumptions for rates of contamination and mislabeling at MBM production (rendering) facilities and feed production facilities.

ASSUMPTIONS FOR MISLABELING AND CONTAMINATION

Parameter	MBM production			Feed production		
	Base case 2003 [a] (percent)	Worst case 2003 [a] (percent)	Revised worst case [b] (percent)	Base case 2003 [a] (percent)	Worst case 2003 [a] (percent)	Revised worst case [b] (percent)
Probability of contamination	14	25	1.8	16	16	1.9
Proportion of prohibited material transferred to nonprohibited material per contamination event	0.1	1	1	0.1	1	1
Mislabeling probability	5	10	2.3	5	33	4

[a] Values from Cohen *et al.* (2003)
[b] Values developed for the 2004 assessment.

This table shows that, not only are the revised worst case estimates for certain of the model parameters much lower than the original worst case estimates, they are also lower than the base case estimates.

The predicted results based on the revised estimates show, with 95 percent confidence, that BSE will not spread if the misfeeding rate is 7.5 percent or less. Even when higher misfeeding rates are assumed, however, the results indicate that BSE spread would be very slow.

Using the terminology of the model, the value of R_0 determines whether the number of BSE infected cattle will increase or decrease over time and how rapidly. R_0 is calculated based on information put into the model, including information on the number of infected animals slaughtered, the amount of infectivity remaining after rendering, and the quantity of ruminant MBM that is consumed by cattle. Values of R_0 greater than 1 indicate an outcome where the number of infected animals will increase; values less than 1 indicate an outcome where the disease will decrease and eventually disappear. The degree to which R_0 is greater than or less than 1 is a measure of the rapidity with

which the disease will increase or decrease.

Using even the highest estimated misfeeding rate of 15 percent, Cohen and Gray found that the value of R_0 is 1.23, only slightly higher than 1, which indicates a very slow rate of spread in the worst case. HCRA noted in its 2004 analysis that data to characterize the misfeed rate would be very useful and might make it possible to judge whether a misfeed rate of more than 7.5 percent is even plausible. Regardless, the risk of BSE spreading at even a very slow rate when the highest estimated misfeeding rate is used assumes that no further mitigation measures are taken that could prevent the disease from spreading in the cattle population. As mentioned previously, FDA continues to conduct inspections to monitor compliance of feed mills, renderers, and protein blenders with the 1997 feed ban rule and has expanded the scope of its inspections to monitor compliance with the 1997 feed ban rule.

Issue: The same commenter stated further that the Harvard-Tuskegee Study noted that a ''true validation of the simulation model * * * is not possible'' due to lack of direct, real world experience with importing BSE-infected cattle.

Response: Although the Harvard-Tuskegee model is not amenable to formal validation through controlled experiments that monitor and measure the consequences of introducing BSE into a country, Harvard-Tuskegee did test its model using a real world situation. As a test of the model's plausibility, Harvard-Tuskegee modeled the small BSE outbreak identified in Switzerland following the introduction of BSE infectivity from the United Kingdom. Working with experts in Switzerland, the authors identified appropriate values for model parameters necessary to appropriately characterize that country's practices and procedures and then simulated the introduction of BSE infectivity. The simulation took into account risk management actions, such as feed bans instituted by the Swiss. HCRA found that the model's predictions were ''reasonably close to empirical observations (Ref 38),'' providing confidence in the model's structure and approach.

Issue: The same commenter stated that the need for more refined quantitative risk analysis is further increased by the fact that the Harvard-Tuskegee Study did not thoroughly model spatial (or other) heterogeneity of BSE risks. In other words, the Study did not, in the commenter's words, consider the extent to which some herds are particularly susceptible, or if other rare conjunctions of unfavorable conditions occur in a small fraction (e.g., less than 1 percent of cases) of a large number of replicates (e.g., farms, processing runs, etc.) each year in the United States, then, by chance, combinations of worst case conditions may occur several times per year at random locations, leading to sporadic adverse animal and human health events. The commenter further stated that the Harvard-Tuskegee Study authors noted something similar, stating, ''Many of the simulation results are 'right skewed, meaning that the average value often exceeds the median (50th percentile) and can sometimes exceed even the 95th percentile.' '' The commenter stated that while the average case is reassuring, the extreme cases are not, and said that extreme cases need to be better quantified. Such analysis of low frequency, potentially high health consequence events from removing current restrictions on Canadian beef imports appears to have been omitted entirely from any of USDA's risk analyses, and is not fully addressed by the Harvard-Tuskegee Study, which indicates the possibility of such events but does not address them specifically for the Canadian situation, which was not the focus of that study.

In summary, the commenter stated, it is not concern about the average case or base case alone that should inform the risk analysis component of decision making in this case, but concern about the less likely but high consequence events and the upper tail of the risk distribution that should be the focus of substantive analysis. Unless some credible information is provided about how frequently adverse events are expected to occur with and without the proposed changes, it is impossible to make an informed judgment about whether the economic benefits outweigh the human and animal health risks.

Response: We disagree that the Harvard-Tuskegee Study did not model the heterogeneity of BSE risks sufficiently to allow it to provide meaningful information for decisions about this rulemaking. We believe that our risk analysis does provide sufficient information about the potential for adverse events.

Specifically, the Harvard-Tuskegee Study considered differential susceptibility of cattle with respect to age, as well as differential infectivity by duration of infection and differential exposure by usage type and age. In their June 18, 2004, memorandum Cohen and Gray conclude ''There is no evidence that susceptibility differs substantially among animals of the same age * * * [E]ven if susceptibility does vary * * *, there is no reason to believe the Harvard-Tuskegee model would substantially * * * underestimate the degree to which the disease would spread * * *'' (Ref 37).

The Harvard-Tuskegee Study did not consider heterogeneity in virulence of BSE strains, clustering of rare events within geographic areas or affected populations, or varying susceptibility between breeds of cattle. The commenter did not provide any evidence or data to show that such heterogeneities exist, and we are unaware of any such data or evidence that would allow the modeling suggested by the commenter. To our knowledge, there is nothing in the scientific literature that concludes that one herd or breed is more susceptible to BSE than another. Cohen and Gray concur (Ref 37). We also note that, while samples from a few cattle in Japan and Italy have recently demonstrated some unusual patterns on Western blot tests, which suggests a possibility that different strains of BSE may exist, the evidence is far from conclusive and could be explained by other factors (Ref 39). Thus, there is no information at this point about the existence of different strains, much less about differences in virulence among strains, that could be modeled. In the absence of such data or evidence, any consideration of the potential impacts of these heterogeneities would be purely hypothetical and speculative, and would not provide an appropriate basis for making regulatory decisions. However, we continue to monitor the latest scientific research, and will certainly consider any significant information that becomes available.

APHIS' risk analysis evaluated known BSE risks and provided a rational, scientific basis for our classification of Canada as a BSE minimal-risk region and for determination that the application of specified mitigation measures would allow for the safe importation of certain animals and products from Canada. Further, our assessment of actions taken by the Canadian Government lead us to place Canada on the list of BSE minimal-risk regions.

Data and Uncertainties

Issue: The same commenter asserted that USDA's recent re-analysis (the Explanatory Note) was not adequately sensitive to data and did not attempt to address uncertainties and that its conclusions are, therefore, unsupportable.

Specifically, the commenter said that APHIS' conclusion and supporting reasoning that the second case does not alter the risk estimate ''violates

principles of sound statistical inference and risk assessment, which teach that observing a second adverse event in a monitored population in a comparatively short period of time after the first observation is informative and should significantly inform (i.e., update) data-driven risk estimates, especially when there is a high prior uncertainty about model parameters.''

Codex Alimentarius and other sources, said the commenter, specify that a risk analysis should include uncertainty analysis. The commenter said that major technical questions and uncertainties that should be addressed and modeled include: the roles of horizontal and vertical transmission (if any); susceptibility distribution within cattle of the same age; variability of virulence of different new BSE cases; proportion of infected animals in Canada (''low'' we are told, but how long, on what basis, and with what confidence); detection probability per case (and hence the number of true cases per observed case); the age distribution at first infection; the latency period (and its distribution) until expression; the potential for clustering of rate events within geographic areas, processing plants, affected populations, etc.; the status and extent of current and future compliance and attendant consequences of noncompliance (such as mislabeling, etc.) in Canada and the United States; and differences in the likelihood of spread of BSE in different geographic areas or for different strains of BSE, different types of cattle, etc. The commenter maintained that these and other sources of uncertainty make initial perceptions about risk sufficiently uncertain that the number of cases of BSE actually detected should shape updated beliefs. When the observed rate increases from one to two detected cases in the past year, said the commenter, estimated risks should increase correspondingly. (In Bayesian terms, noted the commenter, the prior should be sufficiently diffuse or noninformative, given the above uncertainties, so that the posterior is heavily driven by the data, rather than by the prior * * *).

Response: We disagree with the suggestion that a second infected cow of Canadian origin should have altered the conclusions of our risk analysis—namely, that the BSE risk associated with importing ruminants and ruminant products and byproducts from Canada as proposed would be very low. Our Explanatory Note explained that a comprehensive investigation conducted by APHIS in coordination with Canadian authorities indicated that the second BSE-positive animal, found in Washington State, most likely became infected in Canada before Canada's feed ban was put in place in 1997. The apparent or reported rate of disease is meaningful when considered in conjunction with the level and quality of disease surveillance and from the position on the epidemic curve. Canada is well below the reported incidence rate that the OIE recommends for minimal-risk status (i.e., 2 detected cases per million animals during the last 4 consecutive 12-month periods) and, with over 15,800 animals tested as of December 1, 2004, Canada far exceeds the OIE surveillance guidelines for BSE. Further, Canada implemented import restrictions and a feed ban prior to detection of BSE in any indigenous animals. The downward pressure exerted by a feed ban—which the early experience in the United Kingdom demonstrated to be substantial even if only partially implemented—and the time of controls before detection of the disease indicate that it is more likely that the incidence of BSE is decreasing in Canada rather than increasing. Although the reported or apparent incidence of BSE in Canada has increased since May 2003, we are also aware that infected animals born before the feed ban in 1997 have entered the age when they are more likely to be detected, given the incubation period, and that surveillance for BSE in North America has increased. APHIS' designation of Canada or any country as a BSE minimal-risk region is based on the sum total of a country's prevention and control mechanisms for the disease. These include import restrictions, surveillance, feed restrictions, epidemiological investigations, and other measures. It is our view that these factors, evaluated together, provide a better indication of a country's BSE risk than any single numeric threshold criterion for BSE incidence. Therefore, while the discovery of a second infected cow alters Canada's reported incidence rate, the change does not affect the conclusions of our risk analysis. Similarly, it would not have affected Canada's categorization or classification as a BSE minimal-risk region according to OIE guidelines. We note in particular that this rule will not allow the importation of cattle born before Canada implemented its feed ban.

In its decisionmaking, APHIS considered both qualitative and quantitative information. With regard to uncertainty analysis, although APHIS' risk analysis for the proposed rule did not include a separate section entitled ''Uncertainty Analysis,'' the analysis did, in fact, address uncertainty throughout.

For example, in its analysis of BSE risk from imports from Canada, APHIS' risk analysis documented and described the current state of knowledge of BSE epidemiology based on the outbreaks in the United Kingdom and other parts of Europe. While the analysis indicates that BSE transmission occurs primarily through contaminated feed, it also states that uncertainty exists as to whether this is the only mechanism by which the disease may be spread. Having considered this lack of certainty, APHIS errs on the side of caution by requiring further risk mitigation measures, as discussed in the risk analysis, such as age limitations on live animals imported into the United States. The risk analysis states, ''* * * [A]lthough risk factors can be identified with some certainty, individual risk mitigation measures may be difficult to apply precisely. For example * * * it has not been established with certainty that contaminated feed is the only pathway. Furthermore, it cannot be assumed that there is complete compliance with a feed ban, which is the most effective mitigation for contaminated feed. Therefore, [APHIS] considered it necessary to mitigate risk arising from alternate pathways or lack of compliance with a feed ban.''

The Harvard-Tuskegee Study (Ref 3), referred to in the context of APHIS' risk analysis, uses probability distributions. That Study includes probability distributions for many of the model's parameters, including the age at which animals first become infected, the incubation period of BSE, and the level of compliance with a feed ban. Use of these probabilistic input parameters allows the results of the Harvard-Tuskegee Study to be expressed probabilistically, thereby being explicit about the implications of several key sources of uncertainty inherent in the model.

We did not attempt to estimate the number of BSE-infected animals that might be imported into the United States under this rule. We have confidence in Canada's BSE control measures and the rule's required mitigation measures and note, further, that BSE incidence and surveillance in Canada are well within the OIE guidelines for BSE minimal risk. We note further that the Harvard-Tuskegee Study concluded that, even if a small quantity of infectivity were introduced into the United States, it is not likely to cause the establishment of BSE.

With respect to the commenter's assertion that there is so much uncertainty about the situation in

Canada that detection of the second infected cow should be given significant weight in shaping our beliefs, we disagree that we failed to adequately consider the data or to give appropriate weight to the detection of BSE in a second cow of Canadian origin.

Although the commenter suggests that APHIS should have used a Bayesian technique in estimating the prevalence of BSE in Canada, such a technique would have started with the same information base-it would have been informed by the available historical surveillance data, including that acquired since implementation of the Canadian feed ban and import restrictions, which would be relevant to the current prevalence estimate. The projected trajectory of the disease is down, because of the downward pressures the measures have been shown to exert on the incidence of disease in such a region. We know that Canada had two indigenous cases of BSE in an adult cattle population of 5.5 million (a reported incidence rate that is well within the OIE guidelines for a minimal-risk country). Even before the discovery of two Canadian-origin animals with BSE, we had information from both active and passive surveillance about the prevalence of BSE in Canada and we would have used that information to construct a prior distribution. Finally, we note Canada has tested thousands of animals for BSE, and Canadian surveillance since the most recent detected case has increased significantly. As of December 1, 2004, Canada had tested over 15,800 animals in 2004 with no additional BSE cases found.

Issue: The same commenter stated that USDA should conduct a risk analysis that, in addition to addressing the uncertainties already listed in the comment concerning the second case, addresses the following:

Exposure

- What is the probable prevalence of BSE in Canada now and in the future under the proposed conditions. The modeling should explicitly document the data and assumptions used to answer it, specifically including compliance rates with any existing or future management strategies such as feed bans.
- What is (and has been) the likely age distribution of BSE infections among Canadian ruminants over time? A variety of models from the United Kingdom and Japan address the issue of ''hidden'' (unobserved) prevalence and the age distribution of unobserved cases.

Exposure-Response

- What is the probability distribution for R_0 (R_0 being the likelihood that the disease will amplify or diminish over time)?
- What is the frequency distribution of R_0 in different herds/locations/populations in the United States where Canadian ruminants might be imported?

Risk Characterization

- How much would the probability of a U.S. epidemic in the next 10 years increase if Canadian ruminants are imported under the proposed conditions? (This is driven by the probability that $R_0 > 1$ and the expected time until the first BSE import starts an epidemic.)
- If $R_0 < 1$, then how would the equilibrium level of sporadic outbreaks or cases in the United States increase if Canadian ruminants are imported? What is the total harm per outbreak? Putting these two together, what is the increment (mean and variance) in flow of harm per unit time from allowing the imports?

Response: A thorough discussion of why it is not necessary to determine a precise numeric measurement of prevalence of BSE in the Canadian cattle population follows, under the heading ''Prevalence of BSE in Canada.''

The commenter's other points seek to determine the likelihood of different scenarios occurring, given changes in variables. As explained previously, APHIS largely based its conclusions about the likelihood of BSE spreading if introduced into the United States on the Harvard-Tuskegee Study. The Harvard-Tuskegee Study evaluated the effects of changes when one model parameter was assigned a worst case value but other model parameters were assigned base case values, as well as the effects of assigning worst case values to multiple model parameters at the same time. We are confident that the extreme scenarios presented by Harvard-Tuskegee are extremely unlikely to occur and that the base case represents the most likely scenario given the available information. Cohen and Gray's memorandum (Ref 37), discussed in response to a previous comment, substantiates this. Second, we are confident that, even if the most extreme case occurred, few cases of BSE would result and even fewer cases of vCJD. Again, this is substantiated by Cohen and Gray's memorandum, which indicates that even in the most extreme case, the disease will still spread very slowly, leaving time to intervene. Neither the Harvard-Tuskegee Study nor the Cohen and Gray memorandum considered recently strengthened safeguards on slaughter practices, including a ban on the use of air injection stunning devices, requirements for removal of SRMs, and a ban on the use of nonambulatory cattle in human food, that would provide further increases in protection for human and animal health.

Issue: The same commenter stated that APHIS' assertion that it is unlikely that BSE would be introduced from Canada under the proposed rule is not the result of any rational analysis based on independently verifiable, explicit calculations from data. In fact, said the commenter, applying the methods of the Harvard-Tuskegee Study, some BSE imports would be expected under the proposed rule if the age distribution of BSE in beef and the probability of erroneous labeling or routing put at least some positive probability, even if only 0.0001 percent per animal, on such an import.

Response: We disagree with the comment and with the assumption inherent in it. Our decision and the critical evaluation and analyses on which it is based are scientifically sound and entirely consistent with our statutory authority. APHIS, and indeed all regulatory agencies, are called upon each day to make informed and reasonable decisions without numerical calculations. APHIS has made such decisions for years. Although rigorous experimental research, which forms the scientific basis for determining which tissues harbor the BSE agent in infected cattle, can be fed into computer modeling, it is not necessary in all cases to base decisions on numerical calculations. There is a wide body of independently verifiable scientific evidence regarding BSE, including how to control and eliminate the disease. Based on qualitative and quantitative evidence, we have concluded that the risk associated with imports under this rulemaking is very low. Regarding the commenter's second point, we did not assert that there is zero probability that BSE would be introduced from Canada under the conditions we proposed. Rather, we concluded that such imports are unlikely. Furthermore, the Harvard-Tuskegee Study demonstrated that, even if a small amount of infectivity were introduced into the United States, it would be unlikely to spread and result in the establishment of BSE. In accordance with the Animal Health Protection Act, the Secretary has concluded quite reasonably that restrictions on the importation of ruminant meat and meat products from Canada, but not prohibition of those

commodities, is necessary to prevent the introduction of BSE from Canada.

APHIS carries out an array of animal and plant health regulatory programs, governing both domestic and imported commodities. In none of these programs, many of which have been in place for years, is it possible to assure that there is zero risk. Indeed, were we to make trade dependent on zero risk, foreign, as well as interstate, trade in animals and animal products would cease to exist.

Issue: The same commenter quoted APHIS as stating that, ''[a]lthough the BSE-infected cow in Washington State was more than 30 months of age when diagnosed, it was obviously not imported under the conditions of the yet-to-be-implemented proposed rule and would not have been allowed to be imported under the proposed rule.'' The commenter said that USDA has not shown it is impossible for BSE to occur in some cattle less than 30 months of age or that some cattle older than 30 months of age might be inadvertently imported.

Response: As discussed above, the epidemiological investigation conducted by APHIS and others following the detection of BSE in a cow in Washington State in December 2003 indicated that the cow was born in Canada early in 1997 before Canada initiated a feed ban. This animal and all others born before Canada's feed ban would now be at least 7 years old. Because the rule requires that all cattle imported into the United States from Canada be less than 30 months old, no animals born before Canada's feed ban will be allowed to enter the United States under this rule. Furthermore, the rule also requires that cattle imported from Canada be slaughtered before they are 30 months of age. In actual practice, because cattle imported into the United States from Canada will be coming in for slaughter or for feeding and slaughter, the large majority will be less than 24 months of age (most male cattle are slaughtered before 24 months of age). FSIS has established procedures for checking an animal's age at slaughter through records and/or dentition. These procedures apply to both domestic and imported cattle and we are confident they are effective in determining age. The appropriate SRMs based on age will be removed from any cattle that are determined to be 30 months of age or older based on those procedures, and APHIS will take enforcement action as necessary.

With regard to the possibility that BSE could occur in cattle younger than 30 months of age, research demonstrates that the shorter incubation period (*i.e.*, infection developing in less than 30 months) is apparently linked to younger animals receiving a relatively large infectious dose (Ref 40). The younger cases have occurred primarily in countries with significant levels of circulating infectivity. Specifically, BSE was found in animals less than 30 months of age in the United Kingdom in the late 1980's to early 1990's, when the incidence of BSE was extremely high. This research also suggests that a calf must receive an oral dose of 100 grams of infected brain material containing high levels of the infectious agent to produce disease within a minimum of approximately 30 months (Ref 40). All available evidence leads to the conclusion that the level of infectivity in the Canadian cattle population is low and that compliance with the feed ban is high. Further, infectivity in animals younger than 30 months has in most cases been confined to tonsils and distal ileum, both of which would be removed at slaughter in the United States.

Prevalence of BSE in Canada

Issue: The same commenter specifically argued that APHIS should present quantitative evidence of the true prevalence of BSE in Canada and that the risk analysis for the rule should take this into account. The commenter said that the risk analysis only discusses the prevalence of BSE in Canada in vague, subjective terms such as ''very low'' and ''unlikely'' to generate cases in the United States, but that recent history now suggests that figure is 100 percent. The commenter asserted that more quantitative information is needed on the likely prevalence of BSE infections in Canadian ruminants and ruminant products that would be imported under the proposed rule (true prevalence, not just detected or qualitatively perceived). How likely is it, asked the commenter, that BSE prevalence in Canada could be 0.01 percent or 0.1 percent, or 1 percent, given current and prior testing? The commenter stated the belief that available data could help provide useful upper bounds.

Response: We disagree with the comment. Precise measurement of true prevalence of BSE is difficult to achieve, given the constraints of current testing methods available. It should be noted that no country in the world is attempting to officially define the true prevalence of BSE in its entire cattle population. Reports of incidence rates are indications of detectable levels of disease. Current testing methodology can only detect BSE, at the earliest, a few months before an animal exhibits clinical signs and, therefore, limits the ability to measure true prevalence in the entire cattle population. Data obtained through targeted surveillance can be extrapolated to make inferences about prevalence in broader populations as necessary. However, a specific calculation of true prevalence of BSE is not necessary to determine whether risk management policies or control policies are appropriate or need to be changed, and the importance of determining an exact prevalence rate should not be overstated.

We also disagree with the commenter's assertion that APHIS needs to establish a more precise estimate of the true prevalence of BSE in Canada for this rulemaking. Our risk analysis presented compelling evidence that the prevalence of BSE in Canada is low. The absence of a precise numeric measurement of prevalence of BSE in the Canadian cattle population is not an absence of information to inform estimates. As we have stated, we will use a combined and integrated approach that examines the overall effectiveness of control mechanisms in place when evaluating a country for BSE minimal risk. We believe that such an evaluation will provide a better indication of a country's BSE risk than simply a numeric threshold for BSE incidence or prevalence.

The threshold for incidence set by OIE for BSE minimal-risk regions is less than 2 cases per million cattle over 24 months of age during each of the last four consecutive 12-month periods. There have been two cases of BSE in Canadian-origin cattle since May 2003 out of an adult (over 24 months of age) cattle population of 5.5 million (0.4 per million) and no cases before May 2003. While we recognize that the number of detected cases does not, by itself, allow for a determination of prevalence, the number may be taken as a strong indication in countries with active surveillance that the mitigation measures in place to prevent the introduction and spread of BSE are working, thus prevalence is likely to be low. As we have discussed elsewhere, this is the case in Canada, which has had strict import controls in place since 1978 and instituted its feed ban, equivalent to that of the United States, on the same date as the United States in August 1997. Canada has also conducted surveillance for BSE since 1992 and has met or exceeded OIE guidelines for surveillance since 1995. It should be noted that OIE guidelines refer to the reported incidence of BSE infection or levels of detectable disease.

The commenter is incorrect in asserting that recent history suggests that Canadian imports are 100 percent likely to generate cases of BSE in the United States. While our risk analysis

evaluated whether an infected ruminant or ruminant product from Canada might be imported, and concluded that the risk was considered ''low,'' that risk was considered in the context of the proposed mitigation measures. In addition, the risk analysis considered the likelihood that such an animal or product would spread the disease to other animals within the United States; in other words, whether the imported source of infectivity would generate new cases within the United States.

Issue: The same commenter asserted that the HCRA's ''Evaluation of the Potential Spread of BSE in Cattle and Possible Human Exposure Following Introduction of Infectivity into the United States from Canada'' (Ref 10) (referred to below as the Canada Study) contradicts the statement in APHIS' risk analysis that the prevalence of BSE in Canada is ''low.'' According to the commenter, the Canada Study states that the prevalence of BSE in Canada cannot be determined because of the absence of strong evidence about the prevalence of BSE in the Canadian herd. The commenter also took issue with a statement we made that, although a second case of BSE was detected in an animal of Canadian origin, the total number of diagnosed cases attributed to that country remains low. According to the commenter, this statement is irrelevant and misleading. The commenter said that what matters for risk assessment purposes is the occurrence rate per unit time, not the total (cumulative) number ever diagnosed, and that two diagnosed cases in less than 1 year is not self-evidently a ''low'' rate.

Response: APHIS' assessment of the prevalence of BSE in Canada was related to the small number of cases detected through an active surveillance program, and was not contingent upon there being only one case. The statement from the Canada Study that the prevalence of BSE in Canada cannot be determined is taken out of context and used by the commenter to imply that no judgment about the prevalence of BSE in Canada may be made. The Canada Study actually stated that, in the absence of strong evidence about the prevalence of BSE in the Canadian herd, the authors chose to posit a hypothetical introduction of five BSE-positive bulls into the United States instead of calculating a probability of such an introduction. The model used by the HCRA was not set up to gauge the probability of the introduction of BSE into the United States, but rather to calculate the outcome if the BSE agent were introduced. Moreover, the unavailability of precise data for a quantitative estimate of the prevalence of BSE in Canada does not preclude an evaluation and judgment about the prevalence of BSE in Canada. APHIS proposed to classify Canada as a minimal-risk region after considering substantial evidence about the BSE situation in that country, including information on the incidence of cases of BSE and level of surveillance, as well as other relevant factors such as the quality of Canada's BSE surveillance program and its veterinary infrastructure.

Issue: The same commenter stated that, until the source of contaminated feed for the two cows is determined, it is not possible to determine whether infectivity occurred before or after the feed ban was implemented in Canada because of the animals' ages and the 2–8 year incubation period for BSE. The commenter asserted that, if the infectivity occurred after the feed ban was implemented, this suggests a continuing risk of BSE in younger Canadian cattle. The commenter therefore maintained that APHIS must determine the source of the contaminated feed or test more representative samples of Canadian cattle to conclude that the prevalence of BSE in Canada is low. Specifically, said the commenter, Canada plans to test 8,000 head in the next 12 months under limited surveillance; it should be required to test all cattle over 24 months of age for 2 years. The United States should not relax restrictions for countries of unknown prevalence.

Response: As discussed previously, we disagree that Canada is a country of unknown prevalence for BSE or that a precise measurement of prevalence must be made before cattle from Canada are allowed to be imported into the United States. As determined by the epidemiological investigations conducted after their detections, both the May and December 2003 cases of BSE involved cows born before Canada implemented its feed restrictions. Both cows were most likely to have become infected by consuming contaminated feed at very early ages, most likely before the feed ban was implemented.

Animals born before Canada's feed ban would now be at least 7 years old. At this stage of the incubation period, most remaining cattle infected before the feed ban was implemented would be symptomatic. In light of the active surveillance program in Canada, as well as restrictions on the slaughter of animals with symptoms compatible with BSE, any such infected cattle are likely to be detected and to be eliminated from the food chain. Because this rule requires that all cattle imported into the United States from Canada be less than 30 months old at the time of importation and slaughter, no animals born before Canada's feed ban will be allowed to enter the United States under this rule. The age of cattle can also be verified at the time of slaughter through records and/or dentition. As noted above, the appropriate SRMs based on age will be removed from any cattle that are determined to be or suspected of being 30 months of age or older and enforcement action will be taken as necessary by APHIS. Further, as noted in response to a previous comment concerning the possibility that BSE could occur in cattle younger than 30 months of age, infectivity in such young animals has been associated with a high incidence of infectivity in the cattle population where the animal originates. This is not the case with Canada. Further, infectivity in animals younger than 30 months has in most cases been confined to tonsils and distal ileum, both of which would be removed at slaughter in the United States and Canada.

Issue: One commenter stated that the APHIS risk analysis builds upon the Harvard-Tuskegee Study's conclusion that the introduction of BSE into the United States would be an unlikely event. However, the fact that the remains of the December 2003 cow are known to have entered the food chain renders APHIS' risk analysis relative to human health issues nonapplicable and outdated.

Response: We disagree. The Harvard-Tuskegee Study did not address the likelihood of the introduction of BSE infectivity into the United States. However, the Harvard-Tuskegee study did conclude that, even if a small amount of BSE infectivity were introduced into the United States, the disease is unlikely to spread and become established. We are confident that the incidence of BSE in U.S. cattle, if any, is and will remain extremely low.

The epidemiological investigation that was conducted following detection of an imported cow in Washington State (Ref 4) determined that the animals was born before implementation of a ban in Canada on feeding mammalian protein to ruminants and was most likely to have become infected before that feed ban was implemented. Additionally, the investigation determined that the animal was imported into the United States in 2001 at approximately 4 years of age, was more than 30 months of age when diagnosed, and clearly would not have qualified for importation under the provisions of this final rule.

To date, BSE has never been confirmed in indigenous U.S. cattle. We cannot state with certainty that BSE will

never occur in indigenous animals or that material from BSE-infected animals will never enter the human or bovine food supply. We note, however, that an interim rule published by FSIS on January 12, 2004, excludes all non-ambulatory disabled cattle and all SRMs, regardless of the health status of the animal from which they are taken, from the human food supply. In addition, FDA has banned any material from non-ambulatory cattle and SRMs from all cattle from FDA-regulated human food, including dietary supplements, and cosmetics. These rules and other Federal measures described previously ensure stringent protection of the U.S. food supply.

Issue: One commenter said that the term ''isolated cases'' used in the March 4 request for comment is very subjective and asked how we could use the word ''isolated'' when we do not know the prevalence of the disease in the Canadian national herd. The commenter stated that we should clarify what we meant so that appropriate comment could be provided on whether to allow high-risk, over 30-month-old, animals into the United States. The commenter stated further that USDA should not relieve restrictions on imports from Canada until Canada tests a significant percentage of its cull animals, with a major emphasis on the highest risk animals, over the next 2–5 years, without any significant positive findings.

Response: The terms ''isolated cases'' and ''isolated'' were not used in the March 2004 notice or the Explanatory Note., nor did APHIS propose to allow the importation of any live cattle over 30 months of age from Canada.

Finally, as discussed in response to several comments, we do not believe it is necessary to wait to relieve restrictions on imports from Canada until such testing as the commenter suggests has been conducted. Although active surveillance must be conducted to ensure that prevention and control measures implemented by a country are providing adequate protection, there is sufficient evidence already, based on nearly a decade of active surveillance in Canada at levels that have met or exceeded OIE guidelines, for us to conclude that Canada's prevention and control measures have been effective.

Issue: One commenter said that the discovery of a Canadian cow with BSE in Washington State, coupled with the previous finding of a BSE cow in Alberta, indicates that the Canadian feed supply was contaminated as late as 1997. The commenter stated that the infected cattle were from two different herds and utilized different feed sources and concluded that other infected cattle undoubtedly exist. The commenter also concluded that since both the United States and Canada have been doing surveillance for several years without a diagnosed case, these cases must be considered as the first cases to appear on the epidemiological curve. The commenter stated further that the epidemiological curve for BSE is an extended one and must be considered at this time likely to continue for several more years, perhaps 5 to 10, and that no Canadian cattle should be allowed to enter the United States until sufficient time has elapsed for any remaining infected cattle to be identified and removed from the Canadian cattle population.

Response: We disagree with the comment. While it is possible that additional BSE-infected cattle may exist in Canada, we have confidence that if such cattle do exist the number is small. First, Canada has not imported ruminant MBM from any country with BSE since 1978 (Ref 12). Second, Canada has prohibited the feeding of ruminant MBM to ruminants since August 1997, and CFIA has verified high levels of compliance with the feed ban by routine inspections of both renderers and feed mills (Ref 12). Third, Canada has traced and destroyed all remaining cattle imported from the United Kingdom (Ref 12). Fourth, Canada has traced and destroyed the majority of the cattle that comprised the birth cohorts of the two Canadian BSE cases (Ref 11 and 13). Fifth, Canada has conducted surveillance for BSE since 1992 and has conducted targeted surveillance at levels that have met or exceeded OIE guidelines since 1995 (Ref 12 and 13).

Even if BSE-infected cattle do remain in Canada, they are likely to be older animals that were exposed before Canada's feed ban in 1997. Because this rule requires that imported animals be less than 30 months old, such animals could not legally enter the United States under this rule. Even if an infected cow did enter the United States, the Harvard-Tuskegee Study indicates it would be unlikely to lead to the spread of BSE in cattle or to human exposure to the BSE agent.

Regarding the suggestion that the two BSE-infected Canadian cows must be considered as the first cases to appear on the epidemiological curve, we disagree. The evidence strongly indicates that the two Canadian cases do not represent the beginning of a multi-year, exponentially expanding outbreak such as occurred in the United Kingdom. In the United Kingdom, where BSE was first detected, measures to prevent and control the spread of the disease were implemented only after the disease had reached epidemic proportions. In countries such as Canada, where effective measures were implemented before detection of any case of BSE, and well before detection in any indigenous animal, the situation is quite different. The best scientific evidence from the United Kingdom and other countries is that BSE is spread primarily by contaminated feed and that prohibiting the feeding of ruminant-origin protein to ruminants prevents disease spread. Canada has had such a feed ban for over 7 years. While a few older animals born before Canada initiated its feed ban may have been exposed to BSE and may yet develop clinical signs, Canada has taken every necessary step to prevent an epidemic. While additional cases may occur in cattle born before implementation of Canada's feed ban, the epidemiological evidence indicates the number of new cases, if any, will be limited by the downward pressure of the comprehensive mitigations in place.

Issue: One commenter stated that, because the source of infection has not been identified for either BSE-positive cow of Canadian origin, the possibility exists that more asymptomatic cases may be present in Canadian herds, and that additional BSE-positive cattle have already gone to slaughter. The commenter stated that APHIS should not relieve restrictions on importations from Canada in the midst of an outbreak of uncertain size. Another commenter expressed concern that Canada admitted to identifying two feed mills not in compliance with the mandate to cease mixing mammalian tissue into cattle feed. The commenter stated that these mills were the source of the feed that led to the two identified cases of BSE in Canadian cattle.

Response: As we stated in the March 2004 Explanatory Note to our risk assessment, epidemiological evidence indicates that both of the BSE-infected animals of Canadian origin were born before implementation in that country of a ban on the feeding of ruminant protein to ruminants, that they were most likely exposed to the BSE agent through consumption of contaminated feed, and that epidemiological follow-up has identified the feed mills where the contaminated feed most likely originated.

From an epidemiological standpoint, it would be virtually impossible to definitively pinpoint a ''source of infection'' that occurred over 7 years ago. Canada has, however, evaluated the various potential sources of infection and has concluded that the source of

infection was most likely a bovine imported from the United Kingdom in the 1980's.

We agree it is possible there may be other asymptomatic BSE-infected animals in Canada. However, because the two BSE-infected animals were born before the feed ban, there is no evidence to suggest that the feed ban is ineffective. The feed mills identified as having provided possibly infected feed most likely distributed that feed before the ban was implemented. The feed mills complied with CFIA feed ban regulations after they were implemented and have a good compliance record based on CFIA inspections. CFIA indicates that with respect to the inedible rendering sector, full compliance with the feed ban requirements has been consistently achieved, and that with respect to the Canadian commercial feed industry, non-compliance of ''immediate concern'' has been identified in fewer than two percent of feed mills inspected during the period April 1, 2003, to March 31, 2004. Those instances of noncompliance of ''immediate concern'' are dealt with when identified (Ref 11). According to CFIA, non-compliance of immediate concern includes situations where direct contamination of ruminant feed with prohibited materials has occurred, as identified through inspections of production documents or visual observation, and where a lack of appropriate written procedures, records, or product labeling by feed manufacturers may expose ruminants to prohibited animal proteins.

An effective feed ban is an important part of the mitigation measures proposed for the importation of ruminants and ruminant products from a BSE minimal-risk region. However, the feed ban is not the sole mitigation in this rule. In addition to the risk-mitigating effect of the feed ban, importations of cattle and cattle products will also be subject to the import restrictions described in this rule. Those restrictions are based on the scientifically demonstrated likelihood of the BSE agent residing selectively in various tissues of animals of specified species and ages. Based on our analysis of the risk of such importations, it is highly unlikely that the BSE agent will be transmitted to the cattle population of the United States or into the U.S. human food supply through ruminants or ruminant products or byproducts imported into the United States under this rule.

Additionally, the rule prohibits the importation of any cattle 30 months of age or older, which includes cattle born before Canada implemented its feed ban. This age restriction was not in place when the cow that was detected as positive for BSE in December 2003 was imported into the United States.

Issue: One commenter expressed concern that some cattle under 30 months of age and, therefore, eligible for importation from Canada under the proposed rule, might be offspring of cattle born before the feed ban (and thus offspring of potentially infected cattle). The commenter noted that Canadian officials indicated that 68 British cattle that died or were slaughtered in Canada more than 10 years ago are the probable source of the original BSE infection in Canada. The commenter stated that current OIE guidelines do not recommend the immediate culling of offspring in the case of index or cohort animals, provided they are excluded from food and feed chains at the end of their lives. The commenter stated that until all animals born in Canada before the feed ban have been properly identified, as well as their offspring, the risk of importing one of these animals into the United States remains a risk that USDA has not adequately recognized. Other commenters also stated that there are likely additional undetected cases of BSE in Canada resulting from exposure to contaminated feed and that we should not relieve import restrictions at this time. One commenter stated that there are still breeding cattle alive in Canada that may have been exposed to the similar infectious material as the two BSE-positive cows identified in Alberta, Canada, and Washington State.

Response: We disagree that the possible presence of additional animals in Canada, infected before implementation of the Canadian feed ban, present risks that have not been addressed for this rulemaking. As stated in responses to several other comments, it is possible that cattle born before Canada initiated its feed ban in August of 1997 may still exist in Canada. Because these cattle are now 7 years old or older, this rule will not allow them to be imported into the United States. Offspring of such cattle, which may be eligible for importation, are not likely to be infected with BSE. Although some evidence suggesting maternal transmission exists, such transmission has not been proven and, if it occurs at all, it occurs at very low levels not sufficient to sustain an epidemic (Ref 41). Canada has conducted extensive investigations of both of the two known BSE-infected animals in Canada and culled all of those animals' herdmates and offspring, all of which tested negative for BSE. Based on the low prevalence of BSE in Canadian cattle combined with the unlikely occurrence of maternal transmission, we concluded that cattle eligible for importation from Canada under this rule are highly unlikely to have BSE. Breeding cattle of any age may not be imported into the United States from Canada under this rule.

Issue: One commenter stated that Canada has offered no scientific proof that it has either contained or eradicated BSE from its cattle herd, and that the two BSE-infected cattle detected were discovered despite a very limited testing program in effect in both the United States and Canada at the time.

Response: We disagree. We believe Canada has established through import restrictions, a rigorous feed ban and ongoing surveillance that BSE is contained and that the necessary mitigation measures are in place to detect and prevent the dissemination of BSE infected material and eradicate the disease. Our rule is not predicated on eradication of BSE from a region. Canada meets our requirements for a minimal-risk region in part because the country has had an active, targeted surveillance program since 1992, and has exceeded OIE guidelines for BSE surveillance for more than the past 7 years. Additionally, as discussed above, Canada has significantly broadened that surveillance program.

Issue: One commenter stated that, because BSE has a long latency period, it is not possible to know at present the exact disease status of Canada.

Response: We concur that at present it is not possible to know with certainty whether any additional cows in Canada are infected with BSE. However, as documented in our risk analysis, we have concluded that the surveillance, prevention, and control measures implemented by Canada, in combination with the import restrictions imposed by this rule, will comprehensively mitigate the risk of introducing BSE into the United States through imported Canadian-origin animals and animal products.

Whether Existing Regulations Should be Maintained

Issue: One commenter stated that APHIS has not demonstrated that the current regulations applicable to regions where BSE exists are not necessary in all cases. According to the commenter, the Harvard-Tuskegee Study said import restrictions and the feed ban in the United States were the two most important reasons the United States was unlikely to have BSE. The commenter maintained that these regulations are essential now that BSE has ''crossed the Atlantic'' and pointed out that most

countries that have reported a single case of BSE in a native animal have had additional cases either the following year or within the next several years. The commenter further stated that, according to the Harvard-Tuskegee Study, if BSE were introduced into the United States, it would be eliminated within 20 years, but only if the conditions affecting the spread of BSE remained unchanged for the 20 years following its introduction. The commenter maintained that time frame is not acceptable. The commenter stated that the regulations should not be relaxed without a comprehensive scientific evaluation of the implications of such relaxation. The commenter further recommended that APHIS immediately upgrade its present safeguards and restrictions for all imported beef and cattle and mobilize all its available resources to vigorously enforce these restrictions. One other commenter also noted the Harvard-Tuskegee Study's statement that the ban on the importation of live ruminants and ruminant MBM is the most effective measure for reducing the spread of BSE and maintained that USDA should ''follow this recommendation from its own funded study.''

Response: As discussed above, we have determined that it is appropriate, based on science, to use our standards for minimal-risk regions as a combined and integrated evaluation tool, focusing on the overall effectiveness of control mechanisms in place (*e.g.*, surveillance, import controls, and a ban on the feeding of ruminant protein to ruminants).

The commenters' paraphrasing of the Harvard-Tuskegee study is misleading. What the study actually said was, ''Measures in the U.S. that are most effective at reducing the spread of BSE include the ban on the import of live ruminants and ruminant MBM from the [United Kingdom] (since 1989) and all of Europe (since 1997) by USDA/APHIS, and the feed ban instituted by the Food and Drug Administration in 1997 to prevent recycling of potentially infectious cattle tissues.'' APHIS' restrictions on imports from regions listed in § 94.18(a)(1) and (a)(2) are very restrictive and APHIS is not reducing those restrictions.

As noted, since our proposed rule was published, FSIS and FDA have both strengthened their requirements concerning slaughter practices and food restrictions. The Harvard-Tuskegee Study's predictions that, if BSE entered the United States in as many as 10 cattle, few new cases of BSE would result and the disease would be eliminated within 20 years, at most, were based on the control measures existing in 2001. The Harvard-Tuskegee Study did not take into account recent regulatory changes concerning the use of rendered ruminant origin materials or active measures, such as culling and testing, that would be taken in response to an outbreak and for the purpose of eradication. If BSE were detected in a cow native to the United States, APHIS would work with other Federal agencies and State governments to eradicate preventable disease as quickly as possible. In combination with the recent changes in Federal regulations, we are confident that BSE would be eradicated in substantially less than 20 years.

Regarding the possibility of additional cases being discovered in Canada, for reasons given in response to other comments on this issue, we would expect that number, if any, to be very low. This is based on the fact that Canada has had comprehensive BSE prevention and control measures in place for many years, and that the two animals found in 2003 with BSE were older animals likely to have been exposed to contaminated feed before implementation of the feed ban.

Remove Import Restrictions

Issue: Several commenters stated that, because BSE is considered a North American problem, the APHIS risk analysis and the proposed mitigation measures should be revisited, and restrictions on movement from Canada should be removed.

Response: APHIS does not agree that the restrictions included in this rule should be removed. Based on our risk analysis, we consider these restrictions appropriate at this time to protect the United States from the introduction of BSE from minimal-risk regions such as Canada. BSE has been detected in two cows indigenous to Canada and, at this time, BSE has not been detected in any ruminant indigenous to the United States.

Other Comments Related to the Risk Basis for the Rule

Issue: One commenter stated that APHIS has not properly analyzed the risk associated with Canada's inability to identify the source of the BSE case discovered on May 20, 2003. The commenter stated that, because the cow diagnosed with BSE in May 2003 could have consumed contaminated feed after the feed ban was in place and up to the age of 3, and because Canada cannot definitively say that the cow's remains did not enter the ruminant feed chain, other Canadian cattle are likely to be infected. APHIS did not present the full range of risk possibilities associated with this scenario and, instead, presented only a best case scenario. Therefore, we should not relieve restrictions on imports.

Response: The CFIA in May 2003 confirmed BSE in a cow from northern Alberta that was slaughtered in January 2003. In response, CFIA immediately started an exhaustive epidemiological investigation. U.S. representatives worked in conjunction with Canada during the investigation, the results of which are available on the CFIA Web site (Ref 13). The investigation considered a wide range of possible sources of infection, including two possible routes of MBM exposure, maternal transmission, exposure to chronic wasting disease via domestic or sylvatic cervids, exposure to scrapie, and the possibility that the infected animal may have originated in the United States. CFIA concluded, consistent with scientific knowledge from the United Kingdom and Europe, that the most likely source of BSE for the infected cow would have been the consumption of feed containing MBM of ruminant origin contaminated with the BSE prion before the United States and Canada implemented a feed ban in August 1997. CFIA also concluded that the original source of the BSE prion in MBM is likely to have been from a limited number of cattle imported directly into either Canada or the United States from the United Kingdom in the 1980s, before BSE was detected in that country.

Proving the source of an infection is rarely easy, particularly when the infection occurred, as in this case, 6 or 7 years earlier. CFIA's epidemiological investigation was thorough and complete and its conclusions consistent with scientific knowledge about BSE and the facts associated with this case. CFIA did identify the source of the infection with as much certainty as is reasonable to expect. APHIS is confident that CFIA's conclusions are accurate.

As discussed above, the epidemiological investigation additionally focused on rendered material or feed that could have been derived from the carcass of the infected cow. As part of that investigation, a survey was conducted of approximately 1,800 sites that were at some risk of having received such rendered material or feed. The survey suggested that 99 percent of the sites surveyed experienced either no exposure of cattle to the feed (96 percent of the sites) or only incidental exposure (3 percent of the sites). The remaining 1 percent represented limited exposures, such as cattle breaking into feed piles, sheep

reaching through a fence to access feed, and a goat with possible access to a feed bag. Depopulation of Canadian herds possibly exposed to the feed in question was carried out by the Canadian Government. Canadian officials conducted a wide-ranging investigation of possible exposure to the feed in question and carried out depopulation of Canadian herds possibly exposed to the feed. On each of those farms where the investigation could not rule out the possibility of exposure to feed that may have contained rendered protein from the infected animal, the herds were slaughtered and tested. All of those animals tested negative for BSE and their carcasses were disposed of in ways, such as disposal in landfills, to ensure that they did not go into the animal food chain.

Issue: One commenter, in light of the detection of two BSE-positive cows of Canadian origin, criticized the Canadian risk assessment for having concluded that ''993 times out of a thousand, there would be no BSE infection in Canada as the result of importation of cattle from the UK and Europe from 1979 to 1997.''

Response: Canada's risk assessment concluded that there is a very small probability that BSE was introduced into Canada as a result of the importation of cattle from the United Kingdom or elsewhere in Europe from 1979 to 1997. The estimated probability of at least one infection of BSE occurring before 1997 was 7.3×10^{-3} or, as the commenter noted, that 993 times out of a thousand, there would be no BSE infection in Canada as the result of importation of cattle from the UK and Europe from 1979 to 1997'' (Ref 12). However, the Canadian risk assessment did not conclude that no infected animal would ever be found. Both Canada and the United States have conducted aggressive surveillance for BSE designed to detect the disease should it exist in our cattle populations. Other controls are in place to ensure that the disease does not spread and amplify in the cattle populations or result in human exposure.

Issue: One commenter stated that the United States has a zero tolerance policy for fecal, ingesta, or milk contamination on livestock carcasses or meat products. The commenter said that these contaminants can result in diseases that are treatable, even though they may cause severe illness and death, but stated that BSE causes a disease in humans that invariably causes death and asked why we could find an acceptable risk for BSE, which is always terminal, when we have zero tolerance for contaminants, which may cause diseases which are treatable.

Response: The comment suggests an inconsistency that is not present. The policy of zero tolerance is consistent for adulterants whether the adulterant is *E. coli* O157:H7 or the BSE agent. Under FMIA, a meat food product is adulterated if, among other circumstances, it bears or contains any poisonous or deleterious substance that may render it injurious to health (21 U.S.C. 601 (m)(3)). FMIA requires that FSIS inspect the carcasses, parts of carcasses, and meat food products of amenable species to ensure that such articles are not adulterated (21 U.S.C. 604, 606). FMIA gives FSIS broad authority to promulgate such rules and regulations as are necessary to carry out the provision of the Act (21 U.S.C. 621).

FSIS recognizes the agent that causes BSE as an adulterant under FMIA (Ref 42). The infective agent that causes BSE, however, is not fully characterized or easily identified. USDA's Agricultural Research Service is currently conducting research to further characterize the agent that causes BSE. Pathogenesis studies have confirmed that certain tissues of cattle (*i.e.*, the brain, skull, eyes, trigeminal ganglia, spinal cord, vertebral column—excluding the vertebrae of the tail, the transverse processes of the thoracic and lumbar vertebrae, and the wings of the sacrum, and dorsal root ganglia of cattle 30 months of age and older, and the tonsils and distal ileum of all cattle) are predisposed to harboring the infective agent that leads to BSE. FSIS, as part of its January 12, 2004, rulemaking, designated these tissues as SRMs, declaring that they are inedible, and prohibited their use for human food. For these BSE rules, FSIS also used the adulteration provision, which relies upon the determination that certain cattle and parts are unfit for human food because of the uncertainty associated with onset of the disease and the value of the testing results.

E. coli O157:H7 is well characterized and recognized by industry as associated with fecal contamination that is transferred from hide or digestive tract onto carcass during dehiding. As a result, industry recognizes that sanitary dressing is a critical step in the production of safe beef, particularly regarding *E. coli* O157:H7. In contrast, the infective agent for BSE cannot be easily identified and removed in the same way as fecal content. As a result, FSIS has a zero tolerance for SRMs (*i.e.*, any evidence that SRMs were not properly controlled as inedible will result in the product being considered as adulterated) that scientific studies confirmed as associated with the BSE agent. Furthermore, FSIS excludes non-ambulatory cattle from the human food supply because European surveillance data have shown a higher incidence of BSE in non-ambulatory disabled cattle than in healthy slaughter cattle. Therefore, the inconsistency in tolerance suggested by the commenter does not exist.

The FMIA requires that FSIS inspect the carcasses, parts of carcasses, and meat food product of all cattle, sheep, swine, goats, horses, mules, or other equines that are capable for use as human food to ensure that such articles are not adulterated (21 U.S.C. 604, 606). If the carcasses, parts of carcasses, and meat food products are found, upon inspection, to be not adulterated, FSIS marks them as ''Inspected and passed'' (21 U.S.C. 604, 606, 607).

F. Economic Analysis for the Rulemaking

In accordance with Executive Order 12866 and the Regulatory Flexibility Act, we assessed the potential economic costs and benefits of our November 2003 proposed rule and its potential effects on small entities. We included a summary of our economic analysis in the proposed rule and indicated how the public could obtain a copy of the full economic analysis.

A number of commenters addressed the potential economic effects of the proposed rule. Some of the comments focused on the rule in general or specific provisions of the rule, while others addressed our analysis of the potential economic effects of the rule. We discuss below each of the issues raised by commenters. Because some of the comments were technical in nature, we have tried to use the commenters' wording where practicable. Therefore, the manner in which we characterize each of the issues reflects the commenters' viewpoint.

The issues are grouped into eight sections:

- Economic modeling;
- Prices and quantities;
- Social welfare changes;
- Consumer demand;
- Feeder animal movement and feedlot requirements;
- U.S. beef exports;
- Effects on small entities; and
- Other.

1. Economic Modeling

Issue: The APHIS economic analysis of the potential impact of the proposed rule falls short of estimating the larger economic impacts this rule could have on the U.S. economy. It provides only a limited analysis of the effect of imports of Canadian cattle and beef on prices in the United States and ignores

the impacts this rule will have on associated industries and their productive output, as well as on employment.

Response: The commenter provides his own analysis of impacts, using multipliers to demonstrate economy-wide effects. (Multipliers measure total change throughout the economy resulting from one unit change for a given sector.) Effects can be described as direct, indirect, or induced. Direct effects represent the initial change in the industry in question. Indirect effects are changes in inter-industry transactions as supplying industries respond to increased demands from the directly affected industries. Induced effects reflect changes in local spending that result from income changes in the directly and indirectly affected industry sectors (Ref 43).

We acknowledge that the rule will have effects that reach beyond the cattle producing and processing sectors. However, the analysis presented by the commenter estimates only the negative impacts to the wider economy while ignoring the positive impacts. The commenter calculates that a reduction in U.S.-supplied feeder cattle of 283,182 head reduces sales by $181.2 million and causes a $701.2 million loss to the economy, assuming a multiplier of 3.87. However, the analysis for the proposed rule also showed an increase in the total number of feeder cattle fed in the United States of 221,318 head. When valued at $938 per head, the resulting additional fed cattle generate $207.6 million in additional sales for U.S. feedlot operators. Applying the commenter's choice of a 3.87 multiplier yields an economic gain of $803.4 million from feeding these additional feeder cattle. The result is a net gain to the U.S. economy of $102.2 million for importing the 504,500 feeder cattle from Canada. The same type of analysis would also apply to slaughter cattle and carcass beef.

However, the multipliers the commenter chose for his analysis are Type II, which include direct, indirect, and induced effects. We consider the use of Type I multipliers (only the direct and indirect effects) more appropriate for the calculation of impacts of changes in cattle supplies as well as changes in exports. Income loss and reduced consumer spending that might occur in one part of the cattle industry due to this rule need to be balanced against the growth in income and spending that can be expected to occur in other parts of the industry. In recognition of the commenter's observation that the rule will have impacts on associated industries, we include in the analysis for this final rule a multi-sector model of feed inputs, animal production, and animal product processing for a number of agricultural sub-sectors besides cattle and beef. Using this model, we estimate effects of reestablished imports from Canada in terms of changes in gross revenue. For the cattle sector, gross revenues are simulated to decline in 2005 by between 3.85 percent and 4.81 percent and for the beef processing sector, by between 1.26 percent and 1.59 percent. This model does not provide measures of change in welfare for the United States because of the rule; however, welfare changes would be smaller than the change in gross revenue identified by the model.

Issue: The decrease in the quantity of cattle supplied by the United States is a longer-term effect than the analysis suggests. Because the calf-crop that will produce beef in 2005 has already been conceived, this reduction will not occur until at least 2006. If the decrease in quantities supplied by U.S. entities is a short-term consequence (such as cattle held on feed for longer periods), then the longer-term price impact of holding supplies should be calculated.

Response: The model used to estimate effects of the proposed rule did not specify the period of time over which U.S. cattle producers would reduce herd size in response to price declines following resumption of imports from Canada. We expect that the resumption of cattle imports from Canada will have effects both in the near term (adjustment of the length of time animals are fed) and longer term (adjustment of calf retention and breeding decisions). We acknowledge that the comparative statics model abstracts from the problem of what becomes of the cattle that are already in the system, ready to be marketed in the near term; however, we believe the net benefits identified by the model are robust to this abstraction.

Holding cattle longer on feed depends mainly on feed prices relative to expected slaughter prices. Favorable forage conditions are expected to result in more cattle being placed on winter pasture and then moved to feedlots after the grazing season ends. Record-high feeder cattle prices in the United States will continue to pull more heifers into the feedlots than are retained for breeding. Effects described by the analysis should be viewed as including both near-term and longer-term effects.

Issue: Calculating results on a weekly rather than an annual basis allows the ''surge effect'' to be more clearly reflected. Annual averages smooth the price impacts. Weekly surges have been shown to exhibit a powerful effect, both fundamentally and psychologically on cattle and beef markets.

Response: The commenter's reference to surge effects concerns weekly price swings that can affect cattle and beef markets. While we understand that market disruptions can occur within a short time period, we are unable to model expected impacts of the rule on a weekly basis, as we are unaware of any data with sufficient depth and precision to model weekly effects. Annual data used in the analysis of welfare impacts generally capture the very short-term market events that may occur, even if they are not described in detail. In the analysis for this final rule, price effects are estimated over the one or two quarters that the backlog of Canadian fed and feeder cattle are expected to be imported.

Issue: The entire model is heavily dependent on elasticities calculated in 1996. The current situation in U.S. beef supply and demand is very different from that year's; there have been shifts in demand since 1996.

Response: The elasticities used in the analysis for this final rule have been revised from those used for the proposed rule. The revised elasticities are provided by USDA Economic Research Service, based on historical price and quantity data. The price elasticities of supply and demand, respectively, are 0.61 and −0.76 for fed cattle, 0.40 and −0.89 for feeder cattle, and 0.84 and −0.80 for wholesale beef. For comparison in our consideration of near-term price effects during importation of the cattle backlog in the analysis for the final rule, we calculate the results using supply and demand elasticities reduced by one-half. Buyers and suppliers of cattle can reasonably be expected to be less responsive to price changes in one or two quarters than over a year.

2. Prices and Quantities

Issue: In its economic analysis, APHIS estimated that reestablished slaughter cattle imports from Canada of 840,000 head would result in a price decline for such animals of $1.30 per cwt. With regard to feeder cattle, APHIS estimated that reestablished feeder cattle imports from Canada totaling 504,500 head would result in a price decline of 72 cents per cwt. However, if you affect the price of a 1,200-pound finished steer by $1.70 per cwt, then you have to change the price of an 800-pound feeder steer by more than 80 cents per cwt.

Response: The commenter apparently confused the $1.30 per cwt drop in price with the percentage decline it represents, i.e., 1.7 percent. In the economic analysis for this final rule, we

find the decline in prices for fed cattle in 2005 to range from $1.95 to $2.72 per cwt. For feeder cattle, the decline in prices ranges from $0.61 to $1.22 per cwt.

Issue: With constant demand, if you increase supply by 1 percent, you affect the price by 3 to 5 percent. Before the May 2003 ban on ruminant imports into the United States, Canada shipped about 3 percent of its cattle to the United States, both feeder and finished. Accordingly, with finished cattle bringing about $100 per cwt, the estimated effect on the U.S. market should be at least $9 per cwt.

Response: The commenter describes a change that graphically can be portrayed as movement to a lower price on a vertical (constant) demand curve, due to an outward supply shift. In reference to the percentage of cattle shipped from Canada, we believe the commenter did not mean to write ''3 percent of their cattle,'' but rather 3 percent of cattle marketed in the United States. With this change and a fixed demand, the percentages set forth by the commenter would lead as stated to at least a $9 per cwt drop in price.

However, this projected price decline is too large for several reasons. While demand for feeder and finished cattle is inelastic, it is not perfectly inelastic. Demand will increase as price falls, moderating the price decline. The own price elasticities of demand (percentage change in demand for a given percentage change in price) used in the analysis for this final rule are −0.89 for feeder cattle and −0.76 for fed cattle. These are considered short-run elasticities. In addition, the increase in overall supply will be less than the number of cattle imported from Canada. The imports will partly result in an increase in the total supply of cattle sold in the United States, but also partly displace U.S.-produced cattle. Lastly, while the percentages and prices used by the commenter are not specific, inaccuracies do spuriously contribute to the commenter's conclusion. Cattle under 30 months of age imported from Canada in 2002 comprised about 2 percent of the U.S. market for such animals, not 3 percent. Annual 2005 prices forecasted in November 2004 for choice steers (Nebraska, Direct, 1100–1300 lbs), according to USDA World Agricultural Supply and Demand Estimates, range from $82 to $88 per cwt, not $100 per cwt.

Issue: With the loss of other foreign markets for Canadian beef, Canada will probably send more cattle to the United States.

Response: We agree that because of the closure of foreign markets for Canadian beef, there are additional cattle in Canada that are likely to be shipped to the United States with the resumption of imports. This backlog of Canadian cattle is included in the analysis for this final rule.

Issue: A thorough analysis detailing the entire scale of impacts on exports due to the proposed rule is warranted. For example, the economic analysis shows the proposed price effect of importing 840,800 slaughter cattle from Canada. It indicates an increase in the number slaughtered in the United States of only 66,350 and a decrease in the number supplied by the United States of 474,450, yielding a price decrease of $1.30 per cwt. What calculations were used to arrive at these numbers?

Response: Impacts on U.S. exports were addressed in the economic analysis for the proposed rule by considering a range for possible foreign market losses if importing countries do not agree with the U.S. categorization of Canada as a BSE minimal-risk region. Reestablished imports from Canada of 840,800 head of slaughter cattle were estimated to result in an increase of 366,350 head in the total number of cattle slaughtered and displacement of 474,450 head that would have been supplied by U.S. entities. These calculations are based on the partial equilibrium model referenced in footnote 4 of the economic analysis, and a price-quantity baseline as shown in table 2 of the analysis. The same model, but with more current baseline data and estimates on expected cattle imports from Canada, is used in the analysis for this final rule.

Issue: The calculation used to determine the annual number of feeder cattle fed at U.S. feedlots assumes inventory turnover of three times per year, an average of 120 days on feed. This assumes that all feedlots are 100 percent full each day of the year. Due to seasonal supply shortages (e.g., there were 11 percent less cattle on feed during the third quarter of 2003 than the first quarter of that year) and an average of 150 days on feed, industry turnover averages are much closer to 2.5 times per year. Using 2.5 inventory turns per year, the number of feeder cattle fed in U.S. feedlots becomes 27,273,750 head per year. This is 5,454,750 head (17 percent) less than the 32,728,500 calculated using three inventory turns per year. An overstated inventory number understates the price impact related to resumption of cattle imports.

Response: We concur that we may have used too large a number of inventory turns per year in calculating the number of feeder cattle fed at U.S. feedlots. The baseline number of feeder cattle marketed in 2005, for feedlots with capacities greater than 1,000 head, is assumed to be 22,125,000 head, as provided by the USDA Office of the Chief Economist.

Issue: The baseline slaughter cattle information table uses a slaughter cattle price of $78.16 per cwt, the average price of choice steers for the first two quarters of 2003. The market has been over $100 per cwt this fall [the fall of 2003] and Cattle-Fax [a member-owned information organization serving producers in all segments of the cattle industry] forecasts a price of $87 per cwt for the second quarter of 2004. Due to the non-typical price structure that is forecast well into 2004, the price of $78.16 per cwt clearly translates into understated market damages.

Response: In the analysis for this final rule, we use a price range for fed cattle of $82 to $88 per cwt, based on the annual forecast for 2005, as of November 2004 (USDA World Agricultural Supply and Demand Estimates). This price range takes into consideration continued high U.S. demand for beef and present restrictions on U.S. beef exports.

Issue: If the scenarios described in the proposed rule regarding the potential loss of export markets assume an eventual recovery of these lost markets, costs need to be estimated representing recovery efforts. If the assumption is a terminal loss of markets, then a long-term accumulated loss value should be estimated and reported.

Response: We do not assume a permanent loss of export markets. Since publication of the proposed rule, many countries have established restrictions on U.S. cattle and beef due to the Washington State BSE discovery. It is not clear to us what is meant by ''recovery efforts,'' but we believe it is likely the commenter is referring to negotiations between the United States and its trading partners for the resumption of cattle and beef imports from the United States. In the analysis for this final rule, we consider how the rule may influence these countries' future decisions with respect to the lifting of the import restrictions.

Issue: The cost/benefit analysis of the proposed rule shows little if any benefit and underestimated cost to U.S. producers, feeders and packers. It should also be noted that the benefits are limited, as the December prices of Alberta feeder cattle were 10 to 18 percent higher than those of December 2002 and the prices of Alberta slaughter cattle were 7 to 9 percent higher than those of December 2002.

Response: The analysis for the proposed rule estimated price declines

for feeder and fed cattle, given a resumption of imports from Canada. As a group, U.S. entities in competition with firms exporting the Canadian cattle can be expected to experience reduced earnings. They will sell fewer cattle at lower average prices. Entities buying feeder and fed cattle at lower average prices due to the increased supply from Canada can be expected to experience increased earnings. Quantities of cattle assumed to be imported from Canada are based on the backlog that has built up because of current restrictions and on historic import levels. Once the backlog has cleared in 2005, prices for feeder and fed cattle in Canada relative to prices in the United States will influence the number of Canadian cattle sold in the United States and, therefore, the ultimate price effects as well.

Issue: With the December 2003 BSE discovery in Washington State, we have a very clear example of negative price impact from losing our export markets. The only export market currently closed that we estimate would remain open under the least favorable reaction to the APHIS proposal is Mexico. The January Live Cattle contract fell from $90.80 per cwt to $73.50 per cwt, or approximately 19 percent. This negative price impact has not only deflated fed-cattle prices, but is also discounting feeder cattle and calf prices. Every animal slaughtered will take discounts each time it is sold, resulting in heavy cumulative discounts. The APHIS proposal shows potential losses from a 32 percent reduction in beef exports (approximately Japan's portion) to range from $1.65 to $1.93 per cwt on a live weight basis. Another very clear example of the significance of Japan as an export market is demonstrated by the loss of 44 percent of the volume of beef and beef variety meat exports to Japan in 2001–2002 due to the discovery of BSE in Japan. Industry economists estimated the sharp decline in exports to Japan negatively impacts fed cattle prices in the United States by $2.50 per cwt to as much as $4.00 per cwt. Nor was the impact confined to the beef industry—shockwaves rippled through the grain and oilseed sectors, as well as the shipping industry. It is important to realize that this impact was felt from only a 44 percent loss of the Japan market * * *[I]t took nine months to make significant progress and full recovery had not occurred in the trade sector after one year. Determining the actual price impact of lost export markets appears much more amplified than the APHIS proposal suggests.

Response: Although prices for cattle did decline sharply immediately following the Washington State BSE discovery in December 2003, they quickly rebounded. Forecasted annual 2005 prices for feeder cattle, as of October 2004, are $94 to $100 per cwt. This is one of the baseline price ranges used in the analysis for this final rule. Beef prices are also forecasted to remain high despite export restrictions. A wholesale light Choice boxed beef price for 2005 of $141 to $147 per cwt is used in the analysis. In the discussion of possible effects of this rule on U.S. exports, we acknowledge the premium earnings foregone due to closed foreign markets.

Issue: The economic analysis assumes a scenario where U.S. markets are unaffected with BSE—a scenario that is no longer true. In addition, it accepts as justification, in part, for the economic risks, the high prices received by cattle producers and feeders in recent months. However, if you adjust dollars for inflation, producers received less for cattle than they did 40 years earlier.

Response: The analysis for this final rule takes into consideration existing conditions for the U.S. cattle and beef markets. Today's cattle prices, adjusted for inflation, may well be lower than 40 years ago, but this fact is not pertinent in considering expected benefits and costs of the rule.

Issue: Annual imports of beef into the United States rose from 3.6 billion pounds in 1995 to 5.5 billion pounds in 2000. In addition, other factors, such as the declining share of the retail dollar passed on to U.S. producers, have already injured the U.S. cattle industry. To open the border will accentuate this problem. Opening the border to live cattle imports combined with Canadian beef imports will result in supplies being increased by 9 percent and will result in an 18 to 20 percent decline in prices. When the Canadian border was opened to beef imports into the United States, our cattle prices declined 20 percent.

Response: The economic analysis performed for the proposed rule did not indicate the cattle and beef increases suggested by the commenter. The analysis showed that with resumption of imports from Canada, the number of fed cattle may increase by about 3 percent, the number of feeder cattle by less than 2 percent, and beef supplies by less than 1 percent (given ongoing boneless beef imports). We expect a decline in prices due to these increased supplies, but not an 18 percent to 20 percent decline. With the resumption of beef imports from Canada in 2003, there was an increase in cattle prices (choice steers, Nebraska, 1100–1300 lbs) from $78.49 per cwt in the second quarter, to $83.07 per cwt in the third quarter, to $99.38 per cwt in the fourth quarter (USDA World Agricultural Supply and Demand Estimates). The analysis for this final rule indicates a decline in cattle prices for 2005 of roughly between 0.63 percent and 3.2 percent due to reestablishment of imports from Canada, depending on the category of cattle frame and underlying import assumptions.

Issue: The beef analysis for the proposed rule used two different baseline prices for beef, $3.00 and $3.50 per pound. It should be noted that these values for beef may be low. USDA's Economic Research Service (ERS) quotes beef prices at $4.32 per pound in November 2003, a record high.

Response: In the economic analysis for the proposed rule, we noted that $3.00 and $3.50 per pound were used as baseline prices to take into consideration affected beef products lower in value than choice cuts. In the analysis for this final rule, we use a wholesale beef price range of $141 to $147 per cwt (light Choice boxed beef), a forecasted annual 2005 price provided by USDA Economic Research Service.

3. Social Welfare Changes

Issue: Despite APHIS' assertions that price decreases associated with the renewal of trade of feeder and slaughter cattle with Canada would not significantly affect buyers or sellers of slaughter cattle, APHIS must recognize that these costs would be borne entirely by relatively few small businesses, whereas the consumer surplus (in the form of reduced beef prices) would be spread out among millions of consumers.

Response: We acknowledge that consumers who benefit from the expected price decreases will outnumber U.S. livestock producers and other entities harmed by the same price decreases. The economic analysis indicates that the net change in welfare due to these impacts within the United States will be positive.

Issue: Three scenarios in the analysis for the proposed rule are used to evaluate reestablished cattle and beef imports from Canada, assuming (1) no loss, (2) 32 percent loss, and (3) 64 percent of U.S. beef export markets. Based on the APHIS analysis, producers and feeders lose under all three scenarios. Packers gain only if export markets are maintained while live cattle imports resume. Benefits to retailers/consumers are positive under each assumption. The only net benefit scenario for all sectors occurs if live cattle imports resume and export markets are maintained.

Response: The commenter is correct in concluding that the economic analysis for the proposed rule indicated that loss of export markets due to the rule could result in an overall negative impact for the United States. The analysis was clear in stating that we do not know how other countries would react to reestablished imports from Canada. Since publication of the proposed rule, many countries have established import restrictions on U.S. cattle and beef because of the Washington State BSE discovery. In the analysis for this final rule, we consider how the rule may influence these countries' future decisions with respect to lifting of the import restrictions. Possible trade effects of the rule cannot be discussed with the same confidence as expected domestic impacts.

Issue: APHIS' use of ''consumer surplus'' is theoretically questionable. By making a direct offset between the ''consumer surplus'' of public and the ''producer surplus'' of the industry, APHIS assumes that these surpluses are both measurable and comparable between producers and consumers. The concentration of the negative impacts on a relatively small number of industry participants and the wide diffusion of benefits across millions of consumers suggests that the true impact is much more negative than the analysis suggests.

Response: Benefit-cost analysis, the approach used for analyzing Federal regulations, determines whether benefits to society as a whole outweigh costs to society as a whole. Costs and benefits are not borne equally by all groups in a society. When measured in monetary units, comparing changes in consumer and producer surplus is well within standard economic theory, regardless of whether the number of entities differs across producers and consumers. This standard application of economic theory, moreover, is recommended in OMB guidance (Ref 44).

Issue: An impact that is particularly germane is that of other countries shutting their borders to U.S. exports based on the proposed rule. Although this has been addressed in the analysis, it depends upon increased ''consumer surplus'' to offer generous offsets to the crippling losses on the beef industry.

Response: APHIS' economic analysis for the proposed rule found that the net effect of the resumption of cattle imports from Canada would be positive for both feeder cattle and slaughter cattle—that is, the action would benefit U.S. buyers more than it would harm U.S. sellers. The analysis for this final rule also shows net positive effects. This is not surprising, as it is a standard result of microeconomic theory that opening a formerly restricted market benefits consumers in that market more than it hurts producers participating in the market when it was closed. Prior to the Washington State BSE discovery, exports of U.S. beef and ruminant products were earning 7.5 billion annually. Immediately afer the discovery, these export earnings fell by 64 percent. As of November 2004, the export decline had been reduced to 41 percent of pre-BSE levels. (Source: USDA Transcript, Release No. 0497.04, November 9, 2003.)

Issue: Serious concerns exist about the analytical framework that finds offsets for every producer loss as a gain in consumer surplus.

Response: We disagree. It is a standard result of microeconomic theory that expanding the supply in a formerly restricted market causes both an increase in consumer surplus and a decrease in producer surplus among producers participating in the market before it was opened. The analysis would cause more concern if this were not the case.

Issue: In its economic analysis for the proposed rule, APHIS' states that estimated price declines for producers/suppliers and consumers/buyers of slaughter cattle, feeder cattle, and beef due to allowing imports of live cattle from Canada would largely reflect a return to the more normal market conditions that prevailed before Canada's BSE discovery. APHIS' economic analysis states that these ''more normal'' market conditions would come at an annual decrease of $448.7 million for sellers of cattle. APHIS' analysis also claims a ''net benefit'' from reopening the border that presumably is based on consumers' savings through lower beef prices. APHIS needs to reevaluate its economic analysis in light of the current situation and in light of other trends in the beef industry, taking into account the economic situation of cattle farmers and ranchers.

Response: APHIS used the phrase ''more normal market conditions'' in reference to our nation's long history of trade with Canada in cattle and beef and has omitted this wording in the analysis for the final rule to avoid any misunderstanding. The net benefits estimated in the analysis result from the gains for consumers and other purchasing entities (due to the price declines) exceeding the losses for producers and other parties whose products will compete with the imports from Canada.

Issue: Do normal conditions suggest livestock values that reflect negative margins for U.S. producers? If so, that is science that must be considered in the rule, because producers operating at a loss are less able to invest in disease prevention, surveillance, and response.

Response: The rule is expected to result in price declines, but such declines do not equate to negative margins for U.S. producers. Clearly, those producers with smallest net revenues will be the most affected. Given current prices, it is not expected that the rule will cause producers to reduce their investments in disease prevention, surveillance, and response.

Issue: The APHIS analysis shows no benefit to the U.S. live cattle industry or consumers for assuming greater risk. How will reopening the border benefit consumers? How will reopening the border benefit producers?

Response: The economic analysis for the proposed rule showed that beef consumers could be expected to benefit due to lower prices. Producers, if in competition with fed and feeder cattle that would be imported from Canada, are not expected to benefit because of the reestablished imports. However, owners of slaughter facilities, for example, are expected to benefit because of the additional supply of fed cattle. The analysis showed that gains to consumers would exceed losses to producers, for a net gain overall. These same conclusions are reached in the analysis for this final rule.

Issue: Since the United States closed its border to the importation of Canadian cattle under 30 months of age, the beef processing industry in Weld County, Colorado, which is the largest contributor to the local economy there, has been experiencing significant financial losses and is at risk of losing the entire beef industry in that area. The risk from the importation of beef, with its limited inspections, far exceeds the potential problems associated with importation of live cattle from Canada.

Response: As shown in the economic analysis for the proposed rule, buyers of feeder cattle can be expected to benefit from resumption of imports from Canada. Communities such as that identified by the commenter that are dependent on processing industries will gain from the reestablished trade. Removal of SRMs at slaughter and other required risk-mitigating measures of this rule will ensure that beef entering the United States from Canada satisfies animal health criteria the same as or equivalent to those required in the United States.

Issue: In the analysis for the proposed rule, expected effects of the rule on the

fed and feeder cattle markets were examined in separate scenarios. The results of these two scenarios indicate that when fed cattle imports are resumed, producers' surplus declines by $448 million. When feeder cattle imports are resumed, producers' surplus declines by $182 million. APHIS concludes that these impacts would be independent and that increased imports of feeder cattle would benefit feedlot owners. Lower prices for feeder cattle are more likely, however, to pass through the market channel to consumers, and feedlot producers are not likely to realize significant benefits from the lower prices for feeder cattle. This suggests that the impacts of these events [reestablished fed cattle and feeder cattle imports from Canada] would be additive, implying that opening the border to trade with Canada on fed cattle and feeder cattle would likely have an effect of more than $630 million.

Response: Benefits from lower prices for feeder cattle and fed cattle may be at least partially realized by entities further down the marketing chain, including consumers. Revenue margins for feedlot operators may be characterized by greater rigidity than is implied in the analysis for the proposed rule. This possibility is acknowledged in the analysis for this final rule. Impacts described from reestablishing fed and feeder cattle imports from Canada would be additive. Their addition does not negate the fact that expected benefits outweigh expected costs of resumption of imports.

4. Consumer Demand

Issue: A significant negative reaction by importing countries regarding the safety of Canadian beef may very well translate into a U.S. consumer backlash should U.S. beef and beef products be perceived as unsafe. What are the long-term costs and implications of domestic market share loss to other protein sources?

Response: According to Cattle-Fax, U.S. domestic beef sales and demand remained strong after the discovery of a single cow diagnosed with BSE in the state of Washington. Three months after Canada announced a case of BSE, limited trade resumed with the United States, and imports of Canadian boneless meat from animals less than 30 months of age at slaughter began entering the United States. There has been no evidence that domestic consumers substituted other protein sources due to either the BSE discovery in Washington State, or in response to resumed imports of Canadian boneless meat. There is no indication that domestic consumers had a negative reaction to resumed imports of Canadian boneless meat. Rather, all market reports indicate that consumer demand for beef remains strong, even in light of over 70 countries imposing import bans on U.S. cattle and beef products in response to the BSE case in Washington. In fact, the National Cattleman's Beef Association, along with the Cattlemen's Beef Board, administered checkoff surveys of U.S. consumers in January 2004 that indicated that 97 percent of consumers were aware of BSE and a record 89 percent were confident in the safety of domestic beef on the market. That confidence level increased to 91 percent in February surveys. Because there were no discernible losses in consumer confidence or demand for domestic beef, and likewise no domestic market share loss to other protein sources in response to a single case of BSE in Washington State or in response to resumed imports of Canadian boneless meat, we would not expect this climate to change in light of increased imports of associated Canadian commodities.

Issue: Even if U.S. practices are adequate to avoid amplification of BSE after it is imported in Canadian animals, it is clearly wrong to assume, as APHIS does, that a limited number of U.S. cases associated with Canadian-born animals will not materially injure the U.S. industry and consuming public. The fallout over the Washington State BSE case has shown that quite clearly. Cattle prices are dropping on the basis of a single Canadian-born cow slaughtered in the United States. The loss of economic confidence in the beef supply has clear negative impacts on producer revenue. In APHIS' analytical approach, it should also have clear negative impacts on ''consumer surplus,'' since the downward shifting of the demand curve reflects the reduced potential for enjoyment of beef by a shaken public. Assurances—such as we had in December of 2003—of overall safety of the U.S. beef supply will help mitigate this impact. However, the economic impacts are large even if ''it is highly unlikely that such an introduction would pose a major animal health or public health threat.''

Response: U.S. beef consumers have not reduced beef consumption since the discovery of BSE in an imported cow in the United States, nor are there indications of a long-term impact of the discovery on the domestic demand for beef. Following the BSE discovery in Washington State in December 2003, a sudden price decline was short-lived. Prices today have largely recovered, with the projected 2004 price range for choice steers (Nebraska, 1100–1300 lbs) ranging from $84 to $88 per cwt, compared to prices of $67.04 and $84.69 for 2002 and 2003, respectively (USDA World Agricultural Supply and Demand Estimates). U.S. cattle and beef markets since the single BSE occurrence in Washington State have, if anything, reflected the strength and resilience of these industries and the high level of confidence consumers hold with respect to the health and safety of U.S. cattle and beef. We do not expect the rule to result in an increase in risk of BSE in the United States. Removal of SRMs at slaughter and other risk-mitigating measures of the rule will ensure that beef entering from Canada satisfies animal health criteria that are the same as or equivalent to those required in the United States.

Issue: The most serious problem with the economic analysis for the proposed rule is the failure to take seriously the costs to both the producer and the consumer as a result of loss in confidence associated with even a very limited incidence of BSE in the United States.

Response: Consumer confidence is an issue of concern for APHIS; however U.S. consumers do not appear to have reacted to the case of BSE reported in Washington State in a way that demonstrates profound loss of confidence. There were short-term price effects in U.S. markets for cattle and beef, but there do not appear to have been longer-term decreases in the demand for beef or increases in the demand for substitute protein sources such as chicken and pork. In this respect, U.S. consumers' reaction appears to differ from the reaction of consumers in countries like Germany, Japan, and the United Kingdom following BSE discoveries in those countries.

Issue: The economic analysis for the proposed rule is no longer applicable to current cattle market conditions, due to the Washington State BSE discovery.

Response: The economic analysis for this final rule takes into consideration market changes that have occurred since the initial analysis was done. The Washington State BSE discovery has had a significant effect on U.S. beef exports, but it has had little effect on domestic demand, as reflected in continuing high price levels for beef and cattle.

Issue: Once animals are allowed in, if boneless cuts are the only exports allowed, what will happen to the remaining cuts? Are they going to be dumped into our markets?

Response: Beef imported from Canada, like beef from cattle of U.S.

origin, will be consumed domestically or exported to another country depending on prices, trade arrangements, and the numerous other factors influencing the beef market. APHIS cannot predict the eventual use, other than to note current restrictions on U.S. beef exports.

Issue: The most important impact of APHIS' proposed rulemaking is the potential for BSE cases in the United States caused by the importation of Canadian cattle. This is dismissed almost offhandedly in the published analysis. This conclusion has already been proven wrong and is the most glaring deficiency in the economic analysis of the proposed rule. Additionally, the proposed rule ignores the potential economic impact should Canada discover additional cases of BSE while the United States is known to be importing Canadian beef and cattle.

Response: The risk mitigation measures included in the proposed rule were developed to ensure that ruminants and ruminant products imported from Canada pose a minimal BSE risk to the United States. Under the conditions of this final rule, the cow of Canadian origin that was diagnosed with BSE in Washington State would not have been eligible for importation into the United States. We do not expect the rule to result in an increased risk of BSE in the United States, given the risk-mitigating measures put in place in Canada and the monitoring of the movement of imported cattle that will be required. Removal of SRMs at slaughter and other risk-mitigating measures of the rule will ensure that beef entering from Canada satisfies animal health criteria the same as or equivalent to those required in the United States.

Issue: The APHIS analysis ignores the cost the rule would have if a second BSE event occurred on U.S. soil due to the transmission, or market and consumer perception of transmission, resulting from this rule, or even the increased risk that producers and consumers would incur from trade with Canada when there is risk of introduction of BSE. A BSE outbreak would cause demand for beef to decline and an increase in human health concerns. Estimates of the cost of the 1986 outbreak on the British economy, with a herd size of 12.04 million head, are $5.8 billion. Given that the U.S. herd size is 8 times larger, a worst-case scenario suggests the impacts on the United States could be as large as $46.4 billion.

Response: U.S. consumers have not appeared to reduce beef consumption in response to the BSE case found in Washington State. The commenter refers to the economic impact of BSE in the United Kingdom, applying it to the North American situation. It is important to note, as reported by Mathews and Buzby, that the total number of confirmed cases of BSE in the United Kingdom has exceeded 175,000 on over 35,000 farms, compared to the 2 confirmed cases in native North American cattle (Ref 45). We do not expect the rule to result in an increased risk of BSE in the United States.

5. Feeder Animal Movement and Feedlot Requirements

Issue: APHIS did not consider in its economic analysis the costs of ensuring compliance with risk mitigation measures. Such verification (*e.g.*, determination of animal age through dentition and the auditing of health certificates) will be burdensome and costly. Simply obtaining, tracking, and recording the necessary information will be time-consuming and take an undeterminable amount of man-hours.

Response: We acknowledge there will be additional costs to U.S. cattle feeding and packing operations that decide to import Canadian cattle. The additional costs will include, but not be limited to, those associated with increased recordkeeping requirements. These costs will vary by operation. In the analysis for the final rule, we approximate the cost of inspection and certification for movement of Canadian feeder cattle from the port of entry to a feedlot and ultimately to a slaughter facility. As with other business expenditures, affected U.S. firms will include additional recordkeeping costs associated with importing Canadian cattle in their cost calculations, and will purchase Canadian cattle only if the expected returns of doing so outweigh the costs.

Issue: Designated feedlots and slaughter facilities will need to develop a sound segregation plan for Canadian cattle. This adds another level of regulation, cost, and complexity. Without a national animal identification system, which is at least 2 years away, the only way for U.S. feedlots to keep segregation integrity with regard to U.S. and Canadian cattle would be to keep cattle in country-specific pens. This in itself would make it extremely difficult for feedlots to effectively manage cattle health care and feed costs, costing the industry millions of dollars annually. The only way to comply would be for feedlots to establish ''Canadian regions'' within each facility and construct separate hospital treatment facilities. This would also include the tracking of individual animal movements within designated feeding facilities, segregated transportation schedules and staged slaughter times—which requires a more efficient and effective communication link than current industry standards.

Response: In this final rule, there are no requirements for designated feedlots with regard to feeder cattle imported from Canada. Further, the rule does not require feedlots or slaughter facilities to develop segregation plans for live cattle from Canada. Canadian feeder cattle, and feeder sheep and goats, moved from the port of entry to a feedlot and from the feedlot to slaughter must be accompanied by an APHIS Form VS 17–130 to the feedlot and from the feedlot to slaughter by an APHIS Form VS 1–27. These forms will list all animals moved. This final rule will also require that feeder cattle be individually identified before entry by an eartag that allows the animal to be traced back to the premises of origin. The eartag may not be removed until the animal is slaughtered.

Issue: The costs of segregating Canadian cattle from U.S. cattle include additional downtime and changeover time (between processing imported Canadian cattle versus others), increased quality control and regulatory inspection, and a doubling of sku [stock keeping unit] inventory requirements (for ''export only'' sales under the Bovine Export Verification (BEV) program). Furthermore, these costs will definitely place smaller Northern tier single-plants at a disadvantage compared to those in other regions.

Response: Segregation/tracking of Canadian-origin product at the processing stage and beyond will not be necessary to ensure that the products are safe. We address issues concerning the BEV program in our responses to other comments.

Issue: The proposed rule requires that sheep and goats imported from a BSE minimal-risk region be less than 12 months of age if imported for immediate slaughter or for feeding and then slaughter. Was the cost of managing and maintaining imported Canadian sheep and goats as a separate group included in the economic analysis?

Response: The cost of managing and maintaining imported Canadian sheep and goats as a separate group was not included in the economic analysis for the proposed rule. Whether individual feedlot operations consider it worthwhile to handle imports from Canada—*i.e.*, whether the expected additional revenue exceeds the costs associated with feedlot designation—will be an individual choice and will be voluntary on the part of feedlots.

In this final rule, we specify that sheep and goats not for immediate slaughter will be required to be moved to designated feedlots. Criteria for designated feedlots include a written agreement between the feedlot's representative and APHIS that the feedlot will not remove eartags from animals unless medically necessary and cross-reference with the original eartag any eartag that must be replaced on an animal, will create and maintain acquisition and disposition records for at least 5 years, will maintain copies of APHIS movement permits, will allow Federal and State health officials to inspect the premises and animals upon request, and will designate either the entire feedlot or designated pens within the feedlot as terminal for sheep and goats to be moved only directly to slaughter at less than 12 months of age.

Issue: The record high prices for cattle that farmers and ranchers received during the summer and fall of 2003 have given way to limit[ed] down drops in live and future cattle prices. In addition, the market analysis done for the proposed rule ignores recent changes in Americans' diets and cattle herd culling due to extended drought conditions throughout the United States. The economic analysis also ignores that Canadian cattle were captive supplies for cattle that may have been used to manipulate United States cattle markets. These factors were not considered by APHIS in weighing the costs and benefits of the proposed rule.

Response: Record high prices for cattle during the summer and fall of 2003 primarily resulted from tight cattle supplies due to weather conditions and the ban on imports from Canada. With resumption of imports from Canada and improved forage conditions, there will be an increase in the cattle supply, causing downward pressure on prices received by domestic producers. APHIS, of course, does not have authority under statutory mandate to regulate marketing practices such as packer ownership of captive cattle, and any issues presented by packer ownership of cattle supplies is outside the scope of this rule. The economic analysis does not consider captive cattle supplies in examining the costs and benefits of this regulation.

6. U.S. Beef Exports

Issue: The economic analysis does not estimate the impact on the U.S. beef cattle industry as a result of trading partner discomfort with the lessening of restrictions on the importation of ruminants and their products from Canada. APHIS must rework the economic analysis to take this significant impact into consideration.

Response: In the economic analysis for the proposed rule, we addressed possible impacts of the rule on U.S. cattle and beef exports. Consideration was given to the possibility that importing countries may not agree with the United States' categorization of Canada as a region of minimal risk. That part of the analysis, regarding possible restrictions on cattle and beef imports from the United States by other countries because of the rule, addressed possible impacts due to ''trading partner discomfort.'' The analysis for this final rule takes into consideration current restrictions on U.S. beef exports and addresses the question of how the rule may affect these restrictions.

Issue: The negative trade scenarios outlined in the cost-benefit analysis of the proposed rule are based upon there continuing to be very few countries in the world that fully adopt or embrace the recommendations of the OIE regarding imports from BSE-affected countries. Such an underlying assumption is rapidly changing. The possibility that the United States would face lasting negative trade effects as a result of implementation of the proposed rule seems increasingly remote.

Response: In the economic analysis for the proposed rule, we did not assume there would be lasting negative trade effects. However, neither could we assume that negative trade reactions might not result if importing countries did not accept the U.S. categorization of Canada as a BSE minimal-risk region. We now have a different situation, with beef imports from the United States prohibited by a number of countries. It is possible that, because of the rule, these countries may either delay lifting current restrictions on cattle and beef imports from the United States or become more open to reestablishment of the imports. The analysis for this final rule addresses these possible impacts for U.S. beef exports.

Issue: In its cost-benefit analysis, APHIS does not appear to have considered the recent U.S. experience with the cost of segregating U.S. origin meat from Canadian meat to meet Japan's demand that we ship to that country only U.S. born and slaughtered meat. To the extent there are data or estimates available regarding the cost to the U.S. industry to meet Japanese demands, this should be considered in APHIS' analysis.

Response: We believe that the commenter is referring to the voluntary BEV program. Under the BEV program, USDA's Agricultural Marketing Service certifies through compliance audits that beef and other products exported by an eligible supplier are derived from cattle slaughtered in the United States. The BEV program, while ongoing for Canada and Mexico, has been terminated for Japan pending resumption of U.S. beef exports to that country. The BEV program will not be affected by this rule.

Issue: Even if BEV-compliant slaughter facilities do not import Canadian live cattle, they will have to comply and certify they are not receiving Canadian-origin cattle from feedlots and adopt new BEV regulations.

Response: As noted above, the BEV is a program, not a regulation, and is not covered by this rule. Slaughter facilities, if necessary, will be able to identify Canadian-origin cattle by the animal identification requirements included in the rule.

Issue: The proposed analysis calculated the price effect from lost export markets by using elasticities and price information. A large factor that was not analyzed was the loss in premiums that the U.S. beef industry gains by ''upgrading'' cuts with a low value in the United States by sending them to markets that pay a much higher price for them. Japan is the main premium market for U.S. beef and beef variety meats. Based on 2000 research conducted by the United States Meat Export Federation, the extra value achieved by U.S. beef exports is $1.2 billion per year (Ref 46). The loss of export markets will directly pass those markets' portions of this loss of value back to the U.S. beef industry. These losses are in addition to the losses caused by an increased supply of beef on the U.S. market. The extent to which export premiums support prices of domestic beef should be further analyzed.

Response: In the economic analysis accompanying the proposed rule, we stated that we were unsure how other countries would react to a resumption of ruminants and ruminant products from Canada. Because of the Washington State BSE discovery, most U.S. beef exports are now restricted. The question has become how the rule might affect current restrictions. In addressing this issue, we acknowledge the premium earnings foregone due to closed foreign markets.

Issue: The proposed rule fails to take into account the value of the entire animal to the industry. The rule appears to look at muscle cuts, but ignores the ''drop value'' of products such as variety meats, rendered products and goods that utilize such items as a base ingredient (*i.e.*, pet foods). No analysis was done for the potential loss of variety meat exports, both in terms of increased

supply in the United States and lost premiums. Beef variety meat (BVM) exports to Japan averaged 149,388 metric tons from 2000–2002 and averaged $309 million in value. Japan is the number two market for BVM, while Korea is number four with an average of 22,949 metric tons valued at an average $36.5 million from 2000–2002. The Livestock Marketing Information Center states ''The byproduct value can have a considerable impact on current slaughter cattle prices.'' In mid-November, the byproduct (drop credit) value surpassed $10 per cwt on a live weight basis. This is a significant proportion (ten percent) of the entire animal value. What are the costs of losing these variety meat markets?

Response: In response to the single case of BSE in Washington State, many export markets placed bans on imports from the United States. As the commenter states, Japan was the second largest market for U.S. BVM. Exports of BVM to Japan, January to March for 2003 and 2004, illustrate the significance of lost sales. During these three months in 2003, 18,988 metric tons of BVM valued at over $41 million were exported to Japan. During the same months in 2004, only 154 metric tons of BVM with a value of $1.4 million were exported. A question addressed in the analysis for the final rule is whether the rule, in itself, can be expected to affect the restrictions on U.S. beef exports and therefore the continued loss of premium earnings on beef variety meat.

Issue: It is assumed, although not stated in the proposed rule, that beef and variety meats would be segregated through processing beyond slaughter. If this is not done, all economic advantages of prior animal segregation are lost, while the associated costs of segregation are incurred by the industry with no benefit accruing to the domestic or international consumer.

Response: This final rule does not impose any requirements vis-a-vis labeling, segregation, or preservation of identity of the product of Canadian feeder or slaughter cattle. Once imported Canadian cattle are moved to slaughter, the application of FSIS rules for the removal and disposal of SRMs will prevent adverse consequences related to BSE.

Issue: Costs of plant segregation lines were not included in the analysis. Assuming that the proposed rule allows the reestablishment of Canadian beef and cattle imports, and our export markets, mainly Japan and Korea, require that no Canadian beef be exported to them, the costs of animal and beef segregation would become a direct cost to the U.S. beef industry.

Response: APHIS agrees that there could be operational and recordkeeping costs associated with exporting U.S. beef to Asian markets once they reopen, if the importing countries require that the products be derived from cattle of U.S. origin. However, if such requirements were placed on U.S. exports, the effects would be attributable to the policies of the importing countries, not to this rule.

Issue: The APHIS analysis fails to address the likelihood that U.S. beef export customers would reject the proposed actions.

Response: In the economic analysis for the proposed rule, APHIS addressed possible effects of the rule on U.S. cattle and beef exports. Consideration was given to the possibility that importing countries might not agree with the U.S. categorization of Canada as a region of minimal risk. In the analysis for this final rule, we consider whether the rule may influence other countries' decisions with regard to lifting of current restrictions on U.S. beef.

7. Effects on Small Entities

Issue: With regard to potential effects of the rule on small entities, economies of scale dictate that larger entities will be better able to absorb increased fixed costs on a per-unit basis. Segregation costs in packing and processing sectors will have a larger impact on smaller entities. It is believed that larger entities are better situated to absorb market volatility than smaller firms. The history of production agriculture has shown that smaller producers have higher costs of production and face higher risks associated with lower market prices. The economic analysis as proposed by USDA would have harsher consequences on smaller enterprises.

Response: APHIS agrees that larger entities will be better able to absorb costs associated with the rule than smaller entities, such as costs of segregating sheep and goats less than 12 months of age at designated feedlots. We expect entities that envisage a profit by doing so to make the capital investments and plan for the operating outlays that may be required to import such ruminants from Canada.

Issue: The claim that the impacts on small business cannot be estimated due to lack of data is not correct. There is considerable data available from USDA's National Agricultural Statistics Service (NASS) on livestock inventories by operation size. There is clearly adequate data to define small business impact. APHIS should complete a more thorough economic analysis of these impacts, particularly in light of the events of December 2003. Such an analysis should be made available for public comment before consideration of adoption of the proposed rule.

Response: APHIS showed in table 19 of the economic analysis for the proposed rule that the great majority of entities in industries expected to be directly affected by the rule are small, based on NASS data and Economic Census data. It is understood that effects of the rule will differ among entities, depending on specific business circumstances. APHIS does not have data that would allow a comprehensive analysis of potential economic effects for small entities beyond the price declines and welfare gains and losses that are described generally. We are unaware of NASS data or additional data available from the producer segment of the livestock industry that can be used to more finely examine these variations in impact. However, we do provide as an example possible effects of the rule on earnings by small beef cow operations.

Issue: Any resumption of Canadian live cattle imports should be carefully studied to ensure there is no negative impact on the U.S. cattle market. Such analysis should focus on specific geographic areas, especially Idaho and the Pacific Northwest.

Response: The various price and welfare effects described in the analysis are for the nation as a whole, because reestablished imports from Canada will not be restricted by region. However, it is recognized that regions of the United States that historically have been more closely associated with cattle imports from Canada can be expected to be more heavily affected by the rule. An example of possible effects on northern U.S. packing plants is referred to in the analysis of impacts of small entities.

8. Other

Issue: Costs of removing intestines are not included in the analysis. This would be a requirement of cattle imported from Canada and associated costs should be outlined. Associated costs include the costs of removal as well as the loss of the intestine as a product as opposed to removal of only the distal ileum. The intestines are a significant product for international markets.

Response: The FSIS SRM rule requires removal of the small intestine from all cattle slaughtered in the United States. For illustrative purposes, the FSIS Regulatory Impact Analysis estimates small intestine disposal costs to be $0.22 per animal, the value of the small intestine (casings and trepas) to be $12.21 per animal, and the value of alternative industrial uses of small intestine to be $0.33 per animal.

G. Environmental Assessment for the Rulemaking

Consistent with the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), and regulations of the Council on Environmental Quality (CEQ) for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), we prepared an environmental assessment (EA) regarding the potential impact on the quality of the human environment due to the importation of ruminants and ruminant products and byproducts from Canada under the conditions specified in our proposed rule. In December 2004, we revised the EA to address the detection of a BSE-infected cow in Washington State in December 2003 and actions subsequently taken by Federal agencies to further protect the U.S. food supply from potential BSE infection. Other revisions to the EA include the addition of more detail about the available disposal methods of BSE-infected carcasses and information regarding disposal requirements for SRMs of cattle that are now required to be removed in the United States when establishments slaughter cattle or process cattle carcasses or cattle parts. The EA may be viewed on the Internet at *http://www.aphis.usda.gov/lpa/issues/bse/bse.html.*

Issue: One commenter asked whether APHIS considered the appropriate disposal of intestines in its EA.

Response: The revised EA gave an overview of the four methods that would be approved for disposal of diseased carcasses and discussed the FSIS SRM rule, which required slaughter establishments and establishments that process the carcasses or parts of cattle to develop, implement, and maintain written procedures for the removal, segregation, and disposition of SRMs. In its SRM rule, FSIS discussed the need for establishments to have the flexibility to choose the disposal method or methods most appropriate for them; however, general disposal procedures are found in 9 CFR 314.1 and 314.3.

Issue: One commenter stated that APHIS should work with FSIS to develop an environmental impact statement (EIS) for this rulemaking. The commenter suggested that the proposed rulemaking would have potentially significant environmental effects and establishes a precedent for future actions with potentially significant environmental effects.

Response: The commenter is distinguishing between an EA such as the one we have prepared for this rulemaking and an EIS. An EA is a concise public document by which a Federal agency briefly provides its analysis for determining whether to prepare an EIS or a finding of no significant impact (CEQ NEPA Implementing Regulations, 40 CFR 1508.9). An EA identifies and assesses the significance of potential impacts on the environment of the proposed action. Its purpose is to provide any agency with the appropriate environmental information to make an informed decision about the proposed action and assist the agency in deciding whether an EIS is needed. An EIS is a more extensive environmental analysis that seeks to compare potential positive and negative environmental effects and weigh negative environmental effects against an action's other objectives. As discussed above, APHIS has prepared an EA that analyzes the potential environmental effects of the proposed rule. (Instructions for obtaining or viewing the revised EA are included below under the heading ''National Environmental Policy Act.) The revised EA provides additional information on the anticipated nature and extent of environmental consequences and the relevance of preventive actions to protect public health and safety. Based on the known cause of BSE; on the risk information cited to and referenced in the EA; on the preventive actions set forth in this rulemaking and on other mitigation requirements imposed by FSIS, FDA, and the U.S. Environmental Protection Agency; and on the history of BSE in this country, this rulemaking should not significantly affect the quality of the human environment. The CEQ NEPA Implementing Regulations define significance in terms of intensity, including the degree to which the action may establish a precedent for future actions with significant effects or that it represents a decision in principle about a future consideration (40 CFR 1508.27(b)(6)). This section of the CEQ regulations does not apply to this rulemaking because: (1) The EA concludes that the effects are not significant, (2) there is no evidence that any effects in the rulemaking would be cumulative or cumulatively significant, and (3) any future importations from other countries that might eventually be designated BSE minimal-risk regions under this rulemaking will be considered in separate NEPA analyses.

H. Withdraw or Delay Implementation of Rule

Withdraw or Delay Rule for Economic Reasons

Issue: A number of commenters recommended that APHIS withdraw, delay, or restrict implementation of the rule because of its potential negative economic effects on the U.S. livestock and livestock product industry, due to the potential significant influx of cattle from Canada over a short period of time. Additionally, said the commenters, the rule could harm the U.S. export market and its BSE status in the eyes of other countries if trade is allowed with Canada or if requirements less stringent than OIE recommendations are adopted. Further, commenters recommended that APHIS delay implementation of the rule until Canada removes its unfair restrictions on exports from the United States, and delay the rule until all U.S. export markets that were closed due to the December 2003 detection in an imported cow in Washington State are reopened. According to the commenters, if the rule is implemented, APHIS should do one or more of the following to minimize market disruptions:

- Offer an extended window for implementation that closely corresponds with the cattle industry's standard feeding period of 135 to 150 days;
- Resume imports of live cattle in small increments and build up over a 3 to 5 year period;
- Do not allow cattle for immediate slaughter to be imported before feeder cattle;
- Establish a monthly quota for imported cattle until the backlog of cattle from Canada is reduced;
- Stagger resumption of imports of live cattle according to the feeding and weight of the animals;
- Restrict tonnage of imports to the amount that was being imported before restrictions on Canadian imports were established.

Response: APHIS does not have authority to restrict trade based on its potential economic impact, market access effects, or quantity of products. Under its statutory authority, APHIS may prohibit or restrict the importation or entry of any animal or article when the agency determines it is necessary to prevent the introduction or dissemination of a pest or disease of livestock. However, APHIS is actively negotiating with trading partners to reestablish our export markets.

Issue: One commenter stated that the importation of live cattle from Canada should not be resumed until Canada is able to verify that actions equivalent to those imposed by FDA have been in place for at least 30 months before such importation begins.

Response: As stated above, we consider the feed ban in Canada to be equivalent to the one established and enforced by FDA in the United States,

and we consider the feed ban to have been equivalent for more than the 30 months recommended by the commenter.

Issue: One commenter referred to an announcement by CFIA of its intention to conduct further inquiry into the importation of cattle into Canada between 1982 and 1989, their herds of origin in the United Kingdom, and the resulting use of rendered materials and feed distribution from 1986 until 1993. The commenter stated that the information from this phase of CFIA's investigation is vital to determining the risks of allowing further imports from Canada.

Response: We acknowledge the potential value of further inquiry by CFIA in understanding the origin and nature of BSE in North America. However, the epidemiological investigations into both BSE cases (the BSE cow detected in Canada in May 2003 and the BSE cow imported into the United States from Canada and later slaughtered in Washington State) have indicated that it is likely the infected cows were born in Canada before implementation of the feed ban and thus were likely to have been infected under risk conditions that no longer exist. Under this rule, in combination with safeguards in place in Canada and in the United States, we consider the risk that BSE-infected or contaminated animals or animal products will enter the United States from Canada and expose U.S. livestock through feeding of infected materials to susceptible animals to be extremely low. Consequently, we do not consider it necessary to delay implementation of this rule until CFIA completes its inquiry.

Request for Public Meetings

Issue: Several commenters requested that public meetings be held before this rule is made final. One of the commenters requested that USDA convene a meeting of beef producers and consumers to develop a strategy to protect our beef industry and consumers.

Response: We do not believe that public meetings at this time would identify any issues that have not already been raised in the comments received on our proposed rule. As discussed above, we initially provided a 60-day comment period on our November 4, 2003, proposed rule, which closed on January 5, 2004. On March 8, 2004, we reopened the comment period for an additional 30 days until April 7, 2004. Additionally, we gave notice we would consider any comments on the proposed rule we had received between January 6, 2004 (the day after the close of the original comment period) and March 8, 2004. We received a total of 3,379 comments during the 5-month period between November 4, 2003 and April 7, 2004, and do not consider it necessary to hold public meetings before proceeding with this final rule.

Issue: A number of commenters requested the delay of this rulemaking until the investigation of the December 2003 detection of BSE in a cow in Washington State was completed. Several commenters requested that APHIS wait until all appropriate domestic measures to reduce BSE risk are in place before allowing the importation of ruminant products from regions that have had a BSE case. Another commenter requested that APHIS not implement the proposed rule until the advance notice of proposed rulemaking published by APHIS in the **Federal Register** on January 21, 2003 (''Risk Reduction Strategies for Potential BSE Pathways Involving Downer Cattle and Dead Stock of Cattle and Other Species'' (68 FR 2703–2711, Docket No. 01–068–1)), and the advance notice of proposed rulemaking published by FDA in the **Federal Register** on November 6, 2002 (Ref 47) are followed by proposed and final actions. Several commenters requested that the final rule not be implemented until USDA has expanded BSE surveillance, testing, and prevention efforts and has increased funding for BSE research, education, and development of rapid tests to detect the disease in live animals.

Response: We do not consider it necessary to delay implementation of this final rule. As discussed above in section III. B. under the heading ''Reopening of the Comment Period and Explanatory Note,'' an extensive investigation of the detection of the BSE-infected cow in Washington State has been completed. Since publication of the proposed rule and following the detection of the imported BSE case in Washington State, the United States has redirected resources towards planning, implementation, and enforcement of national policy measures to enhance BSE surveillance and protect human and animal health. In that regard, both USDA and FDA have initiated additional food and feed safety measures, discussed previously in this document. In addition, USDA has initiated an enhanced BSE surveillance program that targets cattle from populations considered at highest risk for BSE, Also, FSIS public health veterinarians have begun assisting in APHIS' BSE animal surveillance efforts by collecting brain samples from all cattle condemned during ante-mortem inspection at Federally inspected establishments. This will allow APHIS to focus on sample collection at locations other than Federally inspected establishments, such as rendering operations and farms. Details of the BSE surveillance plan are available at: *http://www.aphis.usda.gov/lpa/issues/bse/BSE_Surveil_Plan03-15-04.pdf.*

Strengthening of the passive surveillance system for BSE through outreach and education is an integral part of the USDA surveillance plan. In this regard, APHIS has developed plans to enhance existing educational materials and processes in conjunction with other Federal and State agencies. These outreach efforts will inform veterinarians, producers, and affiliated industries of the USDA surveillance goals and the sometimes subtle clinical signs of BSE, and will encourage reporting of suspect or targeted cattle on-farm and elsewhere. One of the tools for reporting high-risk cattle, announced on June 8, 2004, is a toll-free number (1–866–536–7593).

To help cover additional costs incurred by industries participating in the surveillance plan, and to help encourage reporting and collection of targeted samples, USDA may provide payments for certain transportation, disposal, cold storage, and other costs.

In addition, increased funding has been requested for USDA's Agricultural Research Service (ARS) to further study BSE. Examples of research projects ARS is actively engaged in include: Development of information and methods to characterize and differentiate among the known prion diseases of ruminant livestock and cervids, including BSE; development and validation of diagnostic and surveillance tests for BSE and CWD and development of intervention strategies for these diseases; development of biological and biochemical methods for detection of the transmissible agent in animal tissues and in the environment; identification and development of new methods and collaborative arrangements with other institutions for detecting animal proteins, especially prion proteins (PrP), in fields, barns, abattoirs, animal feed, feed additives or other animal products; and development of novel techniques for destruction of prion molecules.

It is important to note that all of the above measures are specifically designed to further minimize risks of BSE to animal and human health in the United States that were already low, as characterized by the Harvard-Tuskegee Study, even before the measures taken since December 2003. Because APHIS' risk analysis was based on the controls in place before these improvements, we

consider it unnecessary to delay the implementation of this rule until additional measures are in place.

General information and links to relevant APHIS documents are available at *http://www.aphis.usda.gov/lpa/issues/bse/bse.html.* General information and links to relevant FSIS documents are available at *http://www.fsis.usda.gov/oa/news/2004/bseregs.htm.* General information and links to relevant FDA documents are available at *http://www.fda.gov/cvm/index/bse/bsetoc.html.* In addition, the joint APHIS-FSIS-FDA advance notice of proposed rulemaking published on July 14, 2004, provides an overview of all Federal actions taken related to BSE and requests comment on additional measures under consideration.

Issue: A number of commenters recommended not only that APHIS follow OIE guidelines for BSE minimal-risk status, but that the Agency also delay any rulemaking action until new guidelines regarding BSE risk have been set by OIE. Commenters noted that APHIS was involved in discussions with the international community regarding such guidelines. One commenter stated that OIE is only in the process of developing guidelines that would be consistent with the standards for minimal-risk regions in the proposal.

Response: OIE guidelines have continually evolved and are likely to continue evolving, which is one reason that APHIS has decided not to simply adopt the OIE guidelines as regulations. The United States and other countries routinely propose revisions of the OIE BSE chapter (and other animal disease chapters) and make comments on draft OIE guidelines through official channels. These comments reflect technical and scientific issues relevant to the United States. The recommendations are reviewed by an *ad hoc* committee. As appropriate, the *ad hoc* committee issues a report suggesting revisions to existing OIE chapters. These are presented for adoption at the next General Session of the International Committee.

For instance, in April 2004, the OIE *ad hoc* committee issued a report proposing an example of a simplified BSE classification scheme. This report followed a meeting held in Paris on April 15 and 16, 2004, which resulted from OIE discussions in 2003 regarding the OIE's desire to simplify the BSE risk categorization system while retaining its scientific base. The report included an example of a simplified BSE categorization scheme. It is planned that a simplified scheme will be proposed for possible adoption in 2005.

OIE experts proposed a revision of the risk categories and a reduction in their number from five (''free,'' ''provisionally free,'' ''minimal risk,'' ''moderate risk,'' and ''high risk'') to three (''negligible risk,'' ''controlled risk,'' or ''undetermined risk''). The report stated that the three-category system offered the best science-based practicable approach to the epidemiology of BSE in combination with an emphasis on the safety of commodities for trade rather than on a classification of country status. This overall approach, currently under consideration by OIE, is a scientifically sound approach consistent with APHIS' approach in this final rule, which evaluated in an integrated way the risk conditions existent in the exporting region in combination with risk mitigation measures for commodities. These proposed OIE changes, as well as current OIE guidelines, reinforce the validity of the approach APHIS adopted, which also includes an evaluation of risk in regions seeking to be categorized as minimal risk, coupled with an intense focus on commodity mitigations.

Issue: Several commenters made various statements to the effect that we should not proceed with the rulemaking at this time because of a lack of certainty about the prevalence of BSE in Canada. Several commenters stated that the December 2003 find means that Canada no longer has a single case, and that Canada cannot now be considered a minimal-risk for BSE. One other commenter specifically disagreed with APHIS' conclusion that the additional case of BSE of Canadian origin does not significantly alter the original risk estimate. Another commenter stated that, based on the respective cattle populations, the detection of BSE in 2 cows of Canadian origin is the equivalent of 15 positive cases in the United States in less than a year and that, therefore, the risk of BSE from Canada is too high to resume imports. Several commenters asked whether the finding of a second BSE cow of Canadian origin will preclude Canada from consideration as a BSE minimal-risk region.

Response: The diagnosis of BSE in a cow of Canadian origin in Washington State in December 2003 does not preclude Canada from being considered a BSE minimal-risk region. Under this rule, a determination of minimal-risk status is based on an evaluation of all of a country's BSE prevention and control measures and not on any single criterion, such as the number of reported cases of BSE or any numerical threshold for prevalence. While we did not quantitatively estimate the true prevalence of BSE in Canada, we did evaluate the evidence involving the reported incidence of BSE and the nature and level of BSE surveillance for minimal risk regions in general and for Canada in particular. There is ample evidence to support the conclusion that the prevalence in Canada is very low and that Canada has implemented BSE prevention and control measures adequate to prevent widespread exposure and/or establishment of the disease.

Further, and, we believe, very importantly, the epidemiological evidence obtained shows that both animals referred to by the commenters were likely to have been infected before implementation of the Canadian feed ban. As noted, cattle born before the 1997 feed ban are not eligible for importation under this rule. Therefore, the detection of BSE in the two animals does not reflect the current risk conditions in Canada and the U.S. import conditions addressed in the analysis and proposed rule. In addition to the measures currently in place in Canada that make it unlikely that new cases are developing, the import restrictions in this rule and safeguards in place in the United States make it highly unlikely that the BSE agent will be introduced into the United States from Canada, spread to the U.S. cattle population, or enter the U.S. human food supply through ruminants or ruminant products or byproducts imported into the United States from Canada.

Issue: A number of commenters recommended that APHIS not allow the importation of cattle, beef, or beef products from Canada until more time has passed. The periods of time suggested by commenters ranged from 2 years to 12 years. Commenters provided various reasons for their recommendations. While some commenters recommended a delay only in allowing the importation of cattle, others requested a moratorium on all imports of live cattle, fresh beef, pre-cooked beef, and beef products until a specified period of time has elapsed or until exporters can prove the commodities are BSE-free. Some stated generally either that it requires a substantial amount of time until a region can be considered to present no risk or that more information is necessary on Canada's BSE prevention efforts. One commenter recommended that the importation of live cattle from Canada not be resumed until USDA can assure the U.S. beef industry and the public that it has done a complete analysis of the Canadian livestock production system to ensure that

potential exporters are in full compliance with U.S. regulations that seek to prevent the introduction and spread of BSE in the United States. Others said that APHIS should follow WHO guidelines, which various commenters said recommend waiting periods of from 4 to 12 years from the date of detection of BSE. Several commenters recommended that the importation of beef and live cattle from Canada be prohibited until 30 months from May 20, 2003, the date a BSE-infected cow in Alberta, Canada was diagnosed.

Response: We do not consider it necessary to delay implementation of this final rule. We have evaluated the BSE risk mitigation measures for ruminants and ruminant products in place in Canada and consider them equivalent to the measures that are in place in the United States. These measures are discussed in more detail in this document under the headings ''Reopening of the Comment Period and Explanatory Note'' (section III. B), ''Measures Implemented by FSIS'' (section III. C.), ''Verification of Compliance in the Exporting Region'' (section IV. D.), ''Measures Taken in Canada in Response to BSE Risk Prior to May 2003'' (section III. C.), and ''Epidemiological Investigation and a Report by an International Review Team'' (section III. C.). As noted above, APHIS conducted a risk analysis for this rulemaking. The risk analysis took into account the Canadian measures already in place, as well as our proposed mitigation measures for importation. Based on our analysis of risk, we concluded that any BSE-risk was thoroughly mitigated under the proposed import restrictions. Additional measures implemented since that time, both in the United States and Canada, further reduce risks.

With regard to the reference to WHO guidelines for waiting periods, we are unaware of WHO standards regarding the time periods the commenters' recommended for delay of this rule. The most recent WHO guidelines (Ref 48) reference OIE guidelines for trade, which include provisions for trade of live cattle and meat and meat products under certain conditions even from countries that would be considered high risk for BSE under OIE guidelines.

In addition, it is very important to note again the point made in the technical discussion in the risk analysis that certain commodities, such as muscle meat, are a BSE low-risk commodity in and of themselves. In that discussion, we pointed out that even cattle carrying the BSE infectious agent are unlikely to carry that agent in tissues that have not had demonstrated infectivity (*e.g.*, muscle, liver, skin, hide, milk, embryos) or products derived from these tissues.

Require Certification From All Countries

Issue: One commenter requested that APHIS not implement this rule with regard to Canada until the Agency requires certification regarding livestock feed production from all U.S. trading partners, similar to that required by this rule for minimal-risk regions, and requires them to allow the United States to perform random investigations and testing of their production facilities as a condition of market access.

Response: We do not consider it necessary to postpone implementation of this rule for the reason recommended by the commenter. APHIS evaluates regions on an individual basis to assess the risk of importing animals and animal products into the United States. When supported by such an evaluation, restrictions are imposed as necessary on imports from exporting regions. As part of the evaluation related to BSE, we evaluate the livestock feed practices. We impose import restrictions necessary to ensure that the practices are appropriate. In addition, we have the authority to and will, of course, re-evaluate regions when necessary (§ 92.2(g)). We consider the requirements spelled out in this rule to be comprehensive and sufficient to mitigate the risk of BSE introduction into the United States.

Tracking of Animals

Issue: Several commenters stated that a national tracking system compatible with the Canadian system should be established in the United States before importations occur. One commenter recommended methods for efficiently administering such an identification system.

Response: We do not consider it necessary to delay implementation of this rule until a national animal identification system is implemented in the United States. The animals that will be allowed importation under this rule will either be moved directly to slaughter or be officially and permanently identified and moved within a short period of time under APHIS movement permit to slaughter once in the United States.

Issue: A number of commenters requested that importation of ruminants and ruminant products from Canada not be resumed until more research on BSE is done. Another commenter mentioned that the science of prions is in its infancy and disputed the notion that prions appear only in older animals and not in milk or muscle.

Response: We do not consider it necessary to wait until more research is conducted or more information from Canada is available before implementing this rule. We consider the BSE research upon which we based the proposed rule and this final rule to be very substantial, and consider the mitigation measures in this rule to be very well supported by the research. We discussed the research upon which we based this rulemaking in the risk documents we made available with our November 2003 proposed rule and March 2004 notice of extension of the comment period. Additionally, in the update to our risk analysis described above in section II. C. under the heading ''Update to APHIS' Risk Analysis and Summary of Mitigation Measures and Their Applicability to Canada as a BSE Minimal-Risk Region,'' we describe the sequential risk barriers that Canadian imports will be subjected to. The commenter who disputed whether prions appear only in older animals and not in milk or muscle did not provide any data to support that contention and we are unaware of any reports that demonstrate BSE infectivity in ruminant milk and skeletal muscles.

I. Miscellaneous

Consider Regionalizing Parts of Canada

Issue: Some commenters suggested that APHIS regionalize Canada to differentiate Canadian provinces where BSE-infected cattle have been detected from provinces that have not had a BSE case.

Response: We are making no changes based on the comments. The information currently available to us does not suggest a difference in risk factors between provinces in Canada to the extent that would be necessary to justify such regionalization. Consequently, APHIS is categorizing all of Canada as a BSE minimal-risk region.

Effectiveness of Existing Regulations

Issue: One commenter stated that the detection of BSE in a cow slaughtered in Washington State indicates that even the existing regulations are not sufficiently robust to protect the U.S. cattle industry and the consumer from the introduction of BSE.

Response: From the time of the diagnosis of a BSE-infected cow in Canada in May 2003 until implementation of this final rule, the importation of live ruminants from Canada has been prohibited. As we discussed in the Explanatory Note to our risk analysis and in section III. B.

above under the heading ''Reopening of the Comment Period and Explanatory Note,'' the epidemiological investigation of the imported BSE-positive cow slaughtered in Washington State shows that the infected cow was not indigenous to the United States and most likely became infected in Canada before that country's implementation of a feed ban, and, therefore does not reflect current risk conditions. Furthermore, all cattle identified in the United States as possibly having been from the Canadian source herd of the infected cow were euthanized and tested for BSE, and all of the animals tested negative. Because there is a small probability that BSE can be transmitted maternally, the two live offspring of the infected cow were also euthanized. A third had died at birth in October 2001. All carcasses were properly disposed of in accordance with Federal, State, and local regulations. Also, in conjunction with USDA's investigation, FDA conducted an extensive feed investigation. By December 27, 2003, FDA had located all potentially infectious product rendered from the BSE-positive cow in Washington State. The product was disposed of in a landfill in accordance with Federal, State, and local regulations. This rule by its terms requires that any cattle imported into the United States from Canada were born after the implementation of that country's feed ban.

Enforcement of Current Regulations

Issue: One commenter suggested that USDA focus its limited resources on effectively enforcing current BSE regulations, rather than subjecting the U.S. industry and consumers to what the commenter viewed as an increased BSE risk. The commenter stated that import data obtained through reports from the Economic Research Service (ERS) in 2001 and the Foreign Agricultural Service (FAS) show that several BSE-affected countries have exported beef to the United States. Also, the commenter said Japan should have been listed as an ''undue risk'' country because it did not implement internationally recommended feed import restrictions and because its import requirements were less restrictive than those acceptable for import by the United States.

Response: APHIS has examined U.S. import statistics reported by ERS and FAS that the commenter stated indicated the importation of products from countries with cases of BSE in violation of current APHIS import rules. In many cases, these reports have turned out to be erroneous. In the import databases, several commodities—including those that are restricted from importation and those that are not—may be included in a given category of imports, so the data are subject to misinterpretation. In addition, we have identified certain errors in the reports, such as the miscoding of imports that actually came from Australia as having originated in Austria. Further, import codes are based on tariff needs rather than on animal health needs, which makes it difficult to use the reports to determine compliance with animal health based trade restrictions. We are satisfied that our current import requirements are being properly enforced.

With regard to imports from Japan, following the finding of the first case of BSE in Japan in 2001, APHIS immediately banned the importation of live ruminants and ruminant products and byproducts from that country, and codified that ban by publishing an interim rule in the **Federal Register** on October 16, 2001 (66 FR 52483–52484, Docket No. 01–094–1), that added Japan to the list in § 94.18(a) of regions in which BSE exists. Before detection of BSE in Japan, that country was not listed as a region that posed an undue risk of BSE. At the time the ''undue risk'' category was developed, the focus was on trading practices among Member States of the European Union, because the European Union was where BSE was first detected and its Member States largely follow uniform trade practices. It is not clear to us from the comment what import practices in Japan are being referred to. The lack of a feed ban was not specifically part of the rationale for establishing the ''undue risk'' category.

Follow-Up to Washington State Detection

Issue: Following detection of BSE in an imported cow in Washington State in December 2003, one commenter recommended that a group of USDA stakeholders be assembled to work with the Secretary of Agriculture's BSE advisory group to address all issues arising out of the epidemiological investigation, emergency response, and mitigating measures announced by the Secretary on December 30, 2003.

Response: Following detection of BSE in December 2003 in an imported dairy cow in Washington State, USDA and other Federal and State agencies worked together closely to perform an epidemiological investigation, trace any potentially infected cattle, trace potentially contaminated rendered product, increase BSE surveillance, and take additional measures to protect human and animal health. USDA worked in collaboration with the CFIA in conducting the investigations. Additionally, an international team of scientific experts (the IRT) convened by the Secretary of Agriculture as a subcommittee of the Secretary's Advisory Committee on Foreign Animal and Poultry Diseases (SACFADP) reviewed the U.S. response and recommended actions that could provide additional meaningful human or animal health benefits in light of the North American experience. Both the IRT and the full SACFADP include governmental and nongovernmental representatives who made recommendations for enhancements of the national BSE response program in the United States (Ref 34 and 35).

Imports From Canada Before May 2003

Issue: Several commenters recommended that BSE surveillance in the United States be targeted at cattle imported from Canada into the United States before May 2003.

Response: This recommendation does not directly apply to this rulemaking but, rather, to our animal surveillance program for BSE. Nevertheless, to address the potential risk posed by these earlier imports, USDA and the U.S. Department of Health and Human Services have opted to focus resources on activities that offer the most direct protection of animal and public health. These included applying SRM removal requirements, enforcing the feed ban, and very aggressively increasing overall surveillance in the United States. The Departments have determined that focusing on these measures will be very effective and will do far more to lessen the possibility of BSE-infected material affecting animal health or reaching the public than devoting resources to the exceptionally difficult task of tracing Canadian-origin animals and conducting a surveillance program focused on such Canadian-origin animals.

Possible Causes of BSE Infection

Issue: One commenter asked whether it is known conclusively that cattle can become infected with BSE through eating contaminated materials.

Response: Oral ingestion of feed contaminated with the abnormal BSE prion protein is the only documented route of field transmission of BSE (Ref 49) although other routes have been considered. Thus, the primary source of BSE infection appears to be commercial feed contaminated with the infectious agent. The scientific evidence shows that feed contamination results from the incorporation of ingredients that contain ruminant protein derived from infected

animals. Standard rendering processes do not completely inactivate the BSE agent. Therefore, rendered protein such as meat-and-bone meal derived from infected animals may contain the infectious agent and can result in the infection of other animals that consume the material.

Canadian Prohibition of Imports

Issue: One commenter noted that in 1996 Canada prohibited imports of live ruminants from any country not recognized as free of BSE, and asked why, now that BSE has been detected in cattle indigenous to Canada, the United States would take a different approach than Canada did and allow imports from that country.

Response: The BSE situation addressed by Canada in 1996 was significantly different from the BSE situation in that country today. Actions taken now can be based on scientific research and information that was not available in 1996. In 1996, BSE concerns were focused on the United Kingdom and other countries with a high incidence of the disease. In addition, significant concern existed regarding the risks of possible human exposure to the BSE agent if the importation of live cattle from those regions were allowed. At that time, the apparent link between BSE and vCJD had just been announced, and predictions were being made of huge numbers of cases of vCJD. Since 1996, understanding of the disease has increased significantly, as has our knowledge of and experience with measures that can be taken to mitigate the risk. In addition, the predictions related to numbers of human cases have been scaled down dramatically, reflecting a better understanding of the true exposure that might have occurred. Today, effective import conditions can be designed to address specific risk issues.

U.S. Approach to BSE as Compared to Other Diseases

Issue: Several commenters expressed concern that APHIS' import policy with regard to BSE seems to differ from its general policy with regard to other foreign animal diseases. One commenter stated that, with most diseases, APHIS does not allow importation until adequate surveillance has been done to prove freedom from the disease. However, with regard to BSE, stated the commenter, APHIS allows imports from a region until a case of BSE is identified in that region. The commenter stated that APHIS should define standards for all levels of trade with various countries concerning BSE. Another commenter said that a country should be classified into one of the BSE established categories before trade in ruminant and ruminant products can be established.

Response: With regard to trade from BSE-affected countries, in § 94.18(a)(1) APHIS currently maintains a list of regions where BSE is known to exist. Additionally, § 94.18(a)(2) lists regions that present an undue risk of BSE because their import requirements are less restrictive than those that would be acceptable for import into the United States and/or because the regions have inadequate surveillance for BSE. APHIS prohibits the importation of live ruminants and certain ruminant products and byproducts both from regions where BSE is known to exist (and that are not considered BSE minimal-risk regions) and from regions of undue risk, even though BSE has not been diagnosed in a native animal in the latter regions.

As a newly discovered disease, BSE was limited in its geographic distribution to the United Kingdom and certain other countries in Europe. There was no evidence to suggest the disease existed elsewhere in the world. This situation lent itself to the policy of adding regions to lists of BSE-affected regions or regions that present an undue risk of BSE based on evidence of the disease's existence in those regions or on evidence that there was an undue risk of the disease existing in those regions, rather than assuming that BSE exists in every country of the world unless proven otherwise. This is consistent with our approach to other diseases, such as African horse sickness, which has never been shown to exist in countries other than in Africa and some countries on the Arabian Peninsula. Also, in contrast to infectious diseases that can be diagnosed relatively quickly, BSE has an extremely long incubation period.

If the commenter who discussed the need to conduct adequate surveillance to prove freedom from a disease before allowing importations was referring to the proposed provisions that would allow the importation of ruminants and ruminant products from Canada, it should be noted that we did not propose to consider Canada as a region free of BSE. Rather, in this rule we are creating a new category of regions that present a minimal risk of introducing BSE into the United States via imported ruminants and ruminant products and byproducts. This category is in addition to the categories of regions where BSE exists and regions that present an undue risk for BSE. We are adding conditions to allow the importation of certain live ruminants and ruminant products and byproducts from BSE minimal-risk regions (at this time, only Canada). As discussed in our proposed rule and in this **SUPPLEMENTARY INFORMATION** section, we will evaluate other regions as potential BSE minimal-risk regions upon their request and submission of the necessary information.

We described in the proposed rule and the risk analysis conducted for this rulemaking that Canada has conducted BSE surveillance since 1992. For the past 7 years, Canada has tested more than the minimum number of samples recommended by OIE. Additionally, we consider Canada to have exceeded the OIE guideline for surveillance by conducting active targeted surveillance, as has been done in the United States. We concluded that Canada's level of surveillance is adequate for that country to be recognized as a BSE minimal-risk region.

Change in BSE Status

Issue: One commenter stated that this rule should include criteria for determining when the BSE minimal-risk status of a region will be changed to a status of higher or lower risk, and should include how criteria for such a change in classification will be reviewed and evaluated.

Response: We acknowledge that there may be situations where the BSE minimal-risk status of a region should be changed to a status of higher or lower risk. As proposed, however, this rulemaking was intended to establish and address standards for recognizing a region as a BSE minimal-risk region, along with mitigation measures for the importation of susceptible animals and animal products from such regions. We have taken the commenter's recommendation under review, and, if we determine that standards for movement to a higher or lower risk status should be promulgated, we will propose those standards in a separate rulemaking. The provisions in § 92.2(g) recognize the need to conduct ongoing monitoring of a region's animal health status and provide that a region that has been granted animal health status under the APHIS regulations may be required to submit additional information pertaining to animal health status or allow APHIS to conduct additional information collection activities in order for that region to maintain its status.

WHO Guidelines

Issue: One commenter stated that the WHO does not recognize ''minimal-risk BSE countries'' and that WHO policy is not to allow imports of beef or cattle from BSE countries. Therefore, said the commenter, the import of beef and cattle from Canada should not be allowed.

Response: As discussed above under the heading ''Withdraw or Delay Implementation of Rule,'' we are not aware of any WHO guidelines that reference specific trade policies. It is the OIE guidelines (Ref 2) that are relevant in this regard, and OIE guidelines include provisions for trade in live cattle and meat and meat products from countries in all categories—including those at high risk for BSE.

Indemnity for U.S. Producers

Issue: One commenter asked whether USDA will indemnify U.S. producers if our trading partners question movement and identification controls for cattle imported from Canada and Canadian feeder cattle become unmarketable.

Response: APHIS will not indemnify U.S. producers for the actions of trading partners.

Recognize Isolated Donor Herds

Issue: Several commenters requested that the regulations allow ruminant products to be collected from isolated herds that have been controlled to be free from exposure to contaminated feed and animal diseases, and that APHIS work with companies that currently have such herds to established harmonized standards for BSE freedom.

Response: We are making no changes based on these comments. There are currently no procedures in place for classifying herds as BSE free, and it would not be appropriate to add such criteria in this final rule. However, APHIS welcomes information from interested parties on recommended criteria for BSE-free herds.

Feed Ban and Processing Compliance in the United States

Issue: One commenter recommended that we check more rigorously for violations of the ban on ruminant products in ruminant feed in the United States. Another commenter stated that FDA data from 2000 and 2002 indicate low compliance with the ban on feeding ruminant protein to ruminants in the United States.

Response: The United States, through the FDA, implemented a feed ban prohibiting the use of most mammalian protein in feeds for ruminant animals, effective August 4, 1997. This prohibition appears in 21 CFR part 589.2000. Compliance with the 1997 FDA feed ban is currently very high. Current compliance numbers are not readily comparable with numbers that were published in 2000 and 2002. The two sets of compliance numbers were drawn from different databases and used different presentation formats. Current numbers differentiate between serious and minor violations of the feed rule, the latter of which generally consist of minor recordkeeping deviations. Previous compliance numbers included those minor recordkeeping as part of the total number of violations. A level of high compliance by feed mills, renderers, and protein blenders has been noted for a number of years. BSE inspection results are accessible on the Internet at *http://www.fda.gov/cvm/index/bse/RuminantFeedInspections.htm.*

Animal Feed Restrictions

Issue: Several commenters requested that no animal protein and fat be allowed in feed for farm animals, so as to prevent the possibility of cross-contamination of concentrate feed in mills and accidental misfeeding on farms that contain different species of animals. Several commenters requested that SRMs be banned from use in all animal feed.

Response: As noted, the FDA enforces a feed ban prohibiting the use of most mammalian protein in feeds for ruminant animals and compliance with this feed ban is currently very high. In the joint FDA-FSIS-APHIS advance notice of proposed rulemaking published July 14, 2004, FDA requested additional information to help it determine the best course of action with regard to the feed ban. As discussed above under the heading ''Measures Implemented by FSIS,'' FSIS bans the use of SRMs in human food.

Products for Human Consumption

Issue: One commenter stated that USDA should act to ensure that no central nervous system tissue (CNS) is found in meat destined for human consumption. The commenter said that a survey conducted by FSIS in 2002 regarding the use of advanced meat recovery (AMR) systems in the United States indicated that 74 percent of establishments surveyed tested positive for CNS tissue contamination. (AMR is a technology that enables processors to remove the attached skeletal muscle tissue from livestock bones without incorporating significant amounts of bone and bone products into the final meat product.)

Response: With regard to beef product derived from an AMR system, FSIS reported that their 2002 survey indicates that approximately 76 percent (25 of 34) of the establishments whose AMR product was tested had positive laboratory results for spinal cord, dorsal root ganglia (clusters of nerve cells connected to the spinal cord along the vertebral column), or both in their final beef AMR products. However, as discussed in this **SUPPLEMENTARY INFORMATION** section under the heading ''Measures Implemented by FSIS,'' in an interim final rule published and made effective on January 12, 2004, FSIS expanded the previous prohibition against spinal cord tissue being present in meat derived from AMR systems to include all CNS tissue. In addition, in its January rulemaking, FSIS prohibited the manufacture of mechanically separated beef, as well as the production of AMR using SRMs.

Issue: A number of commenters stated that APHIS should make final its proposed rule only if the United States bans all rendered products from the human food supply.

Response: FSIS has identified those tissues that are unfit for human consumption regardless of whether cattle exhibit signs of BSE. As a result, all SRMs, as well as the small intestine, are prohibited from entering the human food supply, and if rendered, may be used only in inedible rendering.

Issue: As discussed above under the heading ''Measures Implemented by FDA,'' FDA has prohibited SRMs, the small intestine of all cattle, material from non-ambulatory disabled cattle, material from cattle not inspected and passed for human consumption, and MS(beef) from use in FDA-regulated human food, including dietary supplements, and cosmetics. One commenter stated that the APHIS was silent on whether Canada plans to adopt those new FDA restrictions.

Response: FDA applies any restrictions it establishes on the use of products in the United States to products imported into the United States and will enforce those restrictions with regard to imports from Canada accordingly.

Restrictions on Product Use Due to Clinical Signs of BSE

Issue: One commenter stated that, to avoid consumer problems, Federal agencies should provide that any animals exhibiting symptoms of BSE may be used only for pet food.

Response: All cattle slaughtered in Federally inspected establishments in the United States are subject to inspection. FSIS inspectors examine cattle to identify any symptoms of disease, including signs of central nervous system impairment. Cattle that are suspect for any reason are examined by an FSIS veterinarian to determine whether the animals are eligible for slaughter. Cattle that show signs of systemic illness and disease are condemned and are not allowed into the human food supply. As noted, FDA currently prohibits the feeding of most

mammalian protein (other than that from horses and pigs) to ruminants, and is developing a proposed rule to further strengthen the feed ban.

Uniform Standards

Issue: Several commenters requested that this rule not be implemented until a uniform set of BSE standards has been agreed upon among the United States, Canada, and Mexico. The commenters stated that particular relevance should be placed on a ban on the inclusion of blood meal in ruminant feed and on the segregation of lines in feed mills, as FDA announced it was planning to propose.

Response: The United States has been discussing a North American approach to the BSE issue for a number of years. Officials from the United States hold annual meetings with Canadian and Mexican technical experts from counterpart agencies that cover animal health, public health, diagnostics, and research. These meetings have contributed to greater understanding and harmonization of BSE control and prevention policies among the three countries. In fact, the United States, Canada, and Mexico have an agreement to recognize BSE region evaluations conducted by any of the three countries, using the same standards.

Currently, the United States is working with Canada and Mexico to develop a joint North American BSE strategy that promotes international guidelines protecting public and animal health, while encouraging the use of science- and risk-based trade measures in order to maintain sound disease surveillance and transparent reporting. Some of the preliminary results from those discussions are reflected in this final rule, such as the changes from our proposed provisions regarding the importation of live cervids into the United States (discussed above under the heading ''*Cervids*'').

Issue: One commenter recommended that implementation of this rule be delayed until there is a clear consensus among trading partners as to what constitutes SRMs.

Response: As noted above, the United States is working with Canada and Mexico to develop a joint North American BSE strategy and those three countries agree on what constitutes SRMs. APHIS is also interested in maintaining consistency with OIE guidelines regarding SRMs, although in certain cases the USDA considers it prudent to exceed the guidelines currently recommended by OIE.

Country-of-Origin Labeling

Issue: A number of commenters recommended that country-of-origin labeling be required in the United States so that beef imported from Canada would be so labeled. Some commenters suggested APHIS postpone implementation of this rule until such labeling is in place in this country. Several commenters raised concerns about how the United States would be able to certify U.S.-produced material as free of Canadian-sourced material.

Response: Under the Farm and Security and Rural Investment Act of 2002 and the 2002 Supplemental Appropriations Act, USDA is required to implement a mandatory country of origin labeling program (COOL) (Ref 50). USDA's Agricultural Marketing Service (AMS) published a proposed rule on the COOL program on October 30, 2003 (68 FR 61944–61985, Docket No. LS–03–04). Under the proposal, retailers would be required to notify their customers of the country of origin of all beef (including veal), lamb, pork, fish, and selected other perishable commodities being marketed in their stores. In addition, the AMS proposal identified criteria that these commodities must meet to be considered of U.S. origin. In January 2004, President Bush signed Public Law 108–199, which includes a provision to delay until September 2006 the implementation of mandatory COOL for all covered commodities except wild and farm-raised fish and shellfish. The COOL program, when implemented, will address the labeling concerns raised by commenters with regard to APHIS'' proposed rule. APHIS does not consider it necessary to delay implementation of this rule until those labeling provisions are implemented. In its October 30, 2004 proposal, AMS noted, in discussing Section 10816 of Public Law 107–171 (7 U.S.C. 1638–1638d) regarding COOL that the ''intent of the law is to provide consumers with additional information on which to base their purchasing decisions. It is not a food safety or animal health measure. COOL is a retail labeling program and as such does not address food safety or animal health concerns.''

Jurisdiction

Issue: One commenter expressed the need for elimination of what the commenter termed conflicts of jurisdiction between the agencies of the Federal Government that oversee public health and safety. As an example, stated the commenter, the November 2003 APHIS proposed rule gives APHIS precedence over FSIS in determining whether an animal or its food products are safe to import, even though APHIS does not have authority to regulate food derived from the animal. One commenter stated that this rulemaking should be under the control of a human health agency because USDA has no expertise in the subject area. Another commenter suggested as a possible solution to what the commenter viewed as overlapping agency authorities the development of a single food agency in the United States to oversee all aspects of the food product safety system.

Response: We disagree with the commenters' assessments. The issues of protecting human and animal health from the risks of BSE are sufficiently diverse to require involvement of multiple agencies acting under their respective authorities. This work is carried out primarily through the USDA agencies of APHIS for animal health and FSIS for food safety, along with FDA. USDA has the statutory authority to protect both animal agriculture (AHPA) and public health (the Federal Meat Inspection Act, the Poultry Products Inspection Act of 1968, and the Egg Products Inspection Act).

APHIS regulates the importation of animals and animal products into the United States to guard against the introduction of animal diseases, including BSE. FSIS is responsible for ensuring the nation's commercial supply of meat, poultry, and egg products is safe, wholesome, and correctly labeled and packaged, whether produced domestically or imported. To ensure the safety of imported products, FSIS maintains a comprehensive system of import inspection and controls, which includes audits of a region's foreign inspection system, port-of-entry reinspection, and annual review of inspection systems of foreign countries eligible to export meat and poultry to the United States. These two USDA agencies, under their respective authorities, act together in the prevention, monitoring, and control of BSE in the U.S. livestock and meat and meat products food supply.

USDA agencies coordinate their responsibilities with FDA's Center for Veterinary Medicine regarding safety of animal feed. Likewise, such coordination is carried out with the FDA's Center for Food Safety and Applied Nutrition regarding the safety of all foods other than meat, poultry, and egg products, and with other FDA Centers having responsibility for drugs, biologics, and devices containing bovine material. These agencies collaborate, issuing regulations under their respective, to implement a coordinated U.S. response to BSE.

Private Testing for BSE

Issue: Several commenters recommended that private companies be provided the opportunity to do their own testing for BSE.

Response: APHIS has considered carefully the possibility of allowing private companies to conduct their own BSE testing, and remains convinced that allowing such testing for private marketing programs is inconsistent with USDA's mandate to ensure effective, scientifically sound testing for significant animal diseases and to maintain domestic and international confidence in U.S. cattle and beef products. As we continue to deal with the complexities of BSE, we consider it important to maintain clarity with regard to the purpose of USDA's BSE testing and the results such testing yields. As explained previously, currently available post-mortem tests, although useful for disease surveillance, are not appropriate as food safety indicators.

User Fees

Issue: One commenter stated that the $94.00 fee for a permit to import animals and products into the United States is unfair to private individuals and that there should be a minimal or no fee for permits.

Response: The issue raised by the commenter pertains to general import procedures and is not within the scope of this rulemaking. However, with regard to the general issue of user fees, under APHIS' regulations, user fees are charged for the services APHIS provides related to the importation, entry, or exportation of animals and animal products. As provided in 9 CFR part 130, APHIS charges all individuals a $94.00 fee for processing an application for a permit to import live animals, animal products or byproducts, organisms, vectors, or germplasm (embryos or semen) or to transport organisms or vectors. These charges are necessary for APHIS to recover the costs of providing these services. APHIS does not receive funds appropriated by Congress for these activities, and Congress has directed APHIS to charge user fees to recover its costs. The $94.00 cost for APHIS'' processing of applications for permits to import products was set in August 2001 (66 FR 39628–39632, Docket No. 99–060–2) based on the average of the actual volumes of each type of application processed in fiscal years 1998 and 1999. The user fee amount includes cost components for the salaries of employees involved in the processing applications, along with costs of billings and collections, rent, equipment (such as computer technologies), Agency overhead, and departmental charges.

Flexibility and BSE Research Advances

Issue: One commenter recommended that this rule explicitly provide administrative flexibility to the Administrator, with the understanding that the flexibility granted to the Administrator would be applied on the basis of risk assessment and sound science. The commenter stated that such an approach would provide for transparent and predictable application of the rule, while accommodating the evolution of scientific knowledge and risk mitigation processes, new product development, market demand, and revisions to OIE standards or WHO guidance. Another commenter requested that USDA review the provisions in this final rule 2 years after publication to see if technology and research advances warrant changes in the regulations. Another commenter requested that APHIS reassess the rule in 5 or 10 years.

Response: We are making no changes based on these comments. In developing this rule, we considered the best current BSE research available to us and designed the standards for minimal-risk regions to provide for some flexibility. We continually evaluate our regulations to consider advancement in knowledge and science.

Zero Risk

Issue: Several commenters disagreed that importations of ruminants and ruminant products should be allowed under certain conditions from regions that APHIS considers minimal risk for BSE. Some commenters said that countries exporting such commodities to the United States should present a ''zero risk'' of BSE, not a minimal risk. Even with a zero risk standard, said one of these commenters, it would be incorrect to say any region is BSE free and that the most that can be said is testing has not been conducted for BSE in that region.

Response: Zero risk is virtually, if not completely, impossible to achieve. As noted above, if we were to make trade dependent on zero risk, foreign, as well as interstate, trade in animals and animal products would cease to exist. APHIS agrees with the conclusion expressed in international trade agreements, such as the WTO-SPS Agreement and NAFTA, that trade should be commensurate with risk. Under these agreements, participating nations, including the United States and U.S. trading partners, have agreed to base conditions for importations on risk assessment and international standards. Regarding the risk associated with regions that have no or inadequate surveillance for BSE, we do not currently accept live ruminants or ruminant products from these regions, either because they are listed in § 94.18 as a BSE-restricted region or because they have not applied for status necessary to trade in ruminants or ruminant products with the United States, which would involve an evaluation by APHIS of the region for other diseases, such as foot-and-mouth disease and rinderpest, as well as for BSE.

The Harvard-Tuskegee Study

Issue: One commenter asked why USDA requested Harvard to conduct a risk analysis to evaluate the effectiveness of the U.S. system with the presence of Canadian products in U.S. channels, instead of requesting that Canada conduct a similar risk assessment of its system.

Response: As discussed above under the heading ''Harvard-Tuskegee Investigation of BSE Risk in the United States,'' in April 1998, USDA commissioned Harvard and Tuskegee Universities to conduct a comprehensive investigation of BSE risk in the United States. The purpose of the Harvard-Tuskegee Study was to assess the effectiveness of the U.S. domestic system with regard to BSE. The initial study did not specifically address the risk of BSE being introduced into the United States from Canada. The study was completed in 2001 and released by the USDA. Following a peer review of the Harvard-Tuskegee Study in 2002, the authors responded to the peer review comments and released a revised risk assessment in 2003 (Ref 2).

In 2003, using the same simulation model developed for the initial study, the HCRA evaluated the implications of a then-hypothetical introduction of BSE into the United States from Canada (Ref 10). Again, this was an assessment of the internal system in the United States, rather than an assessment of the risk of BSE in Canada. This assessment confirmed the conclusions of the earlier study-namely, that a very low risk exists of BSE becoming established or spreading should it be introduced into the United States. In December 2002, the CFIA, Science Branch, issued a risk assessment that evaluated the risk for BSE in Canada. (Ref 12).

J-List

Issue: One commenter stated that, when the border is opened, we should remove Canadian cattle from the ''J-list.''

Response: The ''J-list'' referred to by the commenter is a list of commodities that the Secretary of the Treasury has exempted from the general requirement in 19 U.S.C. 1304(a) that all products that are imported into the United States be marked as to country of origin. Among the commodities excepted by the Secretary of Treasury from this requirement are live livestock. The commenter's request is beyond the scope of this rulemaking, which does not address U.S. Department of Treasury requirements. However, we note that, under this rule, all cattle, sheep, and goats imported from Canada for other than immediate slaughter must be permanently identified before exportation to the United States as being of Canadian origin.

Comments on Issues Outside the Scope of This Rulemaking

A number of comments raised issues addressed topics outside the scope of the provisions of the proposed rule. These comments included the following issues: Concern regarding the effect of regulations in general on the cost of raising cattle; concern regarding the inhumane treatment and shipment of animals; recommendations regarding the terminology to use when referring to the euthanization of animals; requests for meetings with APHIS officials to discuss product development; concern that APHIS appears to be giving the issue of BSE minimal-risk regions a higher priority than domestic cattle disease programs; prohibiting the lambing of U.S. sheep on pastures where scrapie might be a problem; a recommendation that we require cattle exported from the United States to Canada to have a USDA identification tag and be marked with a brand; a recommendation that all livestock be allowed to live out their lives; a recommendation that cattle not be slaughtered before 30 months of age and that sheep and goats not be slaughtered before 12 months of age; and requests that the Canadian government pay U.S. cattle producers for economic and administrative losses due to the detection of a BSE-infected cow in Washington State.

V. Additional Clarifications

Transiting of Ruminant Products Through the United States

We are providing in § 94.18(d) that meat, and edible products other than meat, that are eligible for entry into the United States from a BSE minimal-risk region may, under certain conditions, be transited overland through the United States for export to another country.

The existing regulations in § 94.18(d) have allowed the transiting through the United States for immediate export, under certain conditions, of meat, and edible products other than meat, that are otherwise prohibited importation into the United States because they are derived from ruminants that have been in a region listed in § 94.18(a) as a region either in which BSE exists or that poses an undue risk of BSE. Before our listing Canada in this rule in § 94.18(a)(3) as a BSE minimal-risk region, the only regions listed in § 94.18(a) were countries from which transport of ruminant products to and through the United States would necessarily involve shipment by air or sea. Therefore, we have interpreted the existing provisions for transiting the United States in § 94.18(d) to apply only to such transiting at air or sea ports in the United States for export to another country. The increased risk from overland shipment would have required mitigation measures in addition to those listed in existing § 94.18(d).

Now that BSE has been detected in a country (Canada) from which overland shipment of ruminant products is feasible, we consider it necessary to clarify our intent with regard to the existing transiting provisions in § 94.18(d) to make it clear that transiting of shipments otherwise prohibited importation into the United States because of a region's BSE status may be done only at air or sea ports in the United States. We are revising the wording in § 94.18(d) to make this clear.

However, because we consider Canada to be a region of minimal risk for BSE, we are adding provisions to this final rule that will allow the overland transiting through the United States of products from BSE minimal-risk regions that are derived from bovines, sheep, or goats. These conditions appear in § 94.18(d) of this final rule and require that, in addition to meeting the existing transiting conditions in § 94.18(d), such shipments must meet additional conditions that are set forth in § 94.18(d)(5), which provide that the shipment must be exported from the United States within 7 days of its entry, the commodities must not be transloaded while in the United States, and a copy of the import permit required under the transiting conditions must be presented to the Federal inspector at the port of arrival and the port of export in the United States.

A reasonable question would be: ''If products are eligible for entry into the United States from a BSE minimal-risk region, why is it necessary to establish conditions for their transiting through the United States?'' The reason for restricting overland transiting to low-risk products from BSE minimal-risk regions is that shipments for controlled transit are not intended for ultimate entry into the United States and generally do not need the same manner of border inspection as shipments intended for U.S. entry. In recognition of this, we are combining the existing transiting requirements and those of this final rule with limitations on the type of products eligible for transiting to further ensure that such products do not present a risk of introducing BSE into the United States.

Part 95, which deals with the importation of inedible products, has provisions in § 95.4(f) that are similar to those in § 94.18(d) regarding transiting of products. In this final rule, we are making the same changes to § 95.4 as those discussed above with regard to § 94.18(d).

Definition of Inspector

Sections 93.400 and 95.2 each contain a definition of *inspector.* Section 94.0 contains a definition of *authorized inspector.* These definitions refer to an individual responsible for certain functions at a port of arrival or export in the United States. Each of the definitions refers to an individual either employed by APHIS or authorized by the Administrator to enforce the regulations. However, these definitions do not reflect the reassignment of certain responsibilities from APHIS to the Department of Homeland Security's Bureau of Customs and Border Protection by the Homeland Security Act of 2002. Therefore, we are replacing the definitions of *inspector* and *authorized inspector* in those sections with new definitions that read as follows: ''Any individual authorized by the Administrator of APHIS or the Commissioner of Customs and Border Protection, Department of Homeland Security, to enforce the regulations in this part.'' Similarly, we are updating §§ 94.18(d)(3) and 95.4(f)(3) (which is redesignated as § 95.4(h)(3) in this final rule), which have required notification of the APHIS Plant Protection and Quarantine Officer at ports of arrival and export, to refer instead to notification of the inspector. We are also adding the definition of *authorized inspector* to § 96.1 to clarify the use of that term in part 96 of the regulations.

Definition of Flock

Before this final rule, the term *flock* was defined in § 93.400 to mean ''a herd.'' However, 9 CFR part 93, subpart D, includes provisions that refer to a ''flock or herd.'' To eliminate this redundancy and to clarify our intent, we

are a making a nonsubstantive change to § 93.400 to define *flock* as ''a group of one or more sheep maintained on common ground; or two or more groups of sheep under common ownership or supervision on two or more premises that are geographically separated, but among with there is an interchange or movement of animals.'' This definition is the same as the existing definition of *herd* in § 93.400, except that the revised definition of *flock* refers specifically to sheep.

Wording Clarification

We are also amending § 94.18(a)(1) to make it clear that imports of ruminants and ruminant products from Canada are not subject to the restrictions of that paragraph.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be economically significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

Under the Animal Health Protection Act of 2002 (7 U.S.C. 8301 *et seq.*) the Secretary of Agriculture is authorized to promulgate regulations to prevent the introduction into the United States or dissemination of any pest or disease of livestock.

The regulations in 9 CFR parts 93 to 96 include provisions that prohibit the importation of ruminants and most ruminant products (meat and certain other products and byproducts) from (1) regions where BSE exists and (2) regions that present an undue risk of introducing BSE into the United States because of import requirements less restrictive than those that would be acceptable for import into the United States or because of inadequate surveillance.

In this rule, APHIS is establishing an additional category of regions that present a minimal risk of introducing BSE into the United States. This category will include (1) those regions in which a BSE-infected animal has been diagnosed but in which measures have been taken that reduce the risk of BSE being introduced into the United States, and (2) those regions in which BSE has not been detected, but that cannot be considered BSE-free. In this rule, APHIS (1) sets forth the standards the Agency will consider before listing a region as one of minimal risk for BSE, (2) lists Canada as the only BSE minimal-risk region at this time, and (3) establishes measures to mitigate any risk that BSE would be introduced into the United States through the importation of ruminants and ruminant products from a BSE minimal-risk region. Future requests received from other regions to be considered BSE minimal-risk regions will be evaluated.

On May 20, 2003, CFIA reported a case of BSE in a beef cow in northern Alberta. To prevent the introduction of this disease into the United States, APHIS issued an interim rule that listed Canada as a region where BSE exists, thereby prohibiting the importation of ruminants and most ruminant products from Canada, effective May 20, 2003.

Following the discovery of the BSE-infected cow, Canada conducted an epidemiological investigation of the BSE occurrence, and took action to guard against any spread of the disease, including the quarantining and depopulation of herds and animals determined to be possibly at risk for BSE. Subsequently, Canada asked APHIS to consider resumption of ruminant and ruminant product imports into the United States, based on information regarding the following: Canada's veterinary infrastructure; disease history; practices for preventing widespread introduction, exposure, and/or establishment of BSE; and measures taken following detection of the disease.

The prohibition was modified on August 8, 2003, to allow the importation of certain ruminant-derived products from Canada under APHIS Veterinary Services permit. The most important commodity that can enter by permit is boneless bovine meat from cattle less than 30 months of age.

This study analyzes ruminant and ruminant product imports from Canada that will be allowed to resume because of this rule. Expected benefits and costs are examined in accordance with requirements of the Office of Management and Budget for benefit-cost analysis as described in Circular A–4, ''Regulatory Analysis,'' which provides guidance for agencies on the analysis of economically significant rulemakings as defined by Executive Order 12866. Effects on small entities are also considered, as required by the Regulatory Flexibility Act.

Although not addressed in the analysis, Canadian producers and suppliers of ruminants and ruminant products will clearly benefit from the resumption of exports to the United States. In 2002, about 90 percent of Canadian beef exports and virtually all (99.6 percent) of Canada's cattle exports were shipped to the United States. Canada's cattle producers reportedly had one million more head of cattle on their farms on July 1, 2004, than they did one year earlier. This increase is largely due to the collapse of Canadian cattle exports.

Below is a summary of our economic analysis. A copy of the full economic analysis is available by contacting the individual listed under **FOR FURTHER INFORMATION CONTACT**. You may also view the economic analysis on the Internet by accessing the APHIS Web site at *http://www.aphis.usda.gov/lpa/issues/bse/bse.html*. Click on the listing for ''Economic Analysis, Final Rule, Bovine Spongiform Encephalopathy: Minimal-Risk Regions and Importation of Commodities (APHIS Docket No. 03–080–3.)''

The commodities that will be allowed to be imported from Canada under specified conditions under this final rule can be summarized as:

- Bovines, as long as they are slaughtered at less than 30 months of age, and as long as those bovines not imported for immediate slaughter are moved to a single feedlot before slaughter;
- Sheep and goats (ovines and caprines), as long as they are slaughtered at less than 12 months of age, and provided sheep and goats not imported for immediate slaughter are moved to a single designated feedlot before slaughter;
- Cervids of any age;
- Camelids (*i.e.*, llamas, alpacas, guanacos, and vicunas);
- Meat from bovines, ovines, and caprines; and
- Certain other products and byproducts, including bovine livers and tongues, gelatin, and tallow.

Model and Assumptions

Cattle and beef imports comprise 99 percent of the value of commodities that will be allowed entry from Canada because of this rulemaking, and they are therefore the focus of the analysis. The model used is a net trade partial equilibrium welfare model. Net trade is defined as the absolute value of the difference between exports and imports. Individual country trade with the United States is not modeled. Non-spatial means that price and quantity effects resulting from geographic differences in market locations are not included. Therefore, price and quantity effects obtained from the model are assumed to be the average of effects across geographically separated markets. Partial equilibrium means that the model results are based on maintaining a commodity-price equilibrium in a limited portion of the overall economy.

Economic sectors not explicitly included in the model are assumed to have a negligible effect on the model

results. Welfare refers to benefits or losses to society, as measured by changes in consumers' willingness to pay for commodities beyond their actual price (a measure of utility known as consumer surplus) and changes in producers' revenue beyond their variable costs (a measure of returns to fixed investment known as producer surplus).

This quantitative economic modeling approach is appropriate because the rule changes are specific to the U.S. cattle and beef sectors, are focused in extent, and have only limited extensions into non-agricultural sectors of the economy. A disadvantage of the model is the lack of linkages between the cattle production and beef processing sectors. This disadvantage is addressed through the presentation of results from an agricultural multi-sector model that recognizes such linkages.

We estimate effects of additional supplies to the United States of fed cattle and feeder cattle, due to resumption of imports from Canada. The additional quantities of cattle, all things equal, will cause prices to fall. The model indicates the expected price decline and the increase in quantity demanded and decrease in domestic production/supply that will occur in response to the fall in price. Summing welfare gains for consumers/buyers and losses for producers/ suppliers (changes in consumer and producer surplus) yields estimated net benefits for the United States. For beef, we expect a small decline in imports from Canada with the rule due to the replacement of beef produced from fed cattle by beef produced from cows, as explained below. Estimated effects for beef are in the opposite direction from those for cattle, with losses for U.S. consumers/ buyers outweighing gains for U.S. producers/suppliers. The effects for beef are much smaller than the effects for cattle.

Cattle imports from Canada. There are three components to the number of cattle under 30 months of age that are expected to be imported from Canada: A quantity that would be imported normally, a quantity that would have entered if cattle imports from Canada were not prohibited (termed the backlog); and a quantity of fed cattle that would be expected to be displaced from slaughter in Canada by increased cow slaughter for the export of processing beef to the United States.

For the first component, the quantities of fed and feeder cattle that would enter normally are based on average imports for 2001 and 2002: About 652,400 fed cattle and about 311,400 feeder cattle in 2005, with somewhat lesser quantities in years 2006–2009 because of assumed expanded slaughter capacity in Canada.

The backlog is the additional Canadian cattle that may have accumulated due to the closing of the border to live ruminant imports in May 2003. Importation of the backlog or some fraction of it would begin as soon as the rule is in effect, with most of these fed and feeder cattle expected to enter in 3 to 6 months.

Calculation of the size of the backlog is based on the change in Canada's cattle inventory from July 2003 to July 2004. The backlog may include about 394,500 fed cattle under 30 months of age and about 204,000 feeder cattle. The backlog of cattle over 30 months of age (not eligible for importation under the rule) numbers about 462,500 head.

The third component of expected cattle imports, an additional supply of fed cattle derives from another change included in the rule-namely, removal of the requirement that beef imported from Canada come from cattle slaughtered at less than 30 months of age. We expect this change to result in a large increase in cow slaughter in Canada for the export of processing beef to the United States. We discuss these expected effects here in greater detail.

Our assumptions regarding (1) the shift in Canada from slaughter of fed cattle under 30 months of age to slaughter of cattle (principally cows) over 30 months of age, for the export of processing beef to the United States, and (2) the shipment to the United States of the fed cattle under 30 months of age not slaughtering in Canada, are based on relative prices and margins in the two countries for fed cattle, cows, fed beef, and processing beef. As of mid-November 2004, a Canadian packer could buy a cow for about US$17 per cwt and sell the processing-grade beef for about US$123 per cwt. The packer also could buy a fed steer or heifer at about US$67 per cwt and sell the beef for about US$132 per cwt. In the United States, the cow would cost a packer about $55 per cwt and the beef would sell for about $125 per cwt; a fed steer or heifer would cost about $85 per cwt and the beef would sell for about $135 per cwt.

Although differences in weights and dressing percentages do not permit the direct comparison of live animals to dressed meat, the difference between the relative purchase prices to sales prices indicate that the margin buying cows and selling processing beef is much larger for a Canadian packer than it is for a U.S. packer. Canadian packers are prevented from taking greater advantage of this large margin by Canada's relatively small market for cow beef. Canadian production of processing beef has already displaced much of Canada's imported product. Without a larger demand, increased production would cause the Canadian price of processing beef to decline sharply.

The United States is already providing Canada with additional demand for beef from fed cattle, through the importation of boneless beef under permit from cattle slaughtered at less than 30 months of age. The United States, in a sense, is currently importing Canada's surplus production of fed beef. Allowing the United States to import Canadian beef from cattle slaughtered at more than 30 months of age would enable Canada to produce and sell much larger quantities of processing beef without fearing the significant price collapse that would likely occur if the entire additional product were only for the Canadian market.

This is not to say that the price of processing beef or cow prices in the United States would not decline from their current levels due to the supply from Canada, but we would not expect a sharp decline. Two facts concerning the U.S. supply of processing beef underlie this reasoning. First, U.S. cow slaughter is forecast to decline in 2005, as producers begin to rebuild herds that have been characterized by diminishing cow inventories for several years. Second, cow retention for herd rebuilding is also expected to take place in Australia and New Zealand, major sources of processing beef for the United States. Their beef exports are forecast to remain largely unchanged in 2005. As long as principal Asian markets continue to prohibit entry of U.S. beef, any increase in imports of beef from Australia and New Zealand by these markets may limit the supply of beef from Australia and New Zealand into the United States.

With the rule, entry of Canadian steers and heifers is expected to result in steer and heifer prices in the two countries becoming more similar. For example, in 2002, fed steer prices in Alberta averaged about US$63 per cwt, while in the United States, the Nebraska Direct Choice steer price averaged about $67 per cwt. Given the difference in mid-November 2004 prices for fed cattle, $67 per cwt in Canada and $85 per cwt in the United States, shipment of fed cattle to the United States will be an attractive alternative for Canadian producers, at least until Canadian prices rise to the level of U.S. prices (adjusted for grade differentials and minus transportation and transaction costs).

Prices for slaughter cows in the two countries are expected to continue to differ because Canadian cattle more

than 30 months of age will not be allowed entry by the rule, despite a ready market for them at slaughter facilities located in the Northern United States. Thus, in the absence of trade in those cattle, the backlog of cattle over 30 months of age will remain until increased cow slaughter in Canada reduces their inventory. We would expect the price of cows in Canada to increase as slaughter increases in response to opportunities to export beef from cattle more than 30 months of age to the United States. However, the margin earned from slaughtering cows in Canada and exporting the processing beef to the United States is likely to remain favorable (though decreasingly so as Canada's backlog of cattle more than 30 months of age is reduced).

It is assumed that the Canadian slaughter sector is operating at full capacity. Key to assumptions underlying this analysis is the willingness of Canadian slaughter facilities to add cow slaughter shifts or days to their operations at the expense of steer and heifer slaughter. We believe they would want to do so, given the price differentials in Canada and the United States and the opportunity for Canadian beef exports to the United States from cattle slaughtered at more than 30 months of age. With the rule, beef imported from Canada would no longer be required to come from a slaughter facility that either slaughters only cattle less than 30 months of age or complies with an approved segregation process, which may permit increased flexibility in scheduling cow slaughter.

In 2005, APHIS expects this shift by Canada to exports of processing beef and additional fed cattle to the United States to take place throughout the year, not during one or two quarters as assumed for the backlog of steers and heifers under 30 months of age. Beyond 2005, additions to Canadian slaughter capacity are expected to allow increased slaughter of cattle of all ages. Canada has been able to increase its slaughter numbers during the past year, but the opening of new plants and major expansion of current processing facilities to accommodate increased cow slaughter will likely take some years. The lack of excess slaughter capacity in Canada and the described price differentials are the basis for the assumed shift to increased cow slaughter in Canada for the production of processing beef for export to the United States, and the assumed additional imports of Canadian fed cattle.

In 2005, the maximum number of imported fed cattle displaced from Canadian slaughter may equal the backlog of cattle over 30 months of age (assumed to be slaughtered for the export of processing beef to the United States), about 460,000 head. For years 2006–2009, we assume the number of fed cattle displaced from slaughter in Canada and exported to the United States to decline, as Canada's slaughter capacity increases and Canada's cow prices trend upward. However, all things equal, as long as live cattle imports from Canada are limited to animals less than 30 months of age and the U.S. demand for processing beef is high, beef imports from Canadian cow slaughter may be favored.

Uncertainty surrounds both the assumed backlog quantities and the quantity of fed cattle expected to be displaced by cows slaughtered in Canada and exported to the United States. We acknowledge these uncertainties by also conducting the analysis using one-half of the assumed backlog and one-half of the assumed number of displaced fed cattle.

After the backlog of cattle has been imported, imports of cattle under 30 months of age from Canada are expected to continue at historic levels elevated by the importation of the fed cattle displaced from Canadian slaughter by the slaughter of cows. We therefore expect the largest impact of the rule to occur during the first 3 to 6 months that the rule is in effect. In order to assess these very near-term price impacts, we estimate effects of the rule for the first and second quarters of 2005, in addition to the five-year analysis of welfare effects. As in the analysis of welfare impacts, we acknowledge uncertainty about the quantity of cattle what will enter from Canada by conducting a sensitivity analysis of near-term price effects using one-half of the assumed backlog and one-half of the assumed number of displaced fed cattle.

Beef imports from Canada. Boneless beef entering from Canada under permit represents a large share of historic beef imports from Canada. Before the Alberta BSE discovery, Canada's share of U.S. beef imports was about 41 percent (90 percent of fresh/chilled beef imports and 4 percent of frozen beef imports). Currently, Canada's share of U.S. beef imports is about 32 percent (fresh/chilled beef, 85 percent; frozen, 3 percent). For this reason alone, the effect of the rule for beef imports will be much smaller than the effect for cattle imports. Canadian beef entering the United States by permit is included in the baseline for the analysis.

As described, we expect Canadian cows to be slaughtered in place of fed cattle for the export of processing beef to the United States, given Canada's limited capability to increase its slaughter capacity in the short term. A cow that is slaughtered produces less meat than a fed steer or heifer due to a lighter weight and lower dressing percentage. Recent statistics from Canada indicate an average difference in beef produced from one steer/heifer and one cow of 150 pounds. In 2005, assuming Canada is fully utilizing all available slaughter capacity, the decrease in beef production would total about 69 million pounds if the backlog of about 460,000 cattle over 30 months of age is slaughtered in place of steers and heifers. To take into consideration possible declines in Canada's domestic consumption of beef as beef prices rise slightly relative to other meats, and therefore movement of beef from the domestic to export markets, we reduce the decline of 69 million pounds by one-third, to 46 million pounds.

The forecast for Canada's beef exports worldwide in 2005 is 570,000 metric tons. U.S. imports of beef from Canada are forecast to equal about 86 percent of Canada's total beef exports, or about 490,200 metric tons. The 490,200 metric tons is equivalent to 1,081 million pounds. In other words, Canada's beef exports to the United States, compared to what would have been exported without this rule, can be expected to decline in 2005 by 4.3 percent (46 million pounds divided by 1,080 million pounds) because of the displacement of steer/heifer slaughter by cow slaughter in Canada. The decrease in Canadian beef exports to the United States because of this displacement is assumed to diminish in years 2006–2009, as Canada's slaughter capacity expands.

Processing-grade beef is not perfectly substitutable for fed beef. The two commodities compete in different but closely related markets. This distinction is not included in the analysis because the model is based on aggregate beef price ranges and elasticities. Increased supplies of processing beef are expected to compete with fed beef in the same fashion as other close substitutes. Thus, allowing imports of beef from cattle slaughtered at over 30 months of age, together with fed cattle imports augmented by the cattle displaced from Canadian slaughter, is expected to result in lower prices for U.S. steers and heifers.

As with the assumed backlog and displaced fed cattle imports, there is uncertainty as to the amount of beef from Canadian cow slaughter that will be imported by the United States. Accordingly, we include in the sensitivity analysis a reduction by one-

half of the assumed change in beef imports from Canada. In 2005, for example, this reduced amount would represent a decrease in beef imports from Canada of 2.1 percent from what would have been imported without the rule.

Welfare and Near-term Price Effects of the Rule for Cattle and Beef

Welfare effects. Welfare effects of the rule for cattle and beef are summarized in Table 1. Present values and annualized values of welfare gains and losses over the five-year period 2005–2009, are determined using 3 percent and 7 percent discount rates, in both 2005 and 2001 dollars.

TABLE 1.—PRESENT AND ANNUALIZED VALUE ESTIMATIONS OF EFFECTS OF THE RULE FOR FED CATTLE, FEEDER CATTLE, AND BEEF, DISCOUNTED AT 3 PERCENT AND 7 PERCENT, IN 2005 AND 2001 DOLLARS, 2005–2009

Value	Discount rate (percent)	Changes in welfare (per thousand dollars)		
		Consumer	Producer	Net
Present, 2005 dollars	3	$2,982,088	−$2,907,462	$74,626
	7	2,592,201	−2,525,852	66,349
Present, 2001 dollars	3	2,810,618	−2,740,283	70,335
	7	2,443,150	−2,380,616	62,534
Annualized, 2005 dollars	3	651,153	−634,858	16,295
	7	632,214	−616,032	16,182
Annualized, 2001 dollars	3	613,711	−598,353	15,358
	7	595,861	−580,610	15,251

Note: The present and annualized values are taken from Appendix H, based on assumed import of the backlog, import of fed cattle displaced from slaughter in Canada by increased cow slaughter for the export of processing beef to the United States, and beef imports from cows slaughtered in place of fed cattle.

The present value of the net benefit of the rule for cattle and beef is estimated to range in 2005 dollars between $66.3 million and $74.6 million, depending on the discount rate used. Over the five-year period, the annualized value of the net benefit in 2005 dollars, depending on the discount rate, ranges between $16.2 million and $16.3 million.

The largest effects for cattle are expected to occur in 2005, when the backlog would be imported and the displacement of fed cattle slaughter by cow slaughter would be largest. The impact for fed cattle would be greater than for feeder cattle because of the larger number of fed cattle expected to be imported. For fed cattle, the annual price declines may range from an average of 3.2 percent in 2005 to 1.3 percent in 2009. For feeder cattle, the price declines range from an average of 1.3 percent in 2005 to 0.6 percent in 2009.

Estimated net benefits in 2005 for fed cattle are estimated to range from $25.0 million to $26.9 million, and for feeder cattle, from $10.4 million to $11.0 million. In each successive year, the net benefits are expected to become smaller, such that by 2009 they may range for fed cattle from $3.8 million to $4.3 million, and for feeder cattle, from $4.3 million to $4.8 million.

Effects of the rule for beef attributable to the change in beef imports from Canada are expected to be much smaller than those for cattle. For example, the expected 2005 net welfare loss (because of the decline in imports due to cow slaughter replacing fed cattle slaughter) in 2005 dollars is estimated to range between $94,000 and $98,000. Average percentage increases in price may range from 0.09 percent in 2005 to 0.01 percent in 2009, suggesting nearly negligible impacts. If the beef-equivalent of the fed and feeder cattle imported from Canada is considered, the supply of beef in the United States increases and the price of beef decreases by 1 to 2 percent from 2005 baseline levels. Smaller decreases from baseline projections would occur after 2005 because the volume of imported animals declines.

Effects may be even smaller for U.S. producers than these percentages indicate, given that nearly all U.S. beef imports from countries other than Canada consist of processing beef. Demand for imported processing beef has increased drastically as ground beef sales continue at a robust pace. At the same time, U.S. production of processing beef has fallen to record lows because of the cyclical decline in cow slaughter.

Table 2 shows the results of the sensitivity analysis, assuming importation of one-half of the backlog, one-half of the fed cattle expected to be displaced from slaughter in Canada, and one-half of the expected replacement of fed cattle beef imports derived from fed cattle by beef imports derived from cows. The present value of the net benefit for cattle and beef in this case is estimated to range in 2005 dollars between $48.9 million and $56.1 million, depending on the discount rate used. Over the five-year period, the annualized value of the net benefit in 2005 dollars, depending on the discount rate, may range between $11.9 million and $12.3 million—that is, about three-fourths of the expected annualized net benefit with the rule.

TABLE 2.—SENSITIVITY ANALYSIS BASED ON REDUCED IMPORT QUANTITIES: PRESENT AND ANNUALIZED VALUE ESTIMATIONS OF EFFECTS OF THE RULE FOR FED CATTLE, FEEDER CATTLE, AND BEEF, DISCOUNTED AT 3 PERCENT AND 7 PERCENT, IN 2005 AND 2001 DOLLARS, 2005–2009

Value	Discount rate (percent)	Changes in welfare (per thousand dollars)		
		Consumer	Producer	Net
Present, 2005 dollars	3	$2,571,323	−$2,515,180	$56,144
	7	2,211,115	−2,162,168	48,947
Present, 2001 dollars	3	2,423,472	−2,370,557	52,915
	7	2,083,976	−2,037,844	46,132

TABLE 2.—SENSITIVITY ANALYSIS BASED ON REDUCED IMPORT QUANTITIES: PRESENT AND ANNUALIZED VALUE ESTIMATIONS OF EFFECTS OF THE RULE FOR FED CATTLE, FEEDER CATTLE, AND BEEF, DISCOUNTED AT 3 PERCENT AND 7 PERCENT, IN 2005 AND 2001 DOLLARS, 2005–2009—Continued

Value	Discount rate (percent)	Changes in welfare (per thousand dollars)		
		Consumer	Producer	Net
Annualized, 2005 dollars	3	561,460	−549,201	12,259
	7	539,270	−527,333	11,938
Annualized, 2001 dollars	3	529,176	−517,622	11,554
	7	508,262	−497,011	11,251

Note: The present and annualized values are midpoints taken from Appendix I, based on assumed imports of one-half of the backlog, one-half of the fed cattle numbers, and one half of the replacement of fed cattle beef imports by cow beef imports.

In this scenario, the impact in 2005, in particular, would be smaller because of the fewer cattle imported. For fed cattle, the annual price declines may range from 2.3 percent in 2005 to 1.2 percent in 2009. For feeder cattle, the price declines over the five-year period may average 0.7 percent. Estimated net benefits in 2005 for fed cattle may range from $12.9 million to $13.9 million, and for feeder cattle, from $8.0 million to $8.5 million. In each successive year, the net benefits are expected to become smaller, such that by 2009 they may range for fed cattle from $3.5 million to $3.9 million, and for feeder cattle from $4.3 million to $4.8 million.

The estimated percentage decrease in the price of fed cattle, if one-half of the backlog and one-half of the fed cattle expected to be displaced from slaughter in Canada were imported, would be about 1 percent less than when we assume importation of the full backlog and full quantity of displaced fed cattle (2.3 percent decrease compared to a 3.2 percent decrease). For feeder cattle, the difference in the effect is smaller in absolute terms, but larger in relative terms (0.6 percent decrease compared to a 1.3 percent decrease). In both cases the effects are expected to diminish over the five-year period.

Near-term price effects. As expected, price effects are larger when the backlog is assumed to enter in one quarter rather than two quarters, and are larger for fed cattle than for feeder cattle, given the larger number of fed cattle expected to be imported. For example, for fed cattle, the decrease in price when the backlog is assumed to enter entirely within one quarter is estimated to be 5.4 percent, assuming a price elasticity of supply of 0.61 and a price elasticity of demand of −0.76. When the backlog of fed cattle is assumed to enter over two quarters using the same price elasticities, the decline in price is estimated to be 3.8 percent. Entry of the backlog of feeder cattle over the two quarters could result in price declines of 1.9 percent, for the same elasticities, compared to a possible price drop of 3.3 percent when the enter entirely within one quarter.

The less elastic the price elasticities (the less responsive sellers and buyers are to price changes), the larger the expected percentage changes in price. When the supply and demand elasticities are halved (supply elasticity of 0.30 and demand elasticity of −0.38), for example, and fed cattle are assumed to enter within two quarters, the decrease in price could be 4.8 percent, compared to a price decrease of 3.8 percent when a supply elasticity of 0.61 and demand elasticity of −0.76 are used.

When the assumed backlog and assumed number of imported fed cattle displaced from Canadian slaughter are halved as a sensitivity analysis, the near-term price effects are found to be smaller overall, with the smaller elasticities again yielding larger price decreases. For example, the percentage decrease in price for fed cattle entering over two quarters is estimated to be 2.5 percent for a supply elasticity of 0.61 and a demand elasticity of −0.76 (compared to a 3.8 percent price decline when the full backlog and number of displaced fed cattle are imported). If the supply elasticity were 0.30 and the demand elasticity were −0.38, the price decline is estimated to be 3.2 percent (compared to 4.8 percent for the full cattle import numbers). Similarly, smaller percentage price declines are observed for feeder cattle when in the sensitivity analysis the backlog and the number of imported fed cattle displaced from Canadian slaughter are halved.

Other Impacts of the Rule

We consider other effects of the rule besides those estimated for cattle and beef, including: The results of an agricultural multi-sector analysis; costs that may be incurred in monitoring the movement of imported Canadian feeder ruminants; effects for ruminant products other than cattle and beef; and possible effects of the rule on U.S. exports.

Multi-sector analysis. Some commenters on the analysis for the proposed rule emphasized the integrated structure of the cattle and beef processing industries, and noted potential effects of the rule on other sectors of the economy. APHIS agrees that a multi-sector analysis can capture industry interactions that are missing from single-sector analyses. We therefore report the results of an analysis based on a model that includes the animal feed, animal production, and animal product processing sectors.

While the major vertically linked marketing channels are included in this model, effects of the rule farther downstream in the economy are not modeled. For example, economic benefits to surrounding communities of increased employment in slaughter plants receiving greater supplies of cattle due to reopening of the Canadian border are not captured by the model, nor are similar economic losses resulting from reduced spending in communities by cattle producers due to reductions in their returns. These effects are believed to be very small on a national basis, but may show some geographic concentration.

The multi-sector analysis simulates percentage changes in prices and gross revenues (price multiplied by the quantity sold) using the assumed 2005 range of imported Canadian cattle (roughly 1.5 million to 2 million head, fed and feeder cattle combined). The results of the analysis show for the combined livestock, feed, and grain sectors, a possible decline in gross revenues of 1.4 percent to 1.7 percent. For the beef and cattle sectors, the gross revenue declines may range from 1.3 percent to 1.6 percent, and from 3.9 percent to 4.8 percent, respectively.

With respect to the change in the price of cattle in 2005, the multi-sector analysis indicates a possible decline of between 3.3 percent and 4.1 percent, compared to 2005 price declines estimated in the single-sector analyses of between 0.6 percent and 1.3 percent

for feeder cattle, and between 2.3 percent and 3.2 percent for fed cattle. To the extent that sector interactions result in expanded effects as indicated by these relative price declines, welfare gains and losses will be larger than are indicated in Table 1. The multi-sector model simulates price and revenue changes, but does not yield measures of welfare change. However, this model does indicate a decline in consumer expenditures by about 1 percent, a finding that supports the estimated consumer welfare gains attributable to the rule.

The multi-sector analysis also examines possible effects if beef consumption in the United States were to decline by 2 percent because of consumers' perception of increased risk of BSE with the rule. Compared to the assumption of no consumer response, this scenario shows that there would be a decline in beef and cattle prices by an additional 0.2 percent to 0.4 percent, causing gross revenues for the beef and cattle sectors to fall by an additional 0.2 percent to 0.5 percent.

A third scenario considered in the multi-sector analysis is partial restoration of beef exports to Japan, such that U.S. beef exports in 2005 would double, from an expected 0.3 million metric tons to 0.6 million metric tons. In this instance, gross revenue for the cattle sector (assuming 1.5 million head of Canadian cattle are imported) could decline by 1.7 percent, compared to a possible decrease of 3.9 percent assuming no change in U.S. beef exports. For the beef sector, gross revenue losses of 1.3 percent may become gains of 2.2 percent because of the exports to Japan. For both sectors, increased U.S. exports could moderate by at least one-half the price declines due to resumption of cattle imports from Canada.

Monitoring the movement of feeder cattle. Movement within the United States of feeder cattle (and feeder lambs and goats) imported from a BSE minimal-risk region such as Canada—from the U.S. port of entry to a feedlot and from the feedlot to slaughter—will require that certain inspection and record keeping safeguards be satisfied. The increased cost of these requirements is considered a cost to this rulemaking. These include certification of each animal's identification (by eartag and branding), age, and feeding history. Feeder cattle will be listed on the APHIS Form VS 17–130 that accompanies the animals from the port of entry and on the APHIS Form VS 1–27 that accompanies the animals to slaughter.

Costs of the process can be approximated by considering the time Federal or State officials or their designees would spend monitoring the movement of these cattle. We approximate the cost of performing the inspections and related tasks to be $10 per animal, based on direct salary, personnel benefits, administrative support costs, agency overhead, and departmental charges, and using a simplified example developed by APHIS Veterinary Services. Given the number of feeder cattle that may enter because of the rule, the overall cost in 2005 would be between $4.1 million and $5.2 million

Commodities other than cattle and beef. Other, less major commodities that will be allowed entry under the rule and for which we have data are sheep, goats, and farmed cervids; meat from these ruminants; and bovine tongues and livers. In all cases, reestablished imports from Canada will have small effects on the U.S. supply of these commodities and the welfare of U.S. entities. Feeder lambs and goats will be required to be moved to designated feedlots. As with feeder cattle from Canada, movement of feeder lambs and goats from the port of entry to feedlot and from feedlot to slaughter will be monitored, which will lead to a small cost.

U.S. exports. The rule, of course, will have no immediate effect for U.S. exports to countries that currently prohibit beef imports from the United States. It could influence these countries' future decisions regarding resumption of beef imports from the United States. A country may consider the rule to lend justification to a decision to continue to prohibit entry of U.S. beef because of concern about BSE risks posed by Canadian cattle, even though there would be no scientific basis. In such a case, there would be continued premium losses over and above the domestic value of the products, especially for beef variety meats. On the other hand, resumption of U.S. imports from Canada may help convince other countries of the sanitary safety of both U.S. and Canadian beef. Any effects the rule may have for future U.S. beef exports may vary from one trading partner to another.

Alternatives to the Rule

Alternatives to the rule would be to leave the regulations unchanged—that is, continue to prohibit entry of ruminants and most ruminant products from regions of minimal BSE risk (other than products allowed entry under permit), or modify the commodities and/or import requirements specified in the rule. By maintaining current import restrictions, the net benefits of reestablishing imports from Canada of fed and feeder cattle, and beef not by permit, and other affected commodities would not be realized. Two possible modifications would be to (i) require that imported beef come from cattle slaughtered at less than 30 months of age, or (ii) continue to prohibit the entry of live ruminants.

Beef only from cattle less than 30 months of age. The proposed rule would have required beef imports from Canada to come from cattle slaughtered at less than 30 months of age. In a notice that reopened the comment period for the proposed rule, APHIS stated that it no longer believed that it would be necessary to require that beef imported from BSE minimal-risk regions be derived only from cattle less than 30 months of age, provided measures are in place to ensure that SRMs are removed when the animals are slaughtered, and that such other measures as are necessary are in place. Canada is removing SRMs at slaughter and fulfilling other required measures.

Requiring that beef come only from cattle slaughtered at less than 30 months of age would continue the prohibition on Canadian cows and bulls as source animals, and eliminate effects of the rule for beef. Continuing to limit imports from Canada to veal from calves and beef from steers and heifers would cause Canada's cow and bull inventories to continue to grow and exert downward pressure on Canada's cow prices, which are already well below U.S. price levels. Canadian suppliers would be prevented from participating in the current high-demand market in the United States for processing beef, and U.S. processors would not benefit from the additional source of supply during a time when U.S. cow slaughter is cyclically low.

This alternative would maintain the status quo in terms of beef imports, other than removing permit requirements and broadening the commodities allowed to be imported beyond boneless beef. In terms of the quantity of beef imported, we expect that these changes would have a very small effect, given the large share of Canada's historic exports that enter currently.

This alternative would affect cattle imports from Canada by removing the incentive for Canadian cows to be slaughtered in place of fed cattle, since the processing beef would not be allowed to be imported by the United States; there would not be the displaced fed cattle assumed to be available for import under the rule. The number of fed cattle imports would be fewer than

with the rule, especially in 2005, and price and welfare impacts, including net benefits, would be smaller.

Welfare effects of this alternative for cattle and beef are summarized in Table 3. Present values and annualized values of welfare gains and losses over the five-year period 2005–2009 are determined using 3 percent and 7 percent discount rates in both 2005 and 2001 dollars.

TABLE 3.—ALTERNATIVE OF CANADIAN BEEF IMPORTS ONLY FROM CATTLE LESS THAN 30 MONTHS OF AGE: PRESENT AND ANNUALIZED VALUE ESTIMATIONS OF THE EFFECTS OF THE RULE FOR FED CATTLE, FEEDER CATTLE, AND BEEF, DISCOUNTED AT 3 PERCENT AND 7 PERCENT, IN 2005 AND 2001 DOLLARS 2005–2009

Value	Discount rate (percent)	Changes in welfare (per thousand dollars)		
		Consumer	Producer	Net
Present, 2005 dollars	3	$2,399,299	−$2,345,160	$54,139
	7	2,064,181	−2,016,794	47,387
Present, 2001 dollars	3	2,261,339	−2,210,314	51,026
	7	1,945,490	−1,900,828	44,662
Annualized, 2005 dollars	3	523,898	−512,076	11,821
	7	503,434	−491,877	11,557
Annualized, 2001 dollars	3	493,774	−482,632	11,142
	7	474,487	−463,594	10,893

Note: The present and annualized values are midpoints taken from Appendix U, based on the assumed backlog imports.

The present value of the net benefit of the alternative for cattle and beef is estimated to range in 2005 dollars between $47.4 million and $54.1 million, depending on the discount rate used (with the rule: Between $66.3 million and $74.6 million). Over the five-year period, the annualized value of the net benefit in 2005 dollars, depending on the discount rate, may range between $11.6 million and $11.8 million (with the rule: Between $16.2 million and $16.3 million).

The largest effects for cattle are expected to occur in 2005, when the backlog is imported. Since allowing Canadian beef imports only from cattle slaughtered at less than 30 months of age would not affect the number of feeder cattle expected to be imported, effects for feeder cattle would be the same as with the rule.

Possible effects of this alternative for future U.S. exports would differ from possible effects with the rule only if other countries perceived BSE-risks associated with Canadian beef produced from cattle slaughtered at less than 30 months of age as different from those associated with Canadian beef produced from cattle slaughtered at more than 30 months of age.

There would be no known reduction in risk of BSE introduction under this alternative. Removal of SRMs at slaughter and other required risk-mitigating measures of the rule will ensure that beef entering from Canada satisfies animal health criteria the same as or equivalent to those required in the United States.

Near-term price effects of this alternative would be similar to those of this rule. For example, for fed cattle the decrease in price when the backlog is assumed to enter entirely within one quarter is estimated to be 4.4 percent (with the rule: 5.4 percent), assuming a price elasticity of supply of 0.61 and a price elasticity of demand of −0.76. When the backlog of fed cattle is assumed to enter over two quarters using the same price elasticities, the decline in price is estimated to be 2.8 percent (with the rule: 3.8 percent). Entry of the backlog of feeder cattle over the two quarters could result in a price decline of 1.9 percent under this alternative and using the same elasticities, compared to a possible price drop of 3.3 percent when the backlog is assumed to enter entirely within one quarter. The expected effects are the same for feeder cattle under this alternative and with the rule because their number is assumed to be unaffected by whether Canadian beef imports are restricted to being derived from cattle less than 30 months of age. When the supply and demand elasticities are halved (supply elasticity of 0.30, and demand elasticity of −0.38, for example, and fed cattle are assumed to enter within two quarters, the decrease in price is estimated to be 3.6 percent (with the rule, 4.8 percent), compared to a decrease of 2.8 percent (with the rule, 3.8 percent) when a supply elasticity of 0.61 and demand elasticity of −0.76 are used.

No live ruminants. Direct effects of this alternative would be equivalent to expected effects of the rule only for ruminant products. We would expect the same effect for beef as with the rule; imports of beef from cows would replace imports of beef from fed cattle, yielding, for the five-year period 2005–2009, present value losses for consumers of between $73.9 million and $78.8 million, gains for producers of between $73.7 million and $78.5 million, and net welfare losses of between $264,000 and $283,000, compared to the baseline (3 percent discount rate, 2005 dollars). There would also be net benefits forgone by the continued prohibition on the importation of sheep and goats. Possible effects of this alternative on future U.S. exports would likely be small, since it would maintain the current prohibition on imports of live ruminants from Canada.

In sum, the rule is preferable in terms of expected net benefits to the status quo (continuing to prohibit the entry of Canadian ruminants, and the entry of Canadian ruminant products other than those allowed by permit), and to the two alternatives discussed: Limiting beef imports to cattle slaughtered at less than 30 months of age or allowing entry of ruminant products but not live ruminants. Risks of BSE introduction would not be reduced to any known degree by selecting one of the alternatives in place of the rule. We believe that listing Canada as a minimal-risk region subject to the required risk-mitigating measures is a balanced response, based on scientific evidence, to Canada's request that certain ruminant and ruminant product imports by the United States be allowed to resume.

Final Regulatory Flexibility Analysis

As a part of the rulemaking process, APHIS evaluates whether regulations are likely to have a significant economic impact on a substantial number of small entities. The resumption of ruminant and ruminant product imports from Canada will most importantly affect the cattle industry, reducing prices and increasing supplies. Entry of fed cattle

(and fed sheep and goats) will benefit U.S. slaughtering establishments, and entry of feeder cattle (and feeder sheep and goats) will benefit feedlots. Also, entry of beef from cattle slaughtered at over 30 months of age will benefit some U.S. meat and meat product wholesalers and packers by providing an additional source of processing beef. At the same time, these imports will increase the competition for U.S. and foreign suppliers of these commodities.

The main industries expected to be affected by the rule are composed predominantly of small entities, as indicated by the 1997 Economic Census, the 2002 Census of Agriculture, and USDA's ''Cattle on Feed'' (February 20, 2004). The small entities number in the hundreds of thousands, with cattle producers comprising the largest number. For beef cattle ranching and farming, the 2002 Census of Agriculture indicates a total of about 657,000 operations, of which nearly 656,000 are considered small entities. For cattle feedlots, more than 91,000 of the approximately 93,200 total operations are small entities. For sheep and goat farming, 44,000 out of about 44,200 operations are considered small entities. Small entities similarly dominate, in terms of percentage operations, other affected industries, including animal slaughtering, meat and meat byproduct processing, and meat and meat product wholesaling.

Notwithstanding the prevalence of small entities, the concentrated structure of affected industries is well-documented. In the U.S. meatpacking industry, for example, four firms handle nearly 80 percent of all steer and heifer slaughter. The cattle feedlot industry is also highly concentrated. Data from 2003 show that only 2 percent of feedlots have capacities greater than 1,000 head, and yet these larger feedlots market 85 percent of fed cattle.

Imports from Canada that will be allowed to resume are expected to have a larger effect on the fed cattle market than on the feeder cattle market. Prices and welfare of producers and suppliers will decline because of the additional supply and the welfare of consumers and buyers will increase. Net benefits of the rule will be positive.

The analysis provides an estimation of possible price effects for small-entity and other producers and processors during the first 3 to 6 months that the rule is in effect, when impacts may be greatest due to the expected importation of the backlog. Depending on the assumed elasticities of supply and demand and the period over which the backlog enters, the estimated price declines could range from 1.9 percent to 4.4 percent for feeder cattle and from 3.8 percent to 6.9 percent for fed cattle. For the year 2005, the model indicates a possible decline in feeder cattle prices of 1.3 percent and a possible decline in fed cattle prices of 3.2 percent.

To give these average percentage price decline some perspective, we consider as an example their effect on earnings by small U.S. beef cow herds. Based on data from the 2002 Census of Agriculture, the average value of sales of cattle and calves by small-entity beef cow operations was about $26,700. Given the forecast feeder cattle baseline price for 2005 of between $94 and $100 per cwt, the 2005 estimated price decline of 1.3 percent would be equivalent to a decrease of between $1.22 to $1.30 per cwt, or a decrease in annual revenue of between $326 and $347, assuming no reduction in the number of cattle marketed. This example abstracts from the wide range in size for small beef cow herds, but gives an indication of a possible average price effect of the rule for these operators in 2005. It should be recognized that while the decline in price would be a loss for producers, it would represent a gain for small-entity feedlot operators.

Beyond the net welfare gains as summarized in Table 1, there will likely be regional impacts not captured in the analysis. Among comments received on the proposed rule were ones that pointed out the historical reliance of some northern U.S. meat processing plants (and the communities they support) on cattle imports from Canada to maintain necessary throughput volumes. Historical dependence of these processing facilities on cattle imports from Canada exemplifies economic ties with Canadian entities that existed prior to the prohibition on ruminant imports. Resumption of imports will enable trade relationships involving small-entity operations to be reestablished.

Alternatives to the rule, whether leaving the regulations unchanged or modifying the commodities and/or import requirements specified in the rule, would benefit certain categories of small entities while harming others. For example, a continued prohibition on the importation of Canadian feeder cattle would benefit small-entity suppliers of feeder cattle, but at the expense of small-entity feedlot operators. Estimated price declines, particularly in the near term, will cause economic losses for some entities and at the same time benefit other entities. Overall, the analysis indicates the rule will have a net positive effect for the United States.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule has been designated by the Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, as a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801–808). Accordingly, the effective date of this rule has been delayed the required 60 days pending congressional review.

Executive Order 12988

This final 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.

National Environmental Policy Act

In October 2003, APHIS prepared an environmental assessment to consider potential impacts to the human environment from implementation of the proposed rulemaking. During the comment period for the proposed rulemaking, comments were received from the public regarding the environmental assessment. As a result of those comments, APHIS revised the environmental assessment to discuss in more detail the potential impacts of concern for the human environment.

The environmental assessment was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

APHIS sent copies of the revised environmental assessment to those who commented on the October 2003 environmental assessment, in accordance with 7 CFR 372.9(a)(3). In a separate notice in today's issue of the **Federal Register**, APHIS is announcing the availability of the revised assessment and is requesting comments on the revised assessment for 30 days.

Paperwork Reduction Act

This final rule includes certain regulatory provisions that differ from those included in the November 2003 proposed rule. Some of those provisions involve changes from the information collection requirements set out in the proposed rule. These changes include

the following regarding ruminants from Canada:

- Bovines, sheep, and goats moved from a U.S. port of entry to a feedlot before being moved to slaughter must be accompanied by an APHIS Form VS 17–130, rather than an APHIS Form VS 1–27 as proposed.
- Those animals moved to a feedlot before being moved to slaughter must be permanently identified in Canada as being of Canadian origin with a distinct and legible mark, properly and humanely applied with a freeze brand, hot iron, or other method. This is a change from the proposed requirement that permanent identification be done by tattooing the animal.
- Those animals moved to a feedlot must be individually identified in Canada by an official Canadian eartag. This requirement was not in the proposed rule.
- The owners of feedlots wishing to be considered designated feedlots must sign an agreement with APHIS. This requirement was not in the proposed rule.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579–0234.

Government Paperwork Elimination Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. For information pertinent to GPEA compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at 301–734–7477.

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List of Subjects

9 CFR Part 93

Animal diseases, Imports, Livestock, Poultry and poultry products, Quarantine, Reporting and recordkeeping requirements.

9 CFR Part 94

Animal diseases, Imports, Livestock, Meat and meat products, Milk, Poultry and poultry products, Reporting and recordkeeping requirements.

9 CFR Part 95

Animal feeds, Hay, Imports, Livestock, Reporting and recordkeeping requirements, Straw, Transportation.

9 CFR Part 96

Imports, Livestock, Reporting and recordkeeping requirements.

■ Accordingly, we are amending 9 CFR parts 93, 94, 95, and 96 as follows:

PART 93—IMPORTATION OF CERTAIN ANIMALS, BIRDS, AND POULTRY, AND CERTAIN ANIMAL, BIRD, AND POULTRY PRODUCTS; REQUIREMENTS FOR MEANS OF CONVEYANCE AND SHIPPING CONTAINERS

■ 1. The authority citation for part 93 continues to read as follows:

Authority: 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

■ 2. Section 93.400 is amended by revising the definitions of *flock* and *inspector* and adding definitions of *as a group, bovine, bovine spongiform encephalopathy (BSE) minimal risk region, camelid, cervid, designated feedlot, positive for a transmissible spongiform encephalopathy, premises of origin, State representative, suspect for a transmissible spongiform encephalopathy,* and *USDA representative,* in alphabetical order, to read as follows:

§ 93.400 Definitions.

* * * * *

As a group. Collectively, in such a manner that the identity of the animals as a unique group is maintained.

Bovine. Bos taurus, Bos indicus, and *Bison bison.*

Bovine spongiform encephalopathy (BSE) minimal risk region. A region listed in § 94.18(a)(3) of this subchapter.

* * * * *

Camelid. All species of the family *Camelidae,* including camels, llamas, alpacas, and vicunas.

* * * * *

Cervid. All members of the family *Cervidae* and hybrids, including deer, elk, moose, caribou, reindeer, and related species.

* * * * *

Designated feedlot. A feedlot that has been designated by the Administrator as one that is eligible to receive sheep and goats imported from a BSE minimal-risk region and whose owner or legally responsible representative has signed an agreement in accordance with § 93.419(d)(8) of this subpart to adhere to, and is in compliance with, the requirements for a designated feedlot.

* * * * *

Flock. Any group of one or more sheep maintained on common ground; or two or more groups of sheep under common ownership or supervision on two or more premises that are geographically separated, but among which there is an interchange or movement of animals.

* * * * *

Inspector. Any individual authorized by the Administrator of APHIS or the Commissioner of Customs and Border Protection, Department of Homeland Security, to enforce the regulations in this subpart.

* * * * *

Positive for a transmissible spongiform encephalopathy. A sheep or goat for which a diagnosis of a transmissible spongiform encephalopathy has been made.

Premises of origin. Except as otherwise used in § 93.423 of this subpart, the premises where the animal was born.

* * * * *

State representative. A veterinarian or other person employed in livestock sanitary work by a State or political subdivision of a State who is authorized by such State or political subdivision of a State to perform the function involved under a memorandum of understanding with APHIS.

Suspect for a transmissible spongiform encephalopathy. (1) A sheep or goat that has tested positive for a transmissible spongiform encephalopathy or for the proteinase resistant protein associated with a transmissible spongiform encephalopathy, unless the animal is designated as positive for a transmissible spongiform encephalopathy; or

(2) A sheep or goat that exhibits any of the following signs and that has been determined to be suspicious for a transmissible spongiform encephalopathy by a veterinarian: Weight loss despite retention of appetite; behavior abnormalities; pruritus (itching); wool pulling; biting at legs or side; lip smacking; motor

abnormalities such as incoordination, high stepping gait of forelimbs, bunny hop movement of rear legs, or swaying of back end; increased sensitivity to noise and sudden movement; tremor, ''star gazing,'' head pressing, recumbency, or other signs of neurological disease or chronic wasting.

* * * * *

USDA representative. A veterinarian or other individual employed by the United States Department of Agriculture who is authorized to perform the services required by this part.

* * * * *

■ 3. Section 93.405 is amended as follows:

■ a. A new paragraph (a)(4) is added to read as set forth below.

■ b. In paragraphs (b)(2) introductory text, (c)(2), and (c)(3) the phrase ''Australia, Canada, and New Zealand'' is removed and the phrase ''Australia and New Zealand'' is inserted in its place.

■ c. In paragraph (c)(3), the phrase ''Australia, Canada, New Zealand, or the United States'' is removed and the phrase ''Australia, New Zealand, or the United States'' is added in its place.

■ d. The Office of Management and Budget citation at the end of the section is revised to read as set forth below.

§ 93.405 Certificate for ruminants.

(a) * * *

(4) If the ruminants are bovines, sheep, or goats from regions listed as BSE minimal-risk regions in § 94.18(a)(3) of this subchapter, the certificate must also include the name and address of the importer; the species, breed, and number or quantity of ruminants to be imported; the purpose of the importation; individual ruminant identification, which includes the eartag required under § 93.419(d)(2) or § 93.436(b)(4) of this subchapter, and any other identification present on the animal, including registration number, if any; a description of the ruminant, including name, age, color, and markings, if any; region of origin; the address of or other means of identifying the premises of origin and any other premises where the ruminants resided immediately prior to export, including the State or its equivalent, the municipality or nearest city, or an equivalent method, approved by the Administrator, of identifying the location of the premises, and the specific physical location of the feedlot where the ruminants are to be moved after importation; the name and address of the exporter; the port of embarkation in the foreign region; and the mode of transportation, route of travel, and port of entry in the United States.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0040, 0579–0165, and 0579–0234)

■ 4. In § 93.419, new paragraphs (c) and (d) are added to read as follows:

§ 93.419 Sheep and goats from Canada.

* * * * *

(c) Any sheep or goats imported from Canada must be less than 12 months of age when imported into the United States and when slaughtered, and must be from a flock or herd subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000. The animals must be accompanied by a certificate issued or endorsed by a salaried veterinarian of the Canadian Government that states that the conditions of this paragraph have been met. Additionally, for sheep and goats imported for other than immediate slaughter, the certificate must state that the conditions of paragraphs (d)(1) and (d)(2) of this section have been met. For sheep and goats imported for immediate slaughter, the certificate must also state that:

(1) The animals have not tested positive for and are not suspect for a transmissible spongiform encephalopathy.

(2) The animals have not resided in a flock or herd that has been diagnosed with BSE; and

(3) The animals' movement is not restricted within Canada as a result of exposure to a transmissible spongiform encephalopathy.

(d) *Imported for feeding.* Any sheep or goats imported from Canada for feeding at a feedlot must be imported only through a port of entry listed in § 93.403(b) or as provided for in § 93.403(f) in a means of conveyance sealed in the region of origin with seals of the national government of the region of origin, must be moved directly as a group from the port of entry to a designated feedlot, must not be commingled with any sheep or goats that are not being moved directly to slaughter from the designated feedlot at less than 12 months of age, and must meet the following conditions:

(1) The sheep and goats must be permanently and humanely identified before arrival at the port of entry with a distinct and legible ''C'' mark, properly applied with a freeze brand, hot iron, or other method, and easily visible on the live animal and on the carcass before skinning. The mark must be not less than 1 inch or more than 1¼ inches high. Other means of permanent identification may be used upon request if deemed adequate by the Administrator to humanely identify the animal in a distinct and legible way as having been imported from Canada;

(2) Each sheep and goat must be individually identified by an official Canadian Food Inspection Agency eartag, applied before the animal's arrival at the port of entry into the United States, that is determined by the Administrator to meet standards equivalent to those for official eartags in the United States as defined in § 71.1 of this chapter and to be traceable to the premises of origin of the animal. No person may alter, deface, remove, or otherwise tamper with the individual identification while the animal is in the United States or moving into or through the United States, except that the identification may be removed at the time of slaughter;

(3) The animals may be moved from the port of entry only to a feedlot designated in accordance with paragraph (d)(8) of this section and must be accompanied from the port of entry to the designated feedlot by APHIS Form VS 17–130 or other movement documentation deemed acceptable by the Administrator, which must identify the physical location of the feedlot, the individual responsible for the movement of the animals, and the individual identification of each animal, which includes the eartag required under paragraph (d)(2) of this section and any other identification present on the animal, including registration number, if any;

(4) The seals of the national government of Canada must be broken only at the port of entry by the APHIS port veterinarian or at the designated feedlot by an accredited veterinarian or a State or USDA representative or his or her designee. If the seals are broken by the APHIS port veterinarian at the port of entry, the means of conveyance must be resealed with seals of the U.S. Government before being moved to the designated feedlot;

(5) The animals must remain at the designated feedlot until transported to a recognized slaughtering establishment. The animals must be moved directly to the recognized slaughtering establishment in a means of conveyance sealed with seals of the U.S. Government by an accredited veterinarian or a State or USDA representative. The seals must be broken only at the recognized slaughtering establishment by a USDA representative;

(6) The animals must be accompanied to the recognized slaughtering establishment by APHIS Form VS 1–27 or other documentation deemed acceptable by the Administrator, which must identify the physical location of the recognized slaughtering establishment, the individual responsible for the movement of the animals, and the individual identification of each animal, which includes the eartag required under paragraph (d)(2) of this section and any other identification present on the animal, including registration number, if any;

(7) The animals must be less than 12 months of age when slaughtered;

(8) To be approved to receive sheep or goats imported for feeding, a feedlot must have signed a written agreement with the Administrator stating that the feedlot:

(i) Will not remove eartags from animals unless medically necessary, in which case another eartag or other form of official identification, as defined in § 79.1 of this chapter, will be applied and cross referenced in the records;

(ii) Will monitor all incoming imported feeder animals to ensure that they have the required ''C'' brand;

(iii) Will maintain records of the acquisition and disposition of all imported sheep and goats entering the feedlot, including the Canadian Food Inspection Agency tag number and all other identifying information, the age of each animal, the date each animal was acquired and the date each animal was shipped to slaughter, and the name and location of the plant where each animal was slaughtered. For Canadian animals that die in the feedlot, the feedlot will remove its eartag and place it in a file along with a record of the disposition of the carcass;

(iv) Will maintain copies of the APHIS Forms VS 17–130 and VS 1–27 or other movement documentation deemed acceptable by the Administrator that have been issued for incoming animals and for animals moved to slaughter and that list the official identification of each animal;

(v) Will allow State and Federal animal health officials access to inspect its premises and animals and to review inventory records and other required files upon request;

(vi) Will keep required records for at least 5 years;

(vii) Will designate either the entire feedlot or pens within the feedlot as terminal for sheep and goats to be moved only directly to slaughter at less than 12 months of age, and

(viii) Agrees that if inventory cannot be reconciled or if animals are not moved to slaughter as required the approval of the feedlot will be immediately withdrawn.

(Approved by the Office of Management and Budget under control numbers 0579–0040 and 0579–0234)

■ 5. Section 93.420 is revised to read as follows:

§ 93.420 Ruminants from Canada for immediate slaughter.

(a) Ruminants imported from Canada for immediate slaughter must be imported only through a port of entry listed in § 93.403(b) or as provided for in § 93.403(f) in a means of conveyance sealed in Canada with seals of the Canadian Government, and must be moved directly as a group from the port of entry to a recognized slaughtering establishment for slaughter as a group. The seals must be broken only at the port of entry by the APHIS port veterinarian or at the recognized slaughtering establishment by an accredited veterinarian or a State or USDA representative or his or her designee. If the seals are broken by the APHIS port veterinarian at the port of entry, the means of conveyance must be resealed with seals of the U.S. Government before being moved to the recognized slaughtering establishment. The shipment must be accompanied from the port of entry to the recognized slaughtering establishment by APHIS Form VS 17–33, which shall include the location of the recognized slaughtering establishment. Such ruminants shall be inspected at the port of entry and otherwise handled in accordance with § 93.408.

(b) In addition to meeting the requirements of paragraph (a) of this section, sheep and goats imported from Canada for immediate slaughter must meet the requirements of § 93.419(c) as well as the following conditions:

(1) The animals have not tested positive for and are not suspect for a transmissible spongiform encephalopathy;

(2) The animals have not resided in a flock or herd that has been diagnosed with BSE; and

(3) The animals' movement is not restricted within Canada as a result of exposure to a transmissible spongiform encephalopathy.

■ 6. An undesignated center heading ''Additional General Provisions'' is added preceding reserved § 93.430.

■ 6a. A new § 93.436 is added to subpart D to read as follows:

§ 93.436 Ruminants from regions of minimal risk for BSE.

The importation of ruminants from regions listed in § 94.18(a)(3) of this subchapter is prohibited, unless the conditions of this section and any other applicable conditions of this part are met. Once the ruminants are imported, if they do not meet the conditions of this section, they must be disposed of as the Administrator may direct.

(a) *Bovines for immediate slaughter.* Bovines from a region listed in § 94.18(a)(3) of this subchapter may be imported for immediate slaughter under the following conditions:

(1) The bovines must be less than 30 months of age when imported into the United States and when slaughtered;

(2) The bovines must have been subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000;

(3) The bovines must be accompanied by a certificate issued by a full-time salaried veterinary officer of the national government of the region of origin, or issued by a veterinarian designated or accredited by the national government of the region of origin and endorsed by a full-time salaried veterinary officer of the national government of the region of origin, representing that the veterinarian issuing the certificate was authorized to do so, and the certificate states that the conditions of paragraphs (a)(1) and (a)(2) of this section have been met;

(4) The bovines must be imported only through a port of entry listed in § 93.403(b) or as provided for in § 93.403(f) in a means of conveyance sealed in the region of origin with seals of the national government of the region of origin, and must be moved directly as a group from the port of entry to a recognized slaughtering establishment. The seals must be broken only at the port of entry by the APHIS port veterinarian or at the recognized slaughtering establishment by a USDA representative. If the seals are broken by the APHIS port veterinarian at the port of entry, the means of conveyance must be resealed with seals of the U.S. Government before being moved to the recognized slaughtering establishment;

(5) The bovines must be accompanied from the port of entry to the recognized slaughtering establishment by APHIS Form VS 17–33; and

(6) At the recognized slaughtering establishment, the bovines must be slaughtered as a group.

(b) *Bovines for feeding.* Bovines from a region listed in § 94.18(a)(3) of this subchapter may be imported for movement to a feedlot and then to slaughter under the following conditions:

(1) The bovines must be less than 30 months of age when imported into the United States;

(2) The bovines must have been subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000;

(3) The bovines must be permanently and humanely identified before arrival at the port of entry with a distinct and legible mark identifying the exporting country, properly applied with a freeze brand, hot iron, or other method, and easily visible on the live animal and on the carcass before skinning. The mark must be not less than 2 inches nor more than 3 inches high, and must be applied to each animal's right hip, high on the tail-head (over the junction of the sacral and first cocygeal vertebrae). Other means of permanent identification may be used upon request if deemed adequate by the Administrator to humanely identify the animal in a distinct and legible way as having been imported from the BSE minimal-risk exporting region. Bovines exported from Canada must be so marked with ''CAN;''

(4) Each bovine must be individually identified by an official eartag of the country of origin, applied before the animal's arrival at the port of entry into the United States, that is determined by the Administrator to meet standards equivalent to those for official eartags in the United States as defined in § 71.1 of this chapter and to be traceable to the premises of origin of the animal. No person may alter, deface, remove, or otherwise tamper with the individual identification while the animal is in the United States or moving into or through the United States, except that the identification may be removed at the time of slaughter;

(5) The bovines must be accompanied by a certificate issued in accordance with § 93.405 that states, in addition to the statements required by § 93.405, that the conditions of paragraphs (b)(1) through (b)(4) of this section have been met;

(6) The bovines must be imported only through a port of entry listed in § 93.403(b) or as provided for in § 93.403(f) in a means of conveyance sealed in the region of origin with seals of the national government of the region of origin, and must be moved directly from the port of entry as a group to the feedlot identified on the APHIS VS Form 17–130 or other movement documentation required under paragraph (b)(8) of this section;

(7) The seals of the national government of the region of origin must be broken only at the port of entry by the APHIS port veterinarian or at the feedlot by an accredited veterinarian or a State or USDA representative or his or her designee. If the seals are broken by the APHIS port veterinarian at the port of entry, the means of conveyance must be resealed with seals of the U.S. Government before being moved to the feedlot;

(8) The bovines must be accompanied from the port of entry to the feedlot by APHIS Form VS 17–130 or other movement documentation deemed acceptable by the Administrator, which must identify the physical location of the feedlot, the individual responsible for the movement of the animals, and the individual identification of each animal, which includes the eartag required under paragraph (b)(4) of this section and any other identification present on the animal, including registration number, if any;

(9) The bovines must remain at the feedlot until transported from the feedlot to a recognized slaughtering establishment for slaughter;

(10) The bovines must be moved directly from the feedlot identified on APHIS Form VS 17–130 to a recognized slaughtering establishment in conveyances that must be sealed at the feedlot with seals of the U.S. Government by an accredited veterinarian or a State or USDA representative. The seals may be broken only at the recognized slaughtering establishment by a USDA representative.

(11) The bovines must be accompanied from the feedlot to the recognized slaughtering establishment by APHIS Form VS 1–27 or other movement documentation deemed acceptable by the Administrator, which must identify the physical location of the recognized slaughtering establishment, the individual responsible for the movement of the animals, and the individual identification of each animal, which includes the eartag required under paragraph (b)(4) of this section and any other identification present on the animal, including registration number, if any; and

(12) The bovines must be less than 30 months of age when slaughtered.

(c) *Sheep and goats for immediate slaughter.* Sheep and goats from a region listed in § 94.18(a)(3) of this subchapter may be imported for immediate slaughter under the conditions set forth in this subpart for such sheep and goats. The conditions for the importation of sheep and goats from Canada for immediate slaughter are set forth in §§ 93.419(c) and 93.420.

(d) *Sheep and goats for feeding.* Sheep and goats from a region listed in § 94.18(a)(3) of this subchapter may be imported for other than immediate slaughter under the conditions set forth in this subpart for such sheep and goats. The conditions for the importation of sheep and goats from Canada for other than immediate slaughter are set forth in §§ 93.405 and 93.419.

(e) *Cervids.* There are no BSE-related restrictions on the importation of cervids from a region listed in § 94.18(a)(3) of this subchapter.

(f) *Camelids.* There are no BSE-related restrictions on the importation of camelids from a region listed in § 94.18(a)(3) of this subchapter.

(Approved by the Office of Management and Budget under control number 0579–0234)

PART 94–RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), EXOTIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, CLASSICAL SWINE FEVER, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

■ 7. The authority citation for part 94 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

■ 8. Section 94.0 is amended by revising the definitions of *authorized inspector* and *cervid* and adding new definitions of *bovine, bovine spongiform encephalopathy (BSE) minimal-risk region, Food Safety and Inspection Service, personal use, positive for a transmissible spongiform encephalopathy, specified risk materials (SRMs),* and *suspect for a transmissible spongiform encephalopathy,* in alphabetical order, to read as follows:

§ 94.0 Definitions.

* * * * *

Authorized inspector. Any individual authorized by the Administrator of APHIS or the Commissioner of Customs and Border Protection, Department of Homeland Security, to enforce the regulations in this part.

* * * * *

Bovine. Bos taurus, Bos indicus, and *Bison bison.*

Bovine spongiform encephalopathy (BSE) minimal-risk region. A region that:

(1) Maintains, and, in the case of regions where BSE was detected, had in place prior to the detection of BSE in an indigenous ruminant, risk mitigation measures adequate to prevent widespread exposure and/or establishment of the disease. Such measures include the following:

(i) Restrictions on the importation of animals sufficient to minimize the possibility of infected ruminants being imported into the region, and on the importation of animal products and animal feed containing ruminant protein sufficient to minimize the possibility of ruminants in the region being exposed to BSE;

(ii) Surveillance for BSE at levels that meet or exceed recommendations of the World Organization for Animal Health (Office International des Epizooties) for surveillance for BSE; and

(iii) A ruminant-to-ruminant feed ban that is in place and is effectively enforced.

(2) In regions where BSE was detected, conducted an epidemiological investigation following detection of BSE sufficient to confirm the adequacy of measures to prevent the further introduction or spread of BSE, and continues to take such measures.

(3) In regions where BSE was detected, took additional risk mitigation measures, as necessary, following the BSE outbreak based on risk analysis of the outbreak, and continues to take such measures.

Cervid. All members of the family *Cervidae* and hybrids, including deer, elk, moose, caribou, reindeer, and related species.

* * * * *

Food Safety and Inspection Service. The Food Safety and Inspection Service (FSIS) of the United States Department of Agriculture.

* * * * *

Personal use. Only for personal consumption or display and not distributed further or sold.

* * * * *

Positive for a transmissible spongiform encephalopathy. A sheep or goat for which a diagnosis of a transmissible spongiform encephalopathy has been made.

* * * * *

Specified risk materials (SRMs). Those bovine parts considered to be at particular risk of containing the bovine spongiform encephalopathy (BSE) agent in infected animals, as listed in the FSIS regulations at 9 CFR 310.22(a).

Suspect for a transmissible spongiform encephalopathy. (1) A sheep or goat that has tested positive for a transmissible spongiform encephalopathy or for the proteinase resistant protein associated with a transmissible spongiform encephalopathy, unless the animal is designated as positive for a transmissible spongiform encephalopathy; or

(2) A sheep or goat that exhibits any of the following signs and that has been determined to be suspicious for a transmissible spongiform encephalopathy by a veterinarian: Weight loss despite retention of appetite; behavior abnormalities; pruritus (itching); wool pulling; biting at legs or side; lip smacking; motor abnormalities such as incoordination, high stepping gait of forelimbs, bunny hop movement of rear legs, or swaying of back end; increased sensitivity to noise and sudden movement; tremor, ''star gazing,'' head pressing, recumbency, or other signs of neurological disease or chronic wasting.

* * * * *

§ 94.1 [Amended]

■ 9. In § 94.1, paragraph (b)(4) and the introductory text to paragraph (d) are amended by removing the reference to ''§ 94.21'' each time it appears and adding in its place a reference to ''§ 94.22''.

■ 10. Section 94.18 is amended as follows:

■ a. In paragraph (a)(1), the word ''Canada,'' is removed.

■ b. Paragraph (a)(3) is redesignated as paragraph (a)(4) and newly redesignated paragraph (a)(4) is revised to read as set forth below.

■ c. A new paragraph (a)(3) is added, and paragraph (b) and the introductory text of paragraph (c) are revised, to read as set forth below.

■ d. In paragraph (d), the introductory text and paragraph (d)(3) are revised and a new paragraph (d)(5) is added to read as set forth below.

§ 94.18 Restrictions on importation of meat and edible products from ruminants due to bovine spongiform encephalopathy.

(a) * * *

(3) The following are minimal-risk regions with regard to bovine spongiform encephalopathy: Canada.

(4) A region may request at any time that the Administrator consider its removal from a list in paragraphs (a)(1) or (a)(2) of this section, or its addition to or removal from the list in paragraph (a)(3) of this section, by following the procedures in part 92 of this subchapter.

(b) Except as provided in paragraph (d) of this section or in § 94.19, the importation of meat, meat products, and edible products other than meat (except for gelatin as provided in paragraph (c) of this section, milk, and milk products) from ruminants that have been in any of the regions listed in paragraph (a) of this section is prohibited.

(c) *Gelatin.* The importation of gelatin derived from ruminants that have been in any region listed in paragraph (a) of this section is prohibited unless the following conditions or the conditions of § 94.19(f) have been met:

* * * * *

(d) *Transit shipment of articles.* Meat, meat products, and edible products other than meat that are prohibited importation into the United States in accordance with this section may transit air and ocean ports in the United States for immediate export if the conditions of paragraph (d)(1) through (d)(4) of this section are met. If such commodities are derived from bovines, sheep, or goats from a region listed in paragraph (a)(3) of this section, they are eligible to transit the United States by overland transportation if the requirements of paragraphs (d)(1) through (d)(5) of this section are met:

* * * * *

(3) The person moving the articles must notify, in writing, the inspector at both the place in the United States where the articles will arrive and the port of export before such transit. The notification must include the:

* * * * *

(5) The commodities must be eligible to enter the United States in accordance with § 94.19 and must be accompanied by the certification required by that section. Additionally, the following conditions must be met:

(i) The shipment must be exported from the United States within 7 days of its entry;

(ii) The commodities must not be transloaded while in the United States;

(iii) A copy of the import permit required under paragraph (d)(1) of this section must be presented to the inspector at the port of arrival and the port of export in the United States.

* * * * *

§§ 94.19 through 94.25 [Redesignated as §§ 94.20 through 94.26]

■ 11. Sections 94.19 through 94.24 are redesignated as §§ 94.20 through 94.26, respectively.

■ 12. A new § 94.19 is added to read as follows:

§ 94.19 Restrictions on importation from BSE minimal-risk regions of meat and edible products from ruminants.

Except as provided in § 94.18 and this section, the importation of meat, meat products, and edible products other than meat (excluding gelatin that meets the conditions of § 94.18(c), milk, and milk products), from bovines, sheep, or goats that have been in any of the regions listed in § 94.18(a)(3) is prohibited. The commodities listed in paragraphs (a) through (f) of this section may be imported from a region listed in

§ 94.18(a)(3) if the conditions of this section are met; if (except for commodities described in paragraph (e) of this section) the commodities are accompanied by an original certificate of such compliance issued by a full-time salaried veterinary officer of the national government of the region of origin, or issued by a veterinarian designated or accredited by the national government of the region of origin and endorsed by a full-time salaried veterinary officer of the national government of the region of origin, representing that the veterinarian issuing the certificate was authorized to do so; and if all other applicable requirements of this part are met.

(a) *Meat, meat byproducts, and meat food products from bovines.* The meat, meat byproduct, or meat food product, as defined by FSIS in 9 CFR 301.2—that those terms as applied to bison shall have a meaning comparable to those provided in 9 CFR 301.2 with respect to cattle, sheep, and goats—is derived from bovines that have been subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000 and meets the following conditions:

(1) The meat, meat byproduct, or meat food product is derived from bovines for which an air-injected stunning process was not used at slaughter; and

(2) The SRMs and small intestine of the bovines were removed at slaughter.

(b) *Whole or half carcasses of bovines.* The carcasses are derived from bovines for which an air-injected stunning process was not used at slaughter and that meet the following conditions:

(1) The bovines are subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000; and

(2) The SRMs and small intestine of the bovines were removed at slaughter.

(c) *Meat, meat byproducts, and meat food products from sheep or goats or other ovines or caprines.* The meat, meat byproduct, or meat food product, as defined by FSIS in 9 CFR 301.2, is derived from ovines or caprines that are from a flock or herd subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000, that were less than 12 months of age when slaughtered, and that meet the following conditions:

(1) The animals were slaughtered at a facility that either slaughters only sheep and/or goats or other ovines and caprines less than 12 months of age or complies with a segregation process approved by the national veterinary authority of the region of origin and the Administrator as adequate to prevent contamination or commingling of the meat with products not eligible for importation into the United States;

(2) The animals did not test positive for and were not suspect for a transmissible spongiform encephalopathy;

(3) The animals have not resided in a flock or herd that has been diagnosed with BSE; and

(4) The animals' movement is not restricted within Canada as a result of exposure to a transmissible spongiform encephalopathy.

(d) *Carcasses of ovines and caprines.* The carcasses are derived from ovines or caprines that are from a flock or herd subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000, that were less than 12 months of age when slaughtered, and that meet the following conditions:

(1) The animals were slaughtered at a facility that either slaughters only sheep and/or goats or other ovines and caprines less than 12 months of age or complies with a segregation process approved by the national veterinary authority of the region of origin and the Administrator as adequate to prevent contamination or commingling of the meat with products not eligible for importation into the United States;

(2) The animals did not test positive for and were not suspect for a transmissible spongiform encephalopathy;

(3) The animals have not resided in a flock or herd that has been diagnosed with BSE; and

(4) The animals' movement is not restricted within Canada as a result of exposure to a transmissible spongiform encephalopathy.

(e) *Meat or dressed carcasses of hunter-harvested wild sheep, goats, or other ruminants other than cervids.* The meat or dressed carcass (eviscerated and the head is removed) is derived from a wild sheep, goat, or other ruminant other than a cervid and meets the following conditions:

(1) The meat or dressed carcass is derived from an animal that has been legally harvested in the wild, as verified by proof such as a hunting license, tag, or the equivalent that the hunter must show to the United States Customs and Border Protection official; and

(2) The animal from which the meat is derived was harvested within a jurisdiction specified by the Administrator for which the game and wildlife service of the jurisdiction has informed the Administrator either that the jurisdiction conducts no type of game feeding program, or has complied with, and continues to comply with, a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000.

(f) *Gelatin other than that allowed importation under § 94.18(c).* The gelatin is derived from the bones of bovines subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000 and from which SRMs and small intestine were removed.

(g) *Ports.* All products to be brought into the United States under this section must, if arriving at a land border port, arrive at one of the following ports: Eastport, ID; Houlton, ME; Detroit (Ambassador Bridge), Port Huron, and Sault St. Marie, MI; International Falls, MN; Sweetgrass, MT; Alexandria Bay, Buffalo (Lewiston Bridge and Peace Bridge), and Champlain, NY; Pembina and Portal, ND; Derby Line and Highgate Springs, VT; and Blaine (Pacific Highway and Cargo Ops), Lynden, Oroville, and Sumas (Cargo), WA.

PART 95—SANITARY CONTROL OF ANIMAL BYPRODUCTS (EXCEPT CASINGS), AND HAY AND STRAW, OFFERED FOR ENTRY INTO THE UNITED STATES

■ 13. The authority citation for part 95 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

■ 14. Section 95.1 is amended by revising the definition of *inspector* and adding new definitions of *bovine, bovine spongiform encephalopathy (BSE) minimal-risk region, offal, positive for a transmissible spongiform encephalopathy, specified risk materials (SRMs), and suspect for a transmissible spongiform encephalopathy,* in alphabetical order, to read as follows:

§ 95.1 Definitions.

* * * * *

Bovine. Bos taurus, Bos indicus, and *Bison bison.*

Bovine spongiform encephalopathy (BSE) minimal-risk region. A region listed in § 94.18(a)(3) of this subchapter.

* * * * *

Inspector. Any individual authorized by the Administrator of APHIS or the Commissioner of Customs and Border Protection, Department of Homeland

Security, to enforce the regulations in this part.

* * * * *

Offal. The inedible parts of a butchered animal that are removed in dressing, consisting largely of the viscera and the trimmings, which may include, but are not limited to, brains, thymus, pancreas, liver, heart, kidney.

Positive for a transmissible spongiform encephalopathy. A sheep or goat for which a diagnosis of a transmissible spongiform encephalopathy has been made.

* * * * *

Specified risk materials (SRMs). Those bovine parts considered to be at particular risk of containing the bovine spongiform encephalopathy (BSE) agent in infected animals, as listed in the FSIS regulations at 9 CFR 310.22(a).

Suspect for a transmissible spongiform encephalopathy. (1) A sheep or goat that has tested positive for a transmissible spongiform encephalopathy or for the proteinase resistant protein associated with a transmissible spongiform encephalopathy, unless the animal is designated as positive for a transmissible spongiform encephalopathy; or

(2) A sheep or goat that exhibits any of the following signs and that has been determined to be suspicious for a transmissible spongiform encephalopathy by a veterinarian: Weight loss despite retention of appetite; behavior abnormalities; pruritus (itching); wool pulling; biting at legs or side; lip smacking; motor abnormalities such as incoordination, high stepping gait of forelimbs, bunny hop movement of rear legs, or swaying of back end; increased sensitivity to noise and sudden movement; tremor, ''star gazing,'' head pressing, recumbency, or other signs of neurological disease or chronic wasting.

* * * * *

■ 15. Section 95.4 is amended as follows:

■ a. In paragraph (a) introductory text, the words ''paragraphs (c) through (f)'' are removed and the words ''paragraphs (c) through (h)'' are added in their place.

■ b. In paragraph (b), the words ''paragraphs (d) and (f)'' are removed and the words ''paragraphs (d) and (h)'' are added in their place.

■ c. In paragraph (c)(4), the first sentence is revised and a new sentence is added after the final sentence to read as set forth below.

■ d. Paragraph (c)(6) is revised to read as set forth below.

■ e. Paragraph (f) is redesignated as paragraph (h).

■ f. New paragraphs (f) and (g) are added to read as set forth below.

■ g. In newly redesignated paragraph (h), the introductory text, paragraph (h)(3) introductory text, and paragraph (h)(4) are revised to read as set forth below.

§ 95.4 Restrictions on the importation of processed animal protein, offal, tankage, fat, glands, certain tallow other than tallow derivatives, and serum due to bovine spongiform encephalopathy.

* * * * *

(c) * * *

(4) Except for facilities in regions listed in § 94.18(a)(3) of this subchapter, if the facility processes or handles any material derived from mammals, the facility has entered into a cooperative service agreement executed by the operator of the facility and APHIS. * * * In facilities in regions listed in § 94.18(a)(3) of this subchapter, the inspections that would otherwise be conducted by APHIS must be conducted at least annually by a representative of the government agency responsible for animal health in the region.

* * * * *

(6) Each shipment to the United States is accompanied by an original certificate signed by a full-time, salaried veterinarian of the government agency responsible for animal health in the region of origin certifying that the conditions of paragraph (c)(1) through (c)(3) of this section have been met, except that, for shipments of animal feed from a region listed in § 94.18(a)(3) of this subchapter, the certificate may be signed by a person authorized to issue such certificates by the veterinary services of the national government of the region of origin.

* * * * *

(f) Tallow otherwise prohibited importation under paragraph (a)(1) of this section may be imported into the United States if it meets the following conditions:

(1) The tallow is derived from bovines that have not been in a region listed in § 94.18(a)(1) or (a)(2) of this subchapter;

(2) The tallow is composed of less than 0.15 percent insoluble impurities;

(3) After processing, the tallow was not exposed to or commingled with any other animal origin material; and

(4) Each shipment to the United States is accompanied by an original certificate signed by a full-time salaried veterinary officer of the national government of the region of origin, or issued by a veterinarian designated by or accredited by the national government of the region of origin and endorsed by a full-time salaried veterinary officer of the national government of the region of origin, representing that the veterinarian issuing the certificate was authorized to do so. The certificate must state that the requirements of paragraphs (f)(1) through (f)(3) of this section have been met; and

(5) The shipment, if arriving at a U.S. land border port, arrives at a port listed in § 94.19(g) of this subchapter.

(g) Offal that is otherwise prohibited importation under paragraph (a)(1) of this section may be imported if the offal is derived from cervids or the offal is derived from bovines, ovines, or caprines from a region listed in § 94.18(a)(3) of this subchapter that have not been in a region listed in § 94.18(a)(1) or (a)(2) of this subchapter, and the following conditions are met:

(1) If the offal is derived from bovines, the offal:

(i) Contains no SRMs and is derived from bovines from which the SRMs and small intestine were removed;

(ii) Is derived from bovines for which an air-injected stunning process was not used at slaughter; and

(iii) Is derived from bovines that are subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000;

(2) If the offal is derived from ovines or caprines, the offal:

(i) Is derived from ovines or caprines that were less than 12 months of age when slaughtered and that are from a flock or herd subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000;

(ii) Is not derived from ovines or caprines that have tested positive for or are suspect for a transmissible spongiform encephalopathy;

(iii) Is not derived from animals that have resided in a flock or herd that has been diagnosed with BSE; and

(iv) Is derived from ovines or caprines whose movement was not restricted in the BSE minimal-risk region as a result of exposure to a transmissible spongiform encephalopathy.

(3) Each shipment to the United States is accompanied by an original certificate signed by a full-time salaried veterinary officer of the national government of the region of origin, or issued by a veterinarian designated by or accredited by the national government of the region of origin and endorsed by a full-time salaried veterinary officer of the national government of the region of origin, representing that the veterinarian issuing the certificate was authorized to do so. The certificate must state that the requirements of paragraph (g)(1) or (g)(2) of this section have been met; and

(4) The shipment, if arriving at a U.S. land border port, arrives at a port listed in § 94.19(g) of this subchapter.

(h) *Transit shipment of articles.* Articles that are prohibited importation into the United States in accordance with this section may transit air and ocean ports in the United States for immediate export if the conditions of paragraphs (h)(1) through (h)(3) of this section are met. If such commodities are derived from bovines, sheep, or goats from a region listed in§ 94.18(a)(3) of this subchapter, they are eligible to transit the United States by overland transportation if the requirements of paragraphs (h)(1) through (h)(4) of this section are met:

* * * * *

(3) The person moving the articles notifies, in writing, the inspector at both the place in the United States where the articles will arrive and the port of export before such transit. The notification includes the following:

* * * * *

(4) The articles are eligible to enter the United States in accordance with this section and are accompanied by the certification required by this section. Additionally, the following conditions must be met:

(i) The shipment is exported from the United States within 7 days of its entry;

(ii) The commodities are not transloaded while in the United States;

(iii) A copy of the import permit required under paragraph (h)(2) of this section is presented to the inspector at the port of arrival and the port of export in the United States.

* * * * *

PART 96—RESTRICTION OF IMPORTATIONS OF FOREIGN ANIMAL CASINGS OFFERED FOR ENTRY INTO THE UNITED STATES

■ 16. The authority citation for part 96 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.4.

■ 17. In § 96.1, a definition of *authorized inspector* is added in alphabetical order to read as follows:

§ 96.1 Definitions.

* * * * *

Authorized inspector. Any individual authorized by the Administrator of APHIS or the Commissioner of Customs and Border Protection, Department of Homeland Security, to enforce the regulations in this subpart.

* * * * *

■ 18. In § 96.2, paragraph (b) is revised to read as follows:

§ 96.2 Prohibition of casings due to African swine fever and bovine spongiform encephalopathy.

* * * * *

(b) *Bovine or other ruminant casings.* The importation of casings, except stomachs, from bovines and other ruminants that originated in or were processed in any region listed in § 94.18(a) this subchapter is prohibited, except that casings derived from sheep that were slaughtered in a region listed in § 94.18(a)(3) of this subchapter at less than 12 months of age and that were from a flock subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000 may be imported, provided the casings are accompanied by a certificate that states that the casings were derived from sheep that met the conditions of this paragraph and that meets the following conditions:

(1) The certificate is written in English;

(2) The certificate is signed by an individual eligible to issue the certificate required under § 96.3; and

(3) The certificate is presented to an authorized inspector at the port of arrival.

* * * * *

■ 19. In § 96.3, a new paragraph (d) is added to read as follows:

§ 96.3 Certificate for Animal Casings.

* * * * *

(d) In addition to meeting the other requirements of this section, the certificate accompanying sheep casings from a region listed in § 94.18(a)(3) of this subchapter must state that the sheep from which the casings were derived were less than 12 months of age when slaughtered and were subject to a ruminant feed ban equivalent to the requirements established by the U.S. Food and Drug Administration at 21 CFR 589.2000.

* * * * *

Done in Washington, DC, this 27th day of December 2004 .

Bill Hawks,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 04–28593 Filed 12–29–04; 3:00 pm]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 03–080–4]

RIN 0579–AB73

Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities; Availability of an Environmental Assessment

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability and request for comments.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment relative to a final rule published in today's issue of the **Federal Register** to amend the regulations regarding the importation of animals and animal products to recognize, and add Canada to, a category of regions that present a minimal risk of introducing bovine spongiform encephalopathy into the United States via live ruminants and ruminant products. The rule also sets out conditions under which certain live ruminants and ruminant products and byproducts may be imported from such regions. We are making the environmental assessment available to the public for review and comment.

DATES: We will consider all comments that we receive on or before February 3, 2005.

ADDRESSES: You may submit comments by any of the following methods:

- EDOCKET: Go to *http://www.epa.gov/feddocket* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once you have entered EDOCKET, click on the ''View Open APHIS Dockets'' link to locate this document.
- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 03–080–4, 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. 03–080–4.
- E-mail: Address your comment to *regulations@aphis.usda.gov.* Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and ''Docket No. 03–080–4'' on the subject line.

Reading Room: You may read any comments that we receive on the environmental assessment in our reading room. 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.

Other Information: You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

FOR FURTHER INFORMATION CONTACT: Dr. Karen James-Preston, Director, Technical Trade Services, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 734–4356.

SUPPLEMENTARY INFORMATION:

Background

On November 4, 2003, the Animal and Plant Health Inspection Service (APHIS) published in the **Federal Register** (68 FR 62386–62405, Docket No. 03–080–1) a proposal to amend the regulations regarding the importation of animals and animal products to recognize a category of regions that present a minimal risk of introducing bovine spongiform encephalopathy (BSE) into the United States via live ruminants and ruminant products, and proposed to add Canada to this category. We also proposed to allow the importation of certain live ruminants and ruminant products and byproducts from such regions under certain conditions.

In that proposed rule, we informed the public that we had prepared an environmental assessment (EA) regarding the potential impact on the quality of the human environment due to the importation of ruminants and ruminant products and byproducts from Canada under the conditions specified in the proposed rule. APHIS' review and analysis of the potential environmental impacts associated with those proposed importations were documented in the EA, titled ''Proposed Rulemaking to Establish Criteria for the Importation of Designated Ruminants and Ruminant Products from Canada into the United States, Environmental Assessment (October 2003).'' We made that EA available to the public for review and comment during the proposed rule's comment period, which originally closed on January 5, 2004, but was subsequently extended to April 7, 2004, by a notice published in the **Federal Register** on March 8, 2004 (69 FR 10633–10636, Docket No. 03–080–2).

During the comment period for the proposed rule, comments were received from the public regarding the EA. As a result of those comments, and in light of new circumstances that have arisen since the October 2003 EA was prepared (most notably the detection of BSE in a Holstein cow in Washington State in December 2003), APHIS has revised the October 2003 EA to discuss in more detail the potential impacts of concern for the human environment. We are making this revised EA, titled ''Rulemaking to Establish Criteria for the Importation of Designated Ruminants and Ruminant Products From Canada into the United States, Final Environmental Assessment (December 2004),'' available to the public for review and comment. We will consider all comments that we receive on or before the date listed under the heading **DATES** at the beginning of this notice.

The EA may be viewed on the EDOCKET Web site (*see* **ADDRESSES** above for instructions for accessing EDOCKET) or on the APHIS Web site at *http://www.aphis.usda.gov/lpa/issues/bse/bse.html.* You may request paper copies of the EA by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT.** Please refer to the title of the EA when requesting copies. The EA is also available for review in our reading room (information on the location and hours of the reading room is provided under the heading **ADDRESSES** at the beginning of this notice).

The EA has been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 27th day of December 2004.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–28594 Filed 12–29–04; 3:00 pm]

BILLING CODE 3410–34–P

Federal Register

Tuesday,
January 4, 2005

Part IV

Federal Communications Commission

47 CFR Part 1

Nationwide Programmatic Agreement for Review Under the National Historic Preservation Act; Final Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 03–128; FCC 04–222]

Nationwide Programmatic Agreement for Review Under the National Historic Preservation Act

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, we adopt revisions to the Federal Communications Commission's (''Commission'') rules to implement a Nationwide Programmatic Agreement (''Nationwide Agreement'') that will tailor and streamline procedures for review of certain Commission undertakings for communications facilities under section 106 of the National Historic Preservation Act of 1966 (''NHPA''). The Nationwide Agreement will tailor the section 106 review in the communications context in order to improve compliance and streamline the review process for construction of towers and other Commission undertakings, while at the same time advancing and preserving the goal of the NHPA to protect historic properties, including historic properties to which federally recognized Indian tribes, including Alaska Native Villages, and Native Hawaiian Organizations (''NHOs'') attach religious and cultural significance.

DATES: Effective March 7, 2005.

FOR FURTHER INFORMATION CONTACT: Frank Stilwell, Wireless Telecommunications Bureau, (202) 418–1892.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's *Report and Order,* FCC 04–222, adopted September 9, 2004, and released October 5, 2004. The full text of the *Report and Order* is available for public inspection during regular business hours at the FCC Reference Information Center, 445 12th St., SW., Room CY–A257, Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor: Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via e-mail at *qualexint@aol.com.*

Paperwork Reduction Act

The *Report and Order* contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. Public and agency comments are due March 7, 2005. Comments should address the following: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (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 the use of automated collection techniques or other forms of information technology. A copy of any comments on the information collections contained herein should be submitted to Judith B. Herman, Federal Communications Commission, 445 12th St., SW., Room 1–C804, Washington, DC 20554, or via the Internet to *Judith-B.Herman@fcc.gov,* and to Edward C. Springer, OMB Desk Officer, 10236 New Executive Office Building, 724 17th St., NW., Washington, DC 20503, or via the Internet to *Edward.Springer@omb.eop.gov.*

In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Pub. L. 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' In this *Report and Order,* we have assessed the effects of certain policy changes brought about by the Nationwide Agreement that might impose information collection burdens.[1] More specifically, we believe that businesses with fewer than 25 employees will be affected by the Nationwide Agreement in a manner similar to other small entities. Burdens and benefits may be felt more acutely by small businesses due to their reduced ability to spread regulatory costs across a larger number of projects. The Nationwide Agreement does impose reporting, recordkeeping, and other compliance requirements.[2] However, Part III of the Nationwide Agreement, which allows for the construction of certain telecommunications facilities without the need to submit section 106 materials to the SHPO/THPO, will probably provide the greatest regulatory relief for small businesses, including those with fewer than 25 employees. We believe that the Part III exclusions will be especially helpful for smaller entities including those with fewer than 25 employees who rely more heavily on the prompt, predictable completion of each project to maintain a satisfactory cash flow. Businesses that avail themselves of an exclusion will have some costs. For example, they will have to determine whether a specific project satisfies the criteria for that exclusion and maintain documentation of that determination in their files.

Summary of the Report and Order

1. In this *Report and Order,* we adopt revisions to the Federal Communications Commission's (''Commission'') rules to implement a Nationwide Programmatic Agreement (''Nationwide Agreement'') that will tailor and streamline procedures for review of certain Commission undertakings for communications facilities under section 106 (16 U.S.C. 470f) of the National Historic Preservation Act of 1966 (''NHPA'') (16 U.S.C. 470 *et seq.*). On June 9, 2003, we released a *Notice of Proposed Rulemaking* (''*NPRM*'') seeking comment on a draft Nationwide Agreement among the Commission, the Advisory Council on Historic Preservation (''Council'') and the National Conference of State Historic Preservation Officers (''Conference''). *See* 68 FR 40876 (July 9, 2003). As discussed below, upon consideration of the record, we have determined that, with certain revisions, the Nationwide Agreement will tailor the section 106 review in the communications context in order to improve compliance and streamline the review process for construction of towers and other Commission undertakings, while at the same time advancing and preserving the goal of the NHPA to protect historic properties, including historic properties to which federally recognized Indian tribes, including Alaska Native Villages, and Native Hawaiian Organizations (''NHOs'') attach religious and cultural significance. The Council and Conference have agreed with this determination, and the parties executed the Nationwide Agreement on October 4, 2004. Accordingly, upon the effective date of the rule changes adopted in this *Report and Order,* the provisions of the attached Nationwide Agreement will become binding on affected licensees and applicants of the Commission.

[1] *See* Final Regulatory Flexibility Analysis, *infra,* at paragraphs 137–141.

[2] *Id.*

2. During the late 1990s, coincident with the explosion in tower constructions necessitated by the deployment of wireless mobile service across the country, delays in completing traditional section 106 reviews began to occur. The Commission's licensees and applicants (''Applicants''), State Historic Preservation Officers (''SHPOs'') and Commission staff began experiencing ever-growing caseloads and backlogs that, it soon became clear, were posing a threat to the timely deployment of wireless service to customers.

3. Faced with the prospect of even larger numbers of towers to be constructed, the Council formed a working group, consisting of representatives of the Council and Commission, SHPOs, Indian tribes, the communications industry, and historic preservation consultants. Members of the Working Group began meeting on a regular basis, seeking ways of tailoring the section 106 process to the unique situation posed by tower constructions (and the collocation of antennas on towers and other structures). While striving to preserve the goal of the NHPA to protect historic properties (including historic properties of cultural and religious importance to Indian tribes and NHOs), the group explored alternatives for streamlining the section 106 process, when feasible.

4. In November 2001, the Working Group began discussing a Nationwide Agreement, consistent with § 800.14(b) (36 CFR 800.14(b)) of the Council's rules, to modify the historic preservation review process for communications towers and for antenna collocations that were not excluded from section 106 review under the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, executed March 16, 2001 (66 FR 17554, April 2, 2001) (''Collocation Agreement''). The Working Group sought to tailor the NHPA review process to the communications context in several ways that were reflected in the draft Nationwide Agreement. Commission staff also consulted on a government-to-government basis with representatives of federally recognized Indian tribes regarding the potential for provisions of the draft Agreement to significantly and uniquely affect their historic and cultural interests.

5. Although we agree, as discussed below, that certain changes to the document are appropriate, we conclude that signing the Nationwide Agreement advances the public interest. Section 800.14(b) of the Council's rules, promulgated pursuant to the Council's authority under section 214 of the NHPA, anticipates that, after due deliberation among affected parties, a federal agency, the Council and the Conference may enter into a nationwide programmatic agreement that streamlines the section 106 review process and tailors it to the particular context of the subject matter to which it is applied. Consistent with this provision, the Nationwide Agreement streamlines and tailors the NHPA review process for tower constructions in a variety of ways, including: identifying classes of undertakings that, due to the small likelihood that they will impact historic properties, are excluded from routine section 106 review; developing clear and concise principles governing the initiation of contact with Indian tribes and NHOs as part of the section 106 process; clarifying methods for involving the public in the process; providing definitional and procedural guidance for the identification and evaluation of historic properties, and the assessment of effects on those properties; establishing procedures, including timelines, for SHPO, Tribal Historic Preservation Officer (''THPO'') and Commission review; providing procedural guidance for situations where construction occurs prior to compliance with section 106; and prescribing uniform filing documentation.

6. We disagree with arguments that the Nationwide Agreement will obstruct deployment and impede public safety by adding regulatory complexity to the section 106 review process. To the contrary, we find, on balance, that the measures described herein will relieve unnecessary regulatory burdens, and therefore will promote public safety and consumer interests, consistent with our deregulatory initiatives. While the procedures prescribed in the Nationwide Agreement are not free of complexity, on the whole they are less burdensome than the current process under the Council's rules, and neither we nor any commenters have identified substantially simpler solutions that would be consistent with our responsibilities under section 106 of the NHPA.

7. At the same time, we conclude that the Nationwide Agreement will sufficiently protect historic properties. The NHPA and the Council's rules do not require that federal undertakings avoid all impacts on historic properties. Rather, section 106 requires that federal agencies ''take into account'' the effect of their undertakings on historic properties, which the Council's rules interpret to include, among other things, a ''reasonable and good faith effort'' to identify historic properties. Moreover, section 214 of the NHPA (16 U.S.C. 470v) directs the Council to ''tak[e] into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties.'' We interpret these provisions to mean that, in formulating exemptions and prescribing processes, the Council and the federal agency need not ensure that every possible effect on a historic property is individually considered in all circumstances, but that they should take into account the likelihood and potential magnitude of effects in categories of situations. Indeed, doing so should advance historic preservation in the long run by enabling all parties to focus their limited resources on the cases where significant damage to historic properties is most likely.

8. Within this framework, we find it significant that both the Council and the Conference, whose principal missions include administering section 106 and protecting historic properties, have agreed to sign the Nationwide Agreement. Like these expert agencies, we conclude, that the procedures and standards set forth in the Nationwide Agreement, while streamlining the process, are sufficient to minimize the likelihood that facilities construction will have unreviewed and unmitigated effects on historic properties, consistent with the NHPA.

9. As a preliminary matter, a number of commenters argue that construction of a communications tower is not a federal undertaking under section 106 of the NHPA. An ''undertaking'' under the NHPA means ''a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including * * * those requiring a Federal permit[,] license, or approval'' (16 U.S.C. 470w(7)(C)). The Commission's rules currently treat tower construction as an ''undertaking'' for purposes of the NHPA. Unless and until we revisit this public-interest question and determine that it is appropriate to amend our rules, we believe our existing policies reflect a permissible interpretation of the Commission's authority under the Communications Act.

10. Some commenters argue that we should not adopt the proposed Nationwide Agreement at this time because federally recognized Indian tribes were not sufficiently involved in its negotiation and drafting. Commission recognizes that as an independent agency of the federal government, we have a trust responsibility to and a government-to-government relationship with federally recognized Indian tribes. Accordingly, it

is our stated policy to consult, to the extent practicable, with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources. *See In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement,* 16 FCC Rcd 4078, 4080 (2000).

11. We conclude that the actions our staff has undertaken in developing the Nationwide Agreement fulfill the commitment made in the *Tribal Policy Statement.*

12. Our actions in this matter were not limited to inviting written comment from Indian tribes. The Commission invited representatives of Tribal governments to participate in deliberations of the Working Group, and in a series of communications to all federally recognized tribes, Commission staff scoped the issues and specifically invited meaningful consultative discussion. Commission staff also distributed materials and discussed the status of the Nationwide Agreement at several tribal conferences during the period of preparation and negotiation. These initial efforts led to direct substantive discussions between Commission staff and representatives of Tribes.

13. As a result of these consultations, we put out for public comment both the Navajo Nation's proposal for notifying Tribes of otherwise excluded undertakings and the United South and Eastern Tribes, Inc. (''USET'') proposal regarding tribal and NHO participation in considering proposed undertakings, and we are adopting aspects of the USET proposal in this *Report and Order.* Our consultation with USET has continued since we released the *NPRM,* and we have also kept other tribal organizations apprised of our work and have invited them and their members to participate. Finally, many Indian tribes and NHOs filed comments in this proceeding, and federally recognized tribes were encouraged to make *ex parte* presentations to members of the Commission staff regarding this rulemaking.

14. We recognize that the execution of the Nationwide Agreement does not end our ongoing government-to-government relationship with federally recognized Tribes. Accordingly, we fully intend to continue regular consultation on a government-to-government basis, consistent with resource constraints, regarding the implementation of the Nationwide Agreement as well as other aspects of our relationship.

15. Section 214 of the NHPA permits the Council to exempt from section 106 review classes of federal undertakings that would be unlikely to impact historic properties. Pursuant to this authority, the draft Nationwide Agreement lists certain types of Commission undertakings that would be exempt from completing the section 106 process under the NHPA.

16. We conclude that categorically excluding from routine section 106 review categories of construction that are unlikely adversely to impact historic properties is appropriate and in the public interest. In addition to facilitating the timely deployment of service, properly drafted exclusions can promote historic preservation both by conserving the Commission's, SHPOs'/THPOs' and the Council's resources to review more important cases, and by providing incentives for applicants to locate facilities in a manner that will render effects on historic properties less likely. As discussed above, the NHPA does not require perfection in evaluating the potential effects of an undertaking in every instance. To the contrary, we believe section 214 contemplates a balancing of the likelihood of significant harm against the burden of reviewing individual undertakings. Moreover, the provisions in the Nationwide Agreement for ceasing construction and notifying the Commission and other interested parties upon discovery of previously unidentified historic properties provides a safeguard in the unusual instances where the availability of an exclusion might otherwise cause an adverse impact to be overlooked.

17. The proposed Nationwide Agreement excludes the ''Modification of a tower and any associated excavation that does not involve a collocation and does not substantially increase the size of the existing tower, as defined in the Collocation Agreement.'' A substantial increase in size, in turn, is defined in the Collocation Agreement by reference to the extent of any increase in the tower's height, the installation of new equipment cabinets or shelters, the extent of any new protrusion from the tower, and excavation outside the current tower site and any access or utility easements. Enhancements to towers that involve collocations and do not result in a substantial increase in size are excluded from review under the Collocation Agreement.

18. We conclude that it is appropriate and necessary to include in the Nationwide Agreement an exclusion for tower enhancements that constitute federal undertakings, do not involve collocations, and do not result in a substantial increase in size. Many changes to tower sites, such as building a fence around a tower, replacing an air conditioner or electric generator, or planting shrubs on the grounds, are in the nature of service or maintenance and are not federal undertakings. Thus, the Nationwide Agreement provides explicitly that Undertakings do not include maintenance and servicing of equipment. Other changes, however, are federal undertakings because they materially change the nature of the project that originally required section 106 review. Thus, a change is a federal undertaking if it alters an essential federal characteristic of the tower or its antennas. Any other interpretation would permit applicants to avoid section 106 review by initially constructing a non-intrusive tower and then modifying it substantially under the guise of a nonfederal alteration.

19. Because certain changes to towers that do not involve collocations are federal undertakings, we conclude that such enhancements should be excluded from review if they do not involve a substantial increase in size. Under the Collocation Agreement, a change to a tower occurring in conjunction with a collocation that does not result in a substantial increase in size is excluded from section 106 review. In some instances, a tower owner may find it beneficial to make a similar type of enhancement that is not associated with an immediate collocation. Such a change would have the same minimal likelihood of affecting historic properties as if it were accompanied by a collocation. Therefore, it should be excluded from section 106 review under the same standard.

20. Under the Collocation Agreement, collocations on towers constructed after March 16, 2001, are not excluded unless the tower has previously completed the section 106 review process. In drafting the Collocation Agreement, the parties recognized that permitting collocations on pre-existing towers without review, absent substantial evidence of an adverse effect from either the proposed collocation or the underlying tower, would minimize the potential for adverse effects from new construction by creating an incentive to collocate. For towers constructed after the effective date of the Collocation Agreement, by contrast, excluding collocations from review where the underlying tower had not been reviewed might create a perverse incentive for companies to build towers without review in the hope of later attracting collocations. The exclusion for enhancements will similarly apply to all towers constructed on or before March 16, 2001, and to

towers constructed after that date that went through the section 106 process. Otherwise, a party might be able to avoid the limitation in the Collocation Agreement by first altering a tower and then adding an excluded collocation.

21. Similar to the exclusion for enhancements to towers, the draft Nationwide Agreement permits the construction of new towers without NHPA review when the new tower replaces an existing tower and does not involve a substantial increase in size, as defined in the Collocation Agreement. In addition, unlike the exclusion for enhancements, the replacement tower exclusion permits construction and excavation within 30 feet in any direction of the leased or owned property previously surrounding the tower.

22. We adopt the replacement tower exclusion. Similar to collocations, strengthened structures may reduce the need for more towers by housing up to two, four or more additional antennas. Given the limitation of the exclusion to replacements that do not effectuate a substantial increase in size, it is highly unlikely that a replacement tower within the exclusion could have any impact other than on archeological properties. Moreover, the limitation on construction and excavation to within 30 feet of the existing leased or owned property means that only a minimal amount of previously undisturbed ground, if any, would be turned, and that would be very close to the existing construction. Finally, for reasons similar to those discussed with respect to tower enhancements, the replacement tower exclusion will apply to towers constructed after March 16, 2001, only if the original tower completed section 106 review.

23. The draft Nationwide Agreement permits the erection of facilities without NHPA review for a temporary period not to exceed twenty-four months. We adopt the proposed temporary facilities exclusion with one revision. By their nature, temporary facilities usually involve little or no excavation. So long as no excavation will occur on previously undisturbed ground, the risk of damage to archeological or other historic properties from a temporary facility is small. Moreover, temporary facilities are often used in response to exigent circumstances where it is important that they be erected quickly. Taking these considerations together, we conclude that an exclusion for temporary facilities is appropriate where no excavation will occur on previously undisturbed ground. We revise the exclusion, however, so that a temporary facility that requires excavation other than on previously disturbed ground must complete section 106 review. We further conclude that a period of 24 months is sufficient to accommodate nearly all temporary facilities, and is necessary to ensure that the exclusion cannot be used to avoid section 106 review indefinitely.

24. The draft Nationwide Agreement permits specified construction on certain properties in active industrial, commercial, or government-office use without NHPA review. We adopt a revised version of this proposed exclusion. First, we limit the exclusion to industrial parks, commercial strip malls, or shopping centers that occupy a total land area of 100,000 square feet or more. As noted by several commenters, applying the exclusion to any commercial property as small as 10,000 square feet, as proposed in the *NPRM,* would create an unacceptable risk of inappropriate development on small commercial properties, such as neighborhood shops, that may be located in or near historic areas. By confining the exclusion to construction in industrial parks, commercial strip malls, or shopping centers that occupy a total land area of 100,000 square feet or more, we effectively ensure that construction subject to the exclusion will occur not only on plots that substantially exceed 10,000 square feet, but on highly developed properties and on ground that, in all likelihood, will have been thoroughly disturbed when the existing structures were constructed. At the same time, these types of properties are among those where wireless telecommunications service is most often needed. Thus, this exclusion combines a low likelihood of significant impact on historic properties with a high potential to satisfy service needs, thereby reducing pressure to site other facilities in potentially more sensitive locations.

25. Second, we limit the exclusion to facilities that are less than 200 feet in overall height. A tower of less than 200 feet is ordinarily unlikely to have significant incremental effects on historic properties within an area that is already highly developed. Furthermore, antenna structures 200 feet or less in height ordinarily do not require notification to the Federal Aviation Administration, and thus are not subject to federal lighting requirements. Thus, to the extent that lighting might have a visual adverse effect on historic properties, any such effect is unlikely from towers 200 feet or less.

26. Third, we require that before applying this exclusion, the applicant must undertake a search of relevant records, and must complete a full section 106 review under the Nationwide Agreement if it discovers that the property on which it proposes to construct is located within the boundaries of or within 500 feet of a historic property. The draft Nationwide Agreement proposed that the exclusion would not apply if a structure 45 years or older were located within 200 feet of the proposed facility. We conclude, however, that this proposed criterion would be burdensome to apply and is not well tailored to prevent potential effects on nearby historic properties. Thus, rather than turning on the age of nearby properties regardless of their eligibility, the exclusion's applicability should depend on whether the property or a property within 500 feet is, in fact, listed or eligible for listing in the National Register. We conclude that, for towers that otherwise meet the terms of the exclusion, a 500 foot buffer zone will adequately protect historic properties from adverse impacts.

27. Finally, for purposes of this exclusion, we require applicants to complete the process of tribal and NHO participation as specified in section IV of the Nationwide Agreement. We note that historic properties of traditional religious and cultural importance often are not listed in the National Register or other publicly available sources. Thus, in order to provide protection for these types of historic properties similar to that afforded to other historic properties by a search of records, it is necessary to seek information directly from Indian tribes and NHOs. If as a result of this process the applicant or the Commission identifies a historic property that may be affected, the applicant must complete the section 106 process pursuant to the Nationwide Agreement notwithstanding the exclusion.

28. The draft Nationwide Agreement excludes from review many towers proposed for construction in or near utility corridors, and along railways and highways. On review of the record, we conclude that the Nationwide Agreement should not create an exclusion for construction along highways and railroads. As numerous commenters observe, highways and railroads frequently follow pathways that track historic settlement and transportation patterns and, earlier, areas frequented by Indian tribes. We recognize that highways and passenger railways are among the areas where customer demand for wireless service is highest, and thus where the need for new facilities is greatest. Moreover, the existence of these modern intrusions reduces the risk that a new communications facility would impose

an additional adverse effect on historic properties. Nonetheless, given the concentration of historic properties near many highways and railroads, we are persuaded that it is not feasible to draft an exclusion for highways and railroads that would both significantly ease the burdens of the section 106 process and sufficiently protect historic properties.

29. We do, however, adopt a limited exclusion for facilities located in or within 50 feet of a right-of-way designated for communications towers or above-ground utility transmission or distribution lines, where the facility would not constitute a substantial increase in size over existing structures in the right-of-way in the vicinity of the proposed construction. Due to the increasing usage of wireless services and advances in technology, providers of certain types of service are increasingly finding it feasible to utilize antennas mounted on short structures, often 50 feet or less in height, that resemble telephone or utility poles. Where such structures will be located near existing similar poles, we find that the likelihood of an incremental adverse impact on historic properties is minimal. Moreover, it promotes historic preservation to encourage construction of such minimally intrusive facilities rather than larger, potentially more damaging structures.

30. For reasons similar to those discussed above with respect to the industrial and commercial properties exclusion, this exclusion does not apply if the facility would be located within the boundaries of a historic property, and we require applicants to conduct a preliminary search of relevant records for such property. Due to the limited size of the structures permitted under this exclusion and their close similarity to nearby existing structures, however, we do not require research regarding historic properties within 500 feet. Finally, for the same reasons discussed above, application of this exclusion depends on successful completion of the tribal and NHO participation process.

31. Finally, the draft Nationwide Agreement excludes from NHPA review undertakings in geographic areas designated by the SHPO/THPO. We adopt this exclusion as drafted, with only minor clarifying edits. Such a provision, we believe, is consistent with the concept of an exclusion—*i.e.,* to exempt from review undertakings where an impact upon historic properties is unlikely. SHPOs/THPOs are in an excellent position, given their local knowledge and experience, to identify such areas, when permissible under state or tribal law. While we encourage SHPOs and THPOs to designate areas pursuant to this provision to the extent warranted, we emphasize that doing so is at the SHPO/THPO's discretion.

32. In the *NPRM,* we requested comment on a proposal by the Conference to allow SHPOs/THPOs to ''opt out'' of the exclusion for construction along utility and transportation corridors in areas where historic properties are likely to be present. We reject the proposed opt-out provision. As drafted, the exclusions from the section 106 process are not dependent on local conditions, but identify circumstances under which construction is unlikely to significantly adversely affect historic properties in any state. At the same time, an opt-out provision would create a patchwork of varying agreements, state-by-state. Moreover, procedural changes, adopted by use of the opt-out provision, would likely occur over a period of time, creating additional burdens and confusion for all parties concerned.

33. We reject arguments that, as a matter of law, the Commission must provide notice to Indian tribes of all excluded undertakings. Section 214 of the NHPA allows for certain undertakings to be ''exempted from any or all of the requirements of this Act'' and expressly authorizes the Council to promulgate regulations to effectuate such exemption. We read section 214 as authorizing exemptions from the tribal consultation requirement of section 101(d)(6). There is nothing in the NHPA or in the Council's rules expressly requiring any type of notice to tribes for every individual undertaking that is excluded from review pursuant to a programmatic agreement that is signed and executed by the agency and the Council. Given that the Council is the agency authorized to promulgate rules to implement section 214 of the NHPA, the absence of notice provisions both in the Council's rules and in other programmatic agreements supports our conclusion that such provisions are not necessary under the NHPA, the Council's rules, or otherwise. Indeed, consistent with its rules, it is the Council, as evidenced by its signature to this agreement, who approves the proposed exemption ''based on the consistency of the exemption with the purposes of the act. * * *''

34. With respect to the specific exclusions in the Nationwide Agreement, we conclude, as discussed above, that tribal and NHO notice and participation are necessary for construction on commercial and industrial properties and in utility rights-of-way notwithstanding the exclusions. This is so because, without an opportunity for tribes and NHOs to participate, there is a substantial possibility that undertakings within these exclusions could affect properties of traditional cultural and religious importance. For the other exclusions, by contrast, any such possibility is insignificant. Therefore, a notice requirement would contravene the goals of section 214 of the NHPA and the Council's rule on exclusions by adding an unnecessary layer of review and regulation.

35. Finally, the Commission has met its government-to-government responsibility to consult with and its trust responsibility to federally recognized tribes with respect to the exclusions. As explained above, the Commission has engaged in government-to-government consultation with tribes regarding the Nationwide Agreement. Moreover, a proposal to require tribal notice was included in the draft Nationwide Agreement, and received the consideration of the various tribes and tribal organizations that participated in this proceeding. Indeed, after considering the comments of Indian tribes, we have included a tribal participation requirement for the industrial and commercial properties and utility corridor exclusions. We conclude that tribes were afforded an opportunity to consult with respect to this issue and accordingly did so.

36. The draft Nationwide Agreement provides that applicants should retain documentation of their determination that an exclusion applies to an undertaking. We decline to require any regular reporting of instances in which the exclusions are used in addition to such recordkeeping. We find that such mass undifferentiated reporting of constructed facilities would be excessively burdensome and, without more, would contribute little to an understanding of how the exclusions are being applied. We note that as records relevant to compliance with the Commission's rules, a company must produce documentation of its determination of an exclusion's applicability to the Commission upon request. SHPOs/THPOs may also require production of such records to the extent authorized under State or tribal law.

37. As a further safeguard to ensure that the exclusions are applied appropriately, we provide that a determination of exclusion should be made by an authorized individual within the applicant's organization. While the exclusions are drafted so that their application should not require historic preservation expertise, a responsible individual who understands the exclusions and their applicability

needs to ensure that they are applied appropriately. Moreover, because the applicant is responsible for compliance with our rules, this responsible individual should be within the applicant's organization. We advise applicants to retain a record of the authorized individual's review as part of their record of the exclusion's applicability.

38. In the *NPRM,* we sought comment on two alternative sets of provisions governing participation of Indian tribes and NHOs in undertakings off tribal lands. Alternative A was developed by the Working Group. This proposed alternative directs applicants to use reasonable and good faith efforts to identify Indian tribes and NHOs that may attach cultural and religious importance to historic properties that may be affected by an undertaking, and provides guidance on how to perform such identification and on the subsequent process to be followed with Indian tribes and NHOs. Alternative B was proposed by USET during the course of meetings after the Working Group completed its deliberations. Alternative B requires the Commission to consult with potentially affected Indian tribes and NHOs on each proposed undertaking, in accordance with the Council's rules, unless either (1) the Indian tribe or NHO has given the applicant a letter of certification stating that such consultation is unnecessary; or (2) the applicant and the Indian tribe have reached a written agreement, filed with the Commission, regarding conditions under which such certification is unnecessary and the applicant has complied with that agreement. Alternative B encourages parties to use these alternative processes in lieu of government-to-government consultation. This alternative does not, however, provide guidance regarding how applicants should contact and relate to Indian tribes and NHOs, stating that such guidance would be provided in an appendix or by separate publication.

39. Since issuing the *NPRM,* the Commission has continued to work with Indian tribes outside the context of this proceeding to improve the means of tribal and NHO participation in the section 106 process. In particular, the Commission, after consultation with federally recognized tribes, has developed and implemented an electronic Tower Construction Notification System to facilitate identification of and appropriate initial contact with Indian tribes and NHOs that may attach religious and cultural significance to historic properties within the geographic area of a proposed undertaking. This system permits each Indian tribe and NHO voluntarily to identify in a secure electronic fashion the geographic areas in which historic properties of religious and cultural significance to that Indian tribe or NHO may be located. When an applicant then voluntarily enters into the system the location and other basic information about a proposed construction project, the Commission automatically forwards the information electronically or by mail to participating tribes and NHOs. Finally, Indian tribes and NHOs have the option of responding to applicants through the Tower Construction Notification System. By rationalizing the process of identification and initial contact through the Commission, we believe the Tower Construction Notification System will relieve burdens and provide certainty for tribes and NHOs, applicants, and the Commission alike.

40. Upon consideration of the record, and in light of the developments described above, we adopt procedures for participation of tribes and NHOs that incorporate aspects of both Alternatives A and B with certain modifications. First, we recognize that pursuant to the federal government's unique legal relationship with Indian tribal governments, as well as specific obligations under the NHPA and the Council's and Commission's rules, the Commission has a responsibility to carry out consultation with any federally recognized Indian tribe or any NHO that attaches religious and cultural significance to a historic property that may be affected by a Commission undertaking. As the Commission has previously recognized, the federal government has a historic trust relationship that requires it to adhere to fiduciary standards in dealing with federally recognized tribes. This fiduciary responsibility and duty of consultation rest with the Commission as an agency of the federal government, not with licensees, applicants, or other third parties.

41. At the same time, we cannot fulfill our duty of consultation in a vacuum. Because our applicants possess unique knowledge regarding the facilities that they propose to construct, the Nationwide Agreement that we adopt directs applicants to make reasonable and good faith efforts to identify the Indian tribes and NHOs that may have interests in a geographic area. The Nationwide Agreement further specifies that where an Indian tribe or NHO has voluntarily provided information to the Tower Construction Notification System, reference to that database constitutes a reasonable and good faith effort at identification. In addition, the Nationwide Agreement provides guidance regarding other means of fulfilling this obligation.

42. The Nationwide Agreement specifies that, after the applicant has identified potentially interested tribes and NHOs, contact should be made at an early stage in the planning process with each such tribe or NHO by either the Commission or the applicant, depending on the expressed wishes of the particular Indian tribe or NHO. The Commission will take steps to ascertain and publicize the contact preferences of all federally recognized Indian tribes and NHOs, both as to who must make the initial tribal contact and by what means, as well as any locations or types of construction projects for which the Indian tribe or NHO does not expect notification. To ensure that communications among parties are in accordance with the reasonable preferences of individual tribes and NHOs, the Commission will also use its best efforts to arrive at agreements regarding best practices with Indian tribes or NHOs, strive for uniformity in such best practices and encourage applicants to follow them. Through these best practices the Commission hopes to facilitate expeditious completion of section 106 review by minimizing misunderstandings among the parties to that process.

43. If there is no preexisting relationship between the applicant and an Indian tribe or NHO, and absent contrary indication from the Indian tribe or NHO, initial contact will be made by the Commission through its electronic Tower Construction Notification System. Where there is such a preexisting relationship the applicant may make the initial contact in the manner that is customary to that relationship or in any manner acceptable to the Indian tribe or NHO. In these circumstances, the applicant shall copy the Commission on any initial contact to the Indian tribe or NHO unless the Indian tribe or NHO has agreed such copying is unnecessary. The Nationwide Agreement specifies that any direct contact with the Indian tribe or NHO shall be made in a sensitive manner that is consistent with the reasonable wishes of the Indian tribe or NHO, including through the Tower Construction Notification System where such means is consistent with the tribe or NHO's preference. Where the tribe or NHO's wishes are not known, the Nationwide Agreement sets forth guidelines regarding respectful address and sufficient information. The text further directs that the applicant afford the tribe or NHO a reasonable

opportunity to respond, ordinarily 30 days, allow additional time to respond as reasonable upon request, and make reasonable efforts to follow up in case the tribe or NHO does not respond to an initial communication.

44. The purpose of the initial contact, whether made by the Commission or the applicant, is to begin the process of ascertaining whether historic properties of religious and cultural significance to an Indian tribe or NHO may be affected by an undertaking, thereby triggering the duty of consultation. Unless the tribe or NHO affirmatively disclaims further interest or has agreed otherwise, this initial contact does not satisfy the applicant's obligation or constitute government-to-government consultation by the Commission. It is our hope and intent that, where direct contacts from an applicant are acceptable to the Indian tribe or NHO, amicable contacts will enable these consulting parties to complete the section 106 process so as to obviate the need for government-to-government consultation in a vast majority of cases. At the same time, because the duty to consult rests with the Commission as a federal government agency, the Nationwide Agreement directs applicants to promptly refer to the Commission any tribal request for government-to-government consultation, and to seek Commission guidance in cases of disagreement or failure to respond. Finally, the Nationwide Agreement substantially adopts provisions from Alternative A regarding inviting Indian tribes and NHOs to become consulting parties in the section 106 process, confidentiality, and the preservation of alternative arrangements.

45. We conclude that the provisions we adopt are consistent with the Commission's fulfillment of its tribal consultation responsibilities under the NHPA and other sources of federal law. The NHPA does not provide for delegation of the tribal consultation responsibility to private entities. The provisions that we adopt, however, do not delegate the Commission's consultation responsibilities but provide for direct contacts with an Indian tribe or NHO by an applicant only in accordance with the expressed wishes of the Indian tribe or NHO. Moreover, the Nationwide Agreement further provides that, where the applicant is unknown to the tribe or NHO, the initial contact will generally be made by the Commission and does not in any circumstance allow applicants and licensees to embark upon and conclude the section 106 process without Commission participation and without tribal or NHO consent.

46. The Nationwide Agreement expressly states that the initial contact between applicants or the Commission and Indian tribes and NHOs is required at ''an early stage of the planning process * * * in order to begin the process of ascertaining whether * * * Historic Properties [of religious and cultural significance to them] may be affected.'' The Nationwide Agreement expresses the ambition that this initial contact will lead to voluntary direct discussions through which applicants and tribes or NHOs will resolve any matters to the tribe or NHO's satisfaction without Commission involvement. However, the Nationwide Agreement makes clear that in the absence of such an agreement, decision-making authority and the duty to consult rest with the Commission. Thus, federally recognized Indian tribes are free, at any point, to request government-to-government consultation with the Commission, and the Commission is accessible and able to engage in government-to-government consultation with any tribe on any undertaking at any time. Moreover, if an applicant and an Indian tribe or NHO disagree regarding whether an undertaking will have an adverse effect on a historic property of religious and cultural significance, or if the tribe or NHO does not respond to the applicant's inquiries, the Nationwide Agreement directs the applicant to seek guidance from the Commission, following which appropriate consultation will occur and only then will the Commission make a decision regarding the proposed undertaking. The Commission only puts the exploratory phase of the process into the hands of those parties with the most intimate knowledge of the proposed undertaking and, subject to the expressed wishes of an Indian tribe or NHO, authorizes them to provide information to, solicit information from, and engage in voluntary discussions with the tribes and NHOs. This is consistent with § 800.2(c)(4) of the Council's rules (36 CFR 800.2(c)(4)), which permits agencies to authorize applicants to initiate section 106 discussions or contacts with consulting parties such as tribes, and is in keeping with applicable federal consultation responsibilities.

47. We reject the argument that the role of applicants in initiating the section 106 process constitutes an illegal delegation. Except where there is a preexisting relationship between a particular tribe or NHO and the applicant or a particular tribe has advised the Commission of its willingness to be contacted initially by applicants, the first contact concerning a proposed undertaking will generally come from the Commission. In any event, cases relating to Congressional delegations of power to other branches of the federal government are inapposite. Moreover, federal agencies may permit private sector entities to perform delineated governmental functions when clear standards are set forth, guidelines for policymaking are offered, and specific findings are required. This is especially true when the private entity's participation is subject to the government agency's ultimate reviewing authority, which, as described above, is the case here. Similarly, OMB Circular A–76, which addresses functions of government that are non-delegable to the private sector, is not applicable because the Commission is not delegating a governmental function or any decision-making authority, but simply seeking assistance from our licensees and applicants in beginning a process over which the Commission ultimately retains control.

48. For these reasons, we conclude that the Nationwide Agreement, as we adopt it today, does not unlawfully delegate or derogate the Commission's duties of consultation. At the same time, in combination with the other developments described above, the Nationwide Agreement provides substantial assistance and guidance to applicants in carrying out their assigned role. We disagree, however, with commenters who urge us to prescribe more definitive time periods or provide greater finality. Ultimately, the Commission has a government-to-government relationship with and fiduciary responsibility to Indian tribes, as manifested in the duties of consultation under general principles of law and under the specific provisions of the NHPA. Thus, absent the Indian tribe or NHO's agreement, only the Commission can confer finality with respect to tribes or NHOs for an undertaking that is not excluded from section 106 review. Moreover, while ultimately no further consultation is required if an undertaking will not affect a historic property of cultural and religious significance to a tribe or NHO, applicants must work with tribes and NHOs in their efforts to determine whether such eligible properties exist, and must refer to the Commission for finality absent tribal or NHO agreement with their identification efforts. It is our hope, through the guidance in the Nationwide Agreement and through the separate negotiation of voluntary best

practices with Indian tribes and NHOs, to facilitate consensual resolutions that satisfy the needs of all parties swiftly and with a minimum expenditure of resources.

49. Section V of the draft Nationwide Agreement establishes procedures to streamline and tailor the public participation provisions of the Council's rules to fit the communications context. Specifically, this section provides for notice of a proposed undertaking to the relevant local government and the public on or before the date the project is submitted to the SHPO/THPO, recommends means of providing public notice, and specifies the content of these notices. The provision also states that the SHPO/THPO may make available lists of additional interested organizations that should be contacted, and it requires the applicant to consider public comments and provide those comments to the SHPO/THPO. In addition, it sets out procedures for identifying consulting parties and the rights of consulting parties.

50. We adopt the public participation provisions substantially as drafted. The Nationwide Agreement simplifies, by tailoring to the communications context, the process in the Council's existing rules for providing notice, involving the public, identifying consulting parties, and addressing comments received. We conclude that the provisions as drafted achieve the important public participation goals of the Council's rules in a manner that will reduce misunderstandings and relieve burdens on applicants, SHPOs/THPOs and the Commission alike.

51. We reject most of the changes that commenters have proposed to this section. Specifically, we find that there should not be a firm time limit on public comments on a proposed undertaking, but that all comments received prior to completion of the review process should be considered. We further conclude, consistent with common practice, that use of the local zoning process, local newspaper publication, or an equivalent process constitutes sufficient notice of a proposed undertaking in the nature of a communications facility to the general public. Moreover, it is appropriate to permit the SHPO/THPO, as the consulting party most familiar with the local community of interest, to provide by generally available list the names of additional parties that should be contacted in order to further ensure a full opportunity for public participation under the circumstances of each case. In order to preserve applicants' flexibility to pursue the process in the most efficient sequence under the circumstances of each case, we only require that notice to the local government and the public occur on or before the date materials are submitted to the SHPO/THPO. We also find that adoption of a national confidentiality standard would be infeasible given the SHPOs'/THPOs' need for information and the diversity of laws on this subject in the various states.

52. We do conclude that it is appropriate for the applicant to inform the SHPO/THPO, as part of the Submission Packet, of the identity of designated consulting parties. Accordingly, we add this provision to the Nationwide Agreement and we include a request for the relevant information on the attached forms. We find, however, that it is unnecessary and burdensome for applicants to notify the Commission of each undertaking as part of the public participation process. Finally, we conclude that the criterion encouraging applicants to grant consulting party status to one who has ''a demonstrated legal or economic interest in the undertaking, or demonstrated expertise or standing as a representative of local or public interest in historic or cultural resources preservation,'' is consistent with, and required by, the Council's rules (36 CFR 800.2(c)(5)).

53. Section VI of the draft Nationwide Agreement establishes procedures and standards for identifying historic properties, evaluating their historic significance, and assessing any effect the proposed undertaking may have upon those historic properties. Commenters address five principal subjects in this area, including: (1) The definition of area of potential effects (APE); (2) the means of identifying and evaluating historic properties within the APE for visual effects; (3) the need for archeological surveys; (4) the definition of an adverse effect; and (5) the use of qualified experts.

54. The APE is the area within which an applicant must look for historic properties that may be affected by an undertaking. The draft Nationwide Agreement provides that each undertaking has one APE for direct (physical) effects, consisting of the area of potential ground disturbance and the portion of any historic property that will be destroyed or physically altered by the undertaking, and a second APE for indirect visual effects. The draft further establishes a rebuttable presumption that the latter APE is the area from which the tower will be visible within ½ mile of the proposed tower for a tower that is 200 feet or less in height, ¾ mile for a tower more than 200 feet but no more than 400 feet in height, and 1.5 miles for a taller tower. The applicant and the SHPO/THPO may mutually agree on an alternative to the presumed distance in any case, and disputes regarding whether to use an alternative APE may be submitted to the Commission for resolution.

55. We adopt the APE provisions substantially as drafted, with only technical and clarifying revisions. In doing so, we emphasize that the scaled distances for visual APEs in the Nationwide Agreement are not inflexible mandates but presumptions, subject to variation in specific instances either by mutual agreement or, in cases of dispute, by Commission decision. Thus, while providing a structure to facilitate the determination of the APE in most cases, the Nationwide Agreement ultimately affords case-by-case flexibility. Although some commenters argue that the presumed distances are too small or too large, we are not persuaded that the presumed distances are inappropriate for the typical case, subject to departure where conditions require. We do add a general definition of the APE for visual effects in order to clarify, consistent with the definition of adverse effect, that it refers only to the geographic area in which the undertaking has the potential to introduce visual elements that diminish the setting, including the landscape, of a historic property where setting is a character-defining feature of eligibility.

56. With respect to identification and evaluation of Historic Properties, the Council's rules define a Historic Property, in relevant part, as ''any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. * * *'' (36 CFR 800.16 (l)(1)). The Council's rules further provide that properties eligible for inclusion in the National Register include ''both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria'' (36 CFR 800.16(l)(2)). This definition implements section 106 of the NHPA, which provides that a federal agency shall take into account the effect of any federal undertaking on any property ''included or eligible for inclusion in the National Register.''

57. We have in the record a letter from the Chairmen of the U.S. House of Representatives Committee on Resources and Subcommittee on National Parks, Recreation and Public Lands to the Chairman of the Council, noting that the Council originally defined properties eligible for inclusion in the National Register under section

106 to include only properties that the Keeper had previously determined to be eligible, and suggesting that the Council consider addressing this definitional issue either in the Nationwide Agreement or in a then-pending Council rulemaking. We determine not to alter the definition of Historic Property used in the draft Nationwide Agreement and the Council's rules. In this regard, we defer to the Council's clearly stated interpretation of its own governing statute, which was recently upheld by the federal court reviewing amendments to the Council's rules. *See National Mining Association* v. *Slater,* 167 F.Supp.2d 265, 290–292 (D.D.C. 2001), *rev'd in part,* 324 F.3d 752 (2003). We also note that § 800.14 (36 CFR 800.14) of the Council's rules, which authorizes programmatic agreements, discusses alternative procedures to Subpart B of the Council's rules, but the definition of Historic Property is in Subpart C. For all these reasons, we conclude that questions regarding the definition of historic properties are outside the scope of this proceeding and should be addressed, if at all, by the Council.

58. At the same time, we conclude, based on our review of the record, that it is appropriate to narrow and define applicants' obligations with respect to the identification and evaluation of historic properties within the APE for visual effects. Section 106 is silent on the methodology necessary to identify properties ''included in or eligible for inclusion in the National Register.'' Indeed, a federal court has held that the Council's requirement that federal agencies conduct surveys to identify historic properties is not mandated by the plain meaning of section 106. Under the Council's regulations, the agency must make ''a reasonable and good faith effort'' that takes into account the burdens of evaluation, the nature and extent of potential effects, the magnitude of the undertaking and the degree of federal involvement in the proposed undertaking. Council regulations provide further that this obligation may be met through procedures specified in subpart B of the rules or as modified in a Programmatic Agreement tailored to the agency's specific needs. Here, the record demonstrates that requiring applicants to undertake field surveys for thousands of new communications facilities annually causes considerable delay in the deployment of communications services and imposes a hefty burden on the resources of applicants and SHPO/THPOs alike. Moreover, only those historic properties within the APE for which visual setting or visual elements are character-defining features of eligibility are potentially subject to visual adverse effects. Of these properties, many will not incur adverse effects from a communications facility, depending on the extent to which the facility is visible from the property and other factors. Taking these considerations together, we conclude that the burdens of conducting field surveys and taking other active measures beyond reviewing defined sets of records to identify historic properties in the APE for visual effects, in the context of the facilities covered by this Nationwide Agreement, are not merited by the small potential benefit to historic preservation.

59. Specifically, the Nationwide Agreement requires that, for most types of historic properties within the APE for visual effects, identification and evaluation efforts are limited to the applicant's review of five sets of records available within the SHPO/THPO's office or in a publicly available source identified by the SHPO/THPO. First, the applicant must identify properties that are actually listed in the National Register. Second, it must identify properties that the Keeper of the National Register has formally determined to be eligible. Third, identification efforts must include properties that the SHPO/THPO is in the process of nominating for the National Register, as certified by the SHPO/THPO. Fourth, identification includes properties that the SHPO/THPO's records identify as having previously been determined eligible by a consensus of the SHPO/THPO and another federal agency or local government representing the Department of Housing and Urban Development. Fifth, identification efforts shall include properties shown in the SHPO/THPO's inventory as having previously been evaluated by the SHPO/THPO and found by it to meet the National Register criteria. Except as described below, an applicant need not identify historic properties within the APE for visual effects that are not in one of these categories, nor need it evaluate the historic significance of such properties.

60. We find, however, that review of records maintained by the SHPO/THPO is insufficient for identification of historic properties of traditional religious and cultural significance to Indian tribes and NHOs. As the Council's rules recognize, Indian tribes and NHOs possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them. Moreover, Indian tribes and NHOs frequently have confidentiality and privacy concerns about including sites of religious and cultural significance to them in publicly available records. Therefore, we conclude that identification and evaluation of historic properties without the involvement of potentially affected Indian tribes and NHOs would create an unacceptable risk that historic properties of traditional cultural and religious significance to them may be overlooked. Accordingly, as part of the process of Indian tribe and NHO participation pursuant to section IV of the Nationwide Agreement, an applicant or the Commission shall gather information from Indian tribes or NHOs to assist in identifying and evaluating historic properties of traditional cultural and religious significance to them.

61. As part of the Submission Packet to be provided to the SHPO/THPO and consulting parties, the Nationwide Agreement requires the applicant to list the historic properties that it has identified pursuant to the Nationwide Agreement. Upon reviewing this list, the SHPO/THPO may identify other properties already included in its inventory within the APE that it considers eligible for inclusion in the National Register. In this event, the SHPO/THPO may notify the applicant of these additional properties pursuant to section VII.A.4 of the Nationwide Agreement in order for the applicant to assess the potential effects on such properties. We conclude that this process, without imposing additional burdens of identification and evaluation on applicants, provides a safeguard for the SHPO/THPO to identify specific historic properties that may be affected in rare instances where the process provided in the Nationwide Agreement might otherwise cause significantly affected properties to be overlooked.

62. Finally, these limitations on the identification and evaluation process do not apply within the APE for direct effects. The APE for direct effects, because it is limited to the area where the tower will cause ground or physical disturbances, is much smaller than for visual effects. As a result, searches of those areas do not present the potential for delay likely to arise in assessing visual effects. At the same time, the potential magnitude of effects to properties within the APE for direct effects is much greater, in some instances including destruction of the property, and these effects are not readily discoverable other than through careful examination of the site. Therefore, additional identification efforts, potentially including an archeological field survey, may be

required within the APE for direct effects.

63. Upon review of the record, we conclude that an archeological field survey should not be required where archeological resources are unlikely to be affected. Many facilities are placed in locations where the likelihood of affecting archeological resources is remote; for example, on paved ground in a highly developed downtown area. Requiring onsite archeological work in these instances would add substantial delay and cost to facilities deployment to no appreciable benefit.

64. At the same time, we conclude, that the Nationwide Agreement must define with specificity the circumstances under which a field survey is not required. First, no archeological field survey is necessary when the ground on which construction will occur has been previously disturbed. Where the ground has been previously disturbed in the locations and at the depths that are proposed to be excavated in connection with future construction, the likelihood of direct effects to archeological resources ordinarily is remote, whether or not archeological resources may be located at greater depths or in other portions of the project area. Due to differences in the compaction characteristics of soils in different parts of the Nation, however, we require a previous disturbance to at least two feet below the proposed construction depth (excluding footings and other anchoring mechanisms). We find that a two-foot margin is necessary to provide reasonable assurance that archeological resources are unlikely to be affected under any soil conditions. The second circumstance under which no archeological field survey is required is when geomorphological evidence indicates that cultural-resource bearing soils do not occur within the project area, or may occur but at more than two feet below the proposed construction depth. Where a qualified expert has found that such conditions exist, direct effects on archeological resources are inherently unlikely, and accordingly it is ordinarily not reasonable to require further identification efforts.

65. With respect to both of these criteria, the depth of proposed construction to be considered excludes footings and other anchoring mechanisms that may require excavation substantially deeper than the general level at a site. These footings cover very small areas within a project site, usually no more than two to three feet (and often less) in diameter, and may extend 20 to 30 feet deep or more. Under the circumstances, we find that a field survey in such narrow deep areas is infeasible, and indeed may typically cause more harm than the minimal amount of damage to archeological resources that could occur during construction. Therefore, performing a field survey at the depths reached by footings and other anchoring mechanisms is ordinarily not part of a reasonable and good faith effort to identify historic properties.

66. Finally, similar to the procedure for identifying historic properties that may incur visual effects, we include provisions to ensure the ability of Indian tribes and NHOs to provide information regarding the potential presence of archeological historic properties of religious and cultural significance to them, and we provide a safeguard opportunity for the SHPO/THPO to identify the need for a field survey. Specifically, as part of the tribal and NHO participation process pursuant to section IV of the Nationwide Agreement, the applicant or the Commission must gather information from identified Indian tribes and NHOs to assist in identifying archeological historic properties, including the need for a field survey. In addition, the applicant must substantiate its determination that no archeological field survey is necessary as part of its Submission Packet, and the SHPO/THPO may identify a need for a field survey, notwithstanding the applicability of either of the criteria discussed above, during its review pursuant to section VII.A. We emphasize that an Indian tribe or NHO, or a SHPO/THPO, must provide evidence supporting a high probability of the presence of intact archeological historic properties within the APE for direct effects in order for a field survey to be necessary under these circumstances.

67. Once historic properties have been identified and their historic significance evaluated, the next step in the section 106 process is assessment of whether the proposed undertaking would have an adverse effect on those historic properties. The draft Nationwide Agreement provides that effects shall be evaluated using the Criteria of Adverse Effect set forth in the Council's rules. The draft further provides guidance, consistent with the Council's rules, that a facility will have a visual adverse effect if its visual effect will noticeably diminish the integrity of one or more characteristics qualifying a property for the National Register, and that a facility will not cause a visual adverse effect unless visual setting or elements are character-defining features of eligibility. The provision then provides examples of historic properties on which visual adverse effects might occur.

68. We adopt with some revisions the provision of the Nationwide Agreement describing visual adverse effects. Although the Council's rule is not entirely clear, it is plain that setting is among the characteristics of a historic property that, when altered and diminished in integrity, may produce an adverse effect. It seems reasonable to us that, under some circumstances, the introduction of a large visual intrusion outside the boundaries of a historic property within the APE may diminish the integrity of setting, including the landscape, on that property in such a way as to alter a characteristic of visual setting or visual elements that qualifies the property for inclusion in the National Register. By contrast, where the features that qualify a property for listing on the National Register are unrelated to its visual setting (for example, its interior design), then a visual intrusion outside the property boundaries will not constitute an adverse effect. Indeed, any other view arguably would be inconsistent with section 106, which directs federal agencies, without limitation, to consider the ''effect'' of their undertakings on historic properties. More important, the Council has consistently interpreted section 106 and its rules in this manner. We therefore disagree with commenters who suggest that a facility must be located within the boundary of a historic property in order to have a visual adverse effect on that property.

69. We do revise the draft Nationwide Agreement to clarify that a facility may have a visual adverse effect on a historic property only if the historic property is within the APE. In addition, the presence within the APE of a historic property for which visual setting or visual elements are character-defining features of eligibility does not in itself mean that the undertaking will necessarily have an adverse effect on that property, but rather the undertaking must noticeably diminish the integrity of a qualifying characteristic of eligibility. Finally, we delete the examples of types of properties to which visual adverse effects may occur. We conclude that in the context of the clarified definition of visual adverse effect, the addition of examples of representative types of situations where there may be but is not necessarily a visual adverse effect would create an unnecessary risk of confusion.

70. We revise the Nationwide Agreement to require that aspects of identification, evaluation, and assessment be performed by experts who meet the Secretary of the Interior's

qualifications. The NHPA (16 U.S.C. 470h–4(a)) expressly recognizes the importance of using qualified experts in historic preservation reviews. It states that ''[a]gency personnel or contractors responsible for historic resources shall meet qualification standards established by the Office of Personnel Management in consultation with the Secretary and appropriate professional societies of the disciplines involved.'' We find it consistent with the objectives embodied in the NHPA that where a licensee or applicant, like a contractor, performs portions of the section 106 process that implicate professional expertise in the agency's stead, it also should use Secretary-qualified experts.

71. The Secretary's standards generally establish minimum levels of education and/or experience for qualified experts in history, architectural history, archeology, and related fields. The record before us details the errors in the section 106 process, leading to delays, that often occur where qualified experts are not used. This persuades us that the mandatory use of Secretary-qualified experts for identification and evaluation of properties within the APE for direct effects, and for assessment of effects on all historic properties, is critical to provide the level of reliability and trust necessary to support the streamlined procedures and standards established in the Nationwide Agreement. The standards in the Nationwide Agreement for these aspects of historic preservation review are not and by their nature cannot be so objective as to render the use of qualified experts unnecessary. Thus, requiring the use of Secretary-qualified experts for these purposes advances the objectives of section 214 of the NHPA.

72. With respect to the identification of properties within the APE for visual effects, by contrast, the Nationwide Agreement largely reduces the applicant's obligations to reviewing defined sets of records in the SHPO's/THPO's files. We find that specialized training is not necessary to glean from these records whether the properties contained therein have been previously determined or considered eligible for inclusion in the National Register as specified in the Nationwide Agreement. Therefore, while we encourage applicants to use Secretary-qualified experts to identify historic properties within the APE for visual effects, we do not require the use of Secretary-qualified experts for this purpose.

73. Although we encourage and expect that applicants will use experts with relevant experience in the section 106 process and the specific geographic area, we do not include such a requirement in the Nationwide Agreement. Unlike the Secretary's standards for general professional qualifications, there are no widely accepted or legally mandated standards for section 106 experience or geographic expertise. Therefore, any requirement along these lines would be either potentially arbitrary or too general to enforce.

74. Section VII of the Nationwide Agreement establishes procedures for SHPO/THPO review of applicants' determinations and for submission of certain matters to the Commission. Generally, the draft Nationwide Agreement provides that applicants shall submit their determinations to the SHPO/THPO using the prescribed Submission Packet, and that the SHPO/THPO has 30 days to review the submission. If the SHPO/THPO agrees with the applicant's determination that no historic properties would be affected or does not respond to such a determination within 30 days, the section 106 process is complete and no Commission processing is necessary. If the SHPO/THPO does not respond within 30 days to an applicant's determination of no adverse effect, the draft establishes a presumption that the SHPO/THPO concurs with the applicant's determination, requires the applicant to forward the Submission Packet to the Commission, and permits the Commission to establish a time period within which the process will be considered complete unless the Commission notifies the applicant otherwise. Section VII also specifies procedures for resolution in cases of adverse effect, similar to those set forth in the Council's rules. In addition, the section provides that instances in which the applicant and SHPO/THPO do not agree on an assessment may be submitted to the Commission.

75. We adopt section VII of the Nationwide Agreement substantially as written. With respect to Applicant determinations of no adverse effect, while we expect that SHPOs/THPOs will endeavor in good faith to review such determinations within the time frame specified in the Nationwide Agreement, we conclude that it is appropriate to require a submission to the Commission where the SHPO/THPO fails to do so. By their nature, determinations of no adverse effect ordinarily involve closer and more subjective judgments of whether an adverse effect may occur than do cases where no historic properties are affected. Indeed, this difference is reflected in the generally applicable procedures set forth in the Council's rules. Therefore, consistent with the positions taken by the Council and the Conference in negotiating the Nationwide Agreement, it is sound historic preservation policy that where a SHPO/THPO has not reviewed an applicant's determination of no adverse effect, the federal agency should have the opportunity to do so. In order to avoid undue delay, we conclude that an applicant's determination of no adverse effect will be final 15 days after electronic submission to the Commission, or 25 days after submission to the Commission by other means, unless the relevant Bureau notifies the applicant otherwise. We find that an additional 10 days is appropriate for hard copy submissions both because non-electronic submissions may take longer to reach the relevant personnel and in order to encourage electronic filing, which saves resources and reduces uncertainty for all parties.

76. We decline to adopt other time limits. While we will endeavor to resolve disputes between SHPOs/THPOs and applicants as quickly as possible, and to facilitate the timely resolution of adverse effects, we conclude that the variety of factual circumstances under which these situations may arise makes it inadvisable to adopt binding time frames. We also find that up to five additional days for SHPOs/THPOs to review comments that are filed toward the end of their review period is reasonable, given that such filings will necessitate additional review only of the new material. In addition, given the variety of factual situations that may arise, we find it appropriate to leave the parties flexibility to determine in each matter whether and when to consider means to achieve conditional findings of no adverse effect. We find no legal support or rationale for the suggestion that the Council must be given an opportunity to review determinations of no historic properties affected and no adverse effect under a programmatic agreement.

77. We do, however, revise and clarify the draft provision for the return and amendment of inadequate submissions. The intent of the requirement that resubmissions occur within 60 days is to permit SHPOs/THPOs to manage their dockets effectively by dismissing stale proceedings. We did not intend to suggest any limitation on the resubmission of a project as a new matter, and we amend the Nationwide Agreement to clarify this point. Additionally, we specify that the resubmission commences a new 30-day review period. While we are aware of

the potential for SHPOs/THPOs to evade the time limit in the Nationwide Agreement through unnecessary returns, we believe the requirement to describe deficiencies will limit this potential, and we conclude that it is unreasonable to permit applicants to benefit from a potentially shorter ultimate review period due to their own initial shortcomings. We intend to monitor any complaints about the application of this provision, and we will not hesitate to request an amendment or other appropriate measures from the other signatories if experience proves it necessary.

78. The draft Nationwide Agreement proposes forms (or templates) that Applicants would be required to use when submitting materials to SHPOs/THPOs. The forms are designed to simplify the submission of section 106 material, clarify for applicants and SHPOs/THPOs what is required, and provide uniformity in submissions nationwide. The draft Nationwide Agreement includes two forms: Form NT for proposed new towers, and Form CO for proposed collocations that are not excluded from section 106 review by either the Collocation Agreement or the Nationwide Agreement.

79. We revise and adopt Form NT and Form CO for submissions to SHPOs and THPOs. In an effort to simplify the forms and make them more user-friendly, we make a number of formal changes in response to the comments. Finally, in order to achieve the benefits of uniformity and simplicity for SHPOs/THPOs as well as applicants, we make use of the forms mandatory for all undertakings that are not excluded from section 106 review. We conclude that the negotiating process as well as the notice and comment in this rulemaking proceeding have provided interested parties with ample opportunities to influence their content and form.

80. We agree with most commenters that the Nationwide Agreement should apply prospectively. The Nationwide Agreement includes not only timelines and procedures, but also standards and forms that help ensure that the timelines and procedures will be reasonable for SHPOs/THPOs and will not compromise historic preservation. Because pending applications may not meet the Nationwide Agreement's standards, and in all likelihood will not use the prescribed forms, to apply it automatically to all pending cases would cause confusion and potentially impose unreasonable burdens on SHPOs/THPOs. We note, however, that should a party wish to take advantage of the provisions in the Nationwide Agreement, it may withdraw its filing and resubmit under the Nationwide Agreement.

81. In the *NPRM,* we proposed amending § 1.1307(a)(4) of the Commission's rules, which directs that proposed undertakings be evaluated for their effects on historic properties, expressly to require that applicants follow the procedures set forth in the Council's rules, as modified and supplemented by the Nationwide Agreement and the Collocation Agreement. We adopt the change to § 1.1307(a)(4) as proposed. The rule will bring administrative certainty by making it clear that the provisions of the Nationwide Agreement are mandatory and binding upon applicants, and that non-compliance with its procedures will subject a party to potential enforcement action.

Final Regulatory Flexibility Analysis

82. As required by the Regulatory Flexibility Act of 1980, as amended (''RFA'') [3] an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the *Notice of Proposed Rulemaking* (''*NPRM*'') for the Nationwide Programmatic Agreement Regarding the section 106 National Historic Preservation Act Review Process (''Nationwide Agreement'').[4] The Federal Communications Commission (''Commission'' or ''FCC'') sought written public comment on the proposals in the *NPRM,* including comment on the IRFA. This present Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.[5]

A. Need for, and Objectives of, Adopted Rules

83. Under Commission rules implementing the National Environmental Policy Act of 1969, as amended (''NEPA''),[6] licensees and other entities that build towers and other communications facilities (''Applicants'') are required to assess such proposed facilities to determine whether they may significantly affect the environment under § 1.1307 of the Commission's rules.[7] For example, under § 1.1307(a)(4) of the Commission's rules, those Applicants currently are obliged to use the detailed procedures specified in the rules of the Advisory Council on Historic Preservation (''Council'') (36 CFR 800.1 *et seq.*) to determine whether their proposed facilities may affect districts, sites, buildings, structures, or objects significant in American history, architecture, archeology, engineering or culture that are listed or eligible for listing in the National Register of Historic Places (''historic properties'').

84. These Council procedures, when combined with the procedures employed by the various State Historic Preservation Officers (''SHPOs'') and Tribal Historic Preservation Officers (''THPOs''), and when multiplied by the number of facilities being constructed, created an unnecessarily inefficient review process for Applicants. For example, in the late 1990's, coincident with the vast increase in tower constructions necessitated by the expanded deployment of wireless mobile services, unacceptable delays in completing traditional section 106 reviews under the Council's rules began to occur and continue to be experienced. The Commission therefore, began to explore alleviating such procedural inefficiencies by using the provision in the rules of the Council that allows for the creation of programmatic agreements between the Council and other agencies.[8] Generally speaking, such programmatic agreements are intended to craft specific procedures that more closely reflect the needs and practices of specific federal agencies and the industries they regulate.

85. Under § 800.14(b) of its rules, the Council, Federal agencies, such as the Commission, and the appropriate SHPO or National Conference of State Historic Preservation Officers (''NCSHPO'') may negotiate a programmatic agreement to govern the implementation of a particular program when, for example, the effects on historic properties are multi-state or when nonfederal parties are delegated major responsibilities. Accordingly, to streamline and tailor the pre-construction review of towers and other communications facilities under section 106 of the National Historic Preservation Act (''NHPA'')[9] and the related Commission and Council rules, the Council, the Commission, and NCSHPO negotiated a programmatic agreement under § 800.14(b) of the Council's rules. Some objectives of the Nationwide Agreement and the related rule revisions are to increase Applicants' awareness of applicable

[3] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996).

[4] *See* Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03–128, *Notice of Proposed Rulemaking,* 18 FCC Rcd 11,664 (2003) (''Notice''); *Errata,* 18 FCC Rcd 12,854 (2003).

[5] *See* 5 U.S.C. 604.

[6] 42 U.S.C. 4321–4335.

[7] 47 CFR 1.1307.

[8] 36 CFR 800.14(b).

[9] 16 U.S.C. 470f.

laws and rules; to tailor and streamline the current procedures under the rules of the Council and the Commission; and to ensure compliance by Applicants with the Nationwide Agreement and related Commission and Council rules.

86. In this *Report and Order*, the Commission incorporates into its rules the recently agreed upon Nationwide Agreement, which, as discussed below, will streamline and tailor existing procedures under the Commission and Council rules for the review of certain Undertakings for communications facilities under section 106 of the National Historic Preservation Act of 1966 (''NHPA'').[10]

87. The Nationwide Agreement clarifies and tailors the obligations [11] of the Applicants to assist the Commission in meeting its responsibilities under NEPA and the NHPA. First, to reduce regulatory burdens (*e.g.*, identifying historic properties, preparing submission packets) on both large and small Applicants, the Nationwide Agreement, in Part III, excludes from routine review under section 106 of the NHPA certain Undertakings that are unlikely to affect historic properties.

88. Second, for those Undertakings that are not addressed by the Part III exclusions and that, therefore, remain subject to review, the draft Agreement specifies standards and procedures that Applicants must follow when completing the section 106 review. For example, for undertakings that remain subject to review, the Agreement sets forth guidelines for tribal participation; [12] procedures for ensuring compliance with the NHPA's public participation requirements;[13] methods for establishing the area of potential effects, identifying and evaluating historic sites, and assessing effects;[14] and procedures for submitting projects to, and for review by, the SHPO or THPO and the Commission.[15] The Nationwide Agreement also includes procedures to be followed when historic properties (*e.g.*, archeological artifacts) are discovered during construction; [16] processes to be followed when facilities are constructed prior to completion of the section 106 process; [17] and provisions for the submission of public comments and objections.[18]

89. In addition, the Nationwide Agreement includes forms which Applicants must use for section 106 submissions to SHPOs, as well as to THPOs that have agreed to accept such forms for projects on tribal lands that are not subject to review by a SHPO.

90. The Commission also amends its rules in order to make clear that the procedures in the Nationwide Agreement will be binding on regulatees, who are subject to its terms, and that non-compliance with these procedures would subject a party to potential Commission enforcement action such as admonishment, forfeiture, or revocation of a license to operate, where appropriate. Specifically, the Commission amends § 1.1307(a)(4) to specify that, in order to ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register,[19] an Applicant must follow the procedures set forth in the rules of the Council, as modified and supplemented by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas and the Nationwide Agreement. Both agreements will be included as appendices in the Code of Federal Regulations.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

91. The Commission considered the potential impact of its actions on smaller entities throughout the process of negotiating and drafting the Nationwide Agreement. One of its goals has been to make the environmental review process more efficient and standardized so that smaller entities can learn and complete the process more quickly.

92. We received one comment in response to the IRFA. The Eastern Band of Cherokee Indians (''EBCI'') opposes any streamlining efforts, whether for large or small businesses, that could have the effect of reducing or eliminating government-to-government consultation between federal agencies and tribes. EBCI also believes that some language in the IRFA should have been stronger to make clear that an Applicant's obligations under the Nationwide Agreement (*e.g.*, notice, timely submission of necessary documents, and consultation) are mandatory.

93. With respect to the impact of the Nationwide Agreement on government-to-government consultation, we address the concerns of EBCI most specifically in section IV of the Nationwide Agreement. In particular, as explained in section III.C.2. of the *Report and Order* [20] we have taken considerable care in the Nationwide Agreement to fulfill the Commission's duty of government-to-government consultation in all cases that cannot be consensually resolved without such consultation. With regard to the obligations of Applicants to comply with the terms of the Nationwide Agreement, we have revised § 1.1307(a)(4) of our rules to ensure that regulatees understand that compliance with the Nationwide Agreement is mandated. However, the Commission notes that, wherever appropriate, any differential burdens favoring small entities have been preserved by the Nationwide Agreement. Furthermore, the Commission has made a concerted effort to reduce burdens on small entities. That being said, the Commission believes that all entities—large and small—will benefit from compliance with the Nationwide Agreement.

C. Description and Estimate of the Number of Small Entities to Which the Adopted Rules Will Apply

94. 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 proposed rules.[21] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[22] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[23] A ''small business concern'' is one which:

[10] *See* 16 U.S.C. 470 *et seq.*

[11] *See* 47 CFR 1.1307(a)(4) (directing that proposed undertakings be evaluated for their effects on historic properties).

[12] Nationwide Agreement, Part IV.

[13] Nationwide Agreement, Part V.

[14] Nationwide Agreement, Part VI.

[15] Nationwide Agreement, Part VII.

[16] Nationwide Agreement, Part IX.

[17] Nationwide Agreement, Part X.

[18] Nationwide Agreement, Part XI.

[19] ''Listed'' properties are those properties for which an application for inclusion in the National Register of Historic Places (''National Register'') has been approved. Under Section 800.16(l)(2) of the regulations of the Advisory Council on Historic Preservation, 36 CFR 800.16(l)(2), the term ''eligible for inclusion in the National Register'' includes both properties formally determined as such by the Keeper of the National Register in accordance with applicable regulations of the Secretary of the Interior and all other properties that meet the National Register criteria. Information on the characteristics of properties that meet these criteria is available at the National Register Web site: *http://www.cr.nps.gov/nr.*

[20] *Nationwide Agreement Report and Order* at section III.C.2.

[21] 5 U.S.C. 604(a)(3).

[22] 5 U.S.C. 604(6).

[23] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.''

(1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (''SBA'').[24]

95. The *Report and Order* and, accordingly, the Nationwide Agreement, will produce a rule change that will impose requirements on a large number of entities in determining whether facilities that they propose to construct may affect historic properties listed or eligible for listing on the National Register of Historic Places.[25] Due to the number and diversity of Applicants, including small entities that are Commission licensees as well as non-licensee tower companies, we now classify and quantify them in the remainder of this section.

Wireless Telecommunications

96. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category ''Cellular and Other Wireless Telecommunications.''[26] Under that SBA category, a business is small if it has 1,500 or fewer employees.[27] According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees.[28] Therefore, even if all twelve of these firms were cellular telephone companies with more than 1,500 employees, nearly all cellular carriers were small businesses under the SBA's definition.

97. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to ''Cellular and Other Wireless Telecommunication'' companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.[29] According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[30] Of this total, 965 firms had 999 or fewer employees, and an additional 12 firms had 1,000 employees or more.[31] If this general ratio continues in 2004 in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business size standard.

98. *220 MHz Radio Service—Phase II Licensees.* The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[32] This small business standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[33] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[34] The SBA has approved these small size standards.[35] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[36] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (''EAG'') Licenses, and 875 Economic Area (''EA'') Licenses. Of the 908 licenses auctioned, 683 were sold.[37] Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[38]

99. *700 MHz Guard Band Licenses.* In the *700 MHz Guard Band Order*, we adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[39] A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[40] Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[41] An auction of 52 Major Economic Area (''MEA'') licenses commenced on September 6, 2000, and closed on September 21, 2000.[42] Of the 104 licenses auctioned, 96 licenses were sold to 9 bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[43]

100. *Lower 700 MHz Band Licenses.* We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.[44] We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not

[24] 15 U.S.C. 632.

[25] 47 CFR 1.1307(a)(4).

[26] 13 CFR 121.201, North American Industry Classification System (NAICS code 517212 (Changed from 513322 in October 2002).

[27] *Id.*

[28] U.S. Department of Commerce, U.S. Census Bureau, 1997 Economic Census, Information—Subject Series, Establishment and Firm Size, Table 5—Employment Size of Firms Subject to Federal Income Tax at 64, NAICS code 517212 (October 2000).

[29] 13 CFR 121.201.

[30] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Employment Size of Firms Subject to Federal Income Tax: 1997,'' Table 5, NAICS code 513322 (issued Oct. 2000).

[31] *Id.* The census data do not provide a more precise estimate of the number of firms that have 1,500 or fewer employees; the largest category provided is ''Firms with 1,000 employees or more.''

[32] Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220–222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89–552, *Third Report and Order*, 12 FCC Red 10943, 11068–70, paragraphs 291–295 (1997) (*220 MHz Third Report and Order*).

[33] *Id.* at paragraph 291.

[34] *Id.*

[35] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[36] *See generally* ''220 MHz Service Auction Closes,'' *Public Notice*, 14 FCC Red 605 (WTB 1998).

[37] ''FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses after Final Payment is Made,'' *Public Notice*, 14 FCC Red 1085 (WTB 1999).

[38] ''Phase II 220 MHz Service Spectrum Auction Closes,'' *Public Notice*, 14 FCC Red 11218 (WTB 1999).

[39] *See* Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99–168, *Second Report and Order*, 15 FCC Red 5299–5344, paragraph 108 (2000).

[40] *Id.* at paragraphs 106–108.

[41] *Id.* at paragraphs 106–108.

[42] *See generally*, ''220 MHz Service Auction Closes: Winning Bidders in the Auction of 908 Phase II 220 MHz Service Licenses,'' *Public Notice*, DA 98–2143 (rel. October 23, 1998).

[43] ''700 MHz Guard Bands Auction Closes: Winning Bidders Announced,'' *Public Notice*, 16 FCC 4590 (WTB 2001).

[44] *See* Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59), GN Docket No. 01–74, *Report and Order*, 17 FCC Red 1022 (2002).

exceeding $40 million for the preceding three years.[45] A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[46] Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (''MSA/RSA'') licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings) commenced on August 27, 2002, and closed on September 18, 2002.[47] Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.

101. *Upper 700 MHz Band Licenses.* The Commission released a Report and Order, authorizing service in the upper 700 MHz band.[48] No auction has been held yet.

102. *Private and Common Carrier Paging.* In the Paging *Third Report and Order,* we developed a small business size standard for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[49] A ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these size standards.[50] An auction of MEA licenses commenced on February 24, 2000, and closed on March 2, 2000.[51] Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won licenses. At present, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging site-specific licenses. According to the most recent *Trends in Telephone Service,* 471 carriers reported that they were engaged in the provision of either paging and messaging services or other mobile services.[52] Of those, the Commission estimates that 450 are small, under the SBA business size standard specifying that firms are small if they have 1,500 or fewer employees.[53]

103. *Broadband Personal Communications Service.* The Broadband Personal Communications Service (''PCS'') spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[54] For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[55] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[56] No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.[57] On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders. Based on this information, we conclude that the number of small broadband PCS licensees includes the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks plus the 113 winning bidders in the re-auction, for a total of 296 small entity broadband PCS providers as defined by the SBA small business standards and the Commission's auction rules.

104. *Narrowband PCS.* To date, two auctions of narrowband personal communications services licenses have been conducted. For purposes of the two auctions that have already been held, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less.[58] Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order.* A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million.[59] A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million.[60] The SBA has approved these small business size standards.[61] There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future actions. However, four of the 16 winning bidders in the two

[45] *Id.* at paragraph 172.

[46] *Id.* at paragraph 172.

[47] *See* ''Lower 700 MHz Band Auction Closes,'' 17 FCC Red 17272 (2002).

[48] Service Rules for the 746–764 and 776–794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99–168, *Second Memorandum Opinion and Order*, 16 FCC Red 1239 (2001).

[49] *220 MHz Third Report and Order*, 12 FCC Red at 11068–70, paragraphs 291–295, 62 FR 16004 at paragraphs 291–295 (1997).

[50] *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas Sugrue, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (June 4, 1999).

[51] Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96–18, PR Docket No. 93–253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Red 10030, 10085, paragraph 98 (1999).

[52] *Trends in Telephone Service* at Table 5.3 (rel. Aug. 2001).

[53] *Id.* The SBA size standard is that of Paging, 13 CFR 121.201, NAICS code 517211.

[54] *See* Amendment of parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96–59, *Report and Order*, 11 FCC Red 7824, paragraph 57–60 (1996); *see also* 47 CFR 24.720(b).

[55] *See* Amendment of parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Red 7824, paragraph 60 (1996).

[56] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Small Business Administration, dated December 2, 1998.

[57] FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. January 14, 1997).

[58] *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 15 FCC Red 10456, 10476, paragraph 40 (May 18, 2000).

[59] *Id.* at 15 FCC Red 10476, paragraph 40.

[60] *Id.* at 15 FCC Red 10476, paragraph 40.

[61] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Administrator, Small Business Administration (Dec. 2, 1998).

previous narrowband PCS auctions were small businesses, as that term was defined under the Commission's Rules. The Commission assumes, for purposes of this analysis, that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

105. *900 MHz Specialized Mobile Radio (''SMR'').* In September of 1995, in a rulemaking adopting competitive bidding rules specifically for the 900 MHz SMR service, the Commission established a two-tiered bidding credit scheme for the 900 MHz SMR auction in which we defined two categories of small businesses: (1) An entity that, together with affiliates, has average gross revenues for the three preceding years of $3 million or less; and (2) an entity that, together with affiliates, has average gross revenues for the three preceding years of $15 million or less.[62] The SBA has approved these size standards.[63] In Auction Seven, which closed on April 15, 1996, sixty winning bidders for geographic area licenses in the 900 MHz SMR band qualified as small businesses under the $15 million size standard.

106. *800 MHz SMR.* In the 800 MHz Second Report and Order, we adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[64] This small business standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[65] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[66] The SBA has approved these small size standards.[67]

107. The auction of the 525 800 MHz SMR geographic area licenses for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Three (3) winning bidders for geographic area licenses for the upper 200 channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard, and seven (7) qualified as very small businesses. Next, the auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven (11) out of a total of 14 winning bidders for geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. Finally, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold in an auction completed on December 5, 2000. Of the 22 winning bidders, 19 claimed ''small business'' status. Thus, 40 winning bidders for geographic licenses in the 800 MHz SMR band qualified as small businesses.

108. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations on the 800 MHz bands. We do not know how many firms provide 800 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities as defined for the 800 MHz SMR service.

109. *Private Land Mobile Radio.* Private Land Mobile Radio (''PLMR'') systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. The SBA has not developed a definition of small entity specifically applicable to PLMR licensees due to the vast array of PLMR users. For purposes of this FRFA, we will use the SBA's definition applicable to Cellular and Other Wireless Telecommunications—that is, an entity with no more than 1,500 persons.[68]

110. The Commission is unable at this time to estimate the number of small businesses which could be impacted by the rules. The Commission's 1994 Annual Report on PLMRs[69] indicates that at the end of fiscal year 1994 there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

111. *Fixed Microwave Services.* Microwave services include common carrier,[70] private-operational fixed,[71] and broadcast auxiliary radio services.[72] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. For purposes of this FRFA, we will use the SBA's definition applicable to Cellular and Other Wireless Telecommunications—that is, an entity with no more than 1,500 persons.[73] We estimate that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small

[62] Amendment of parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896–901 MHz and the 935–940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89–553, *Second Order on Reconsideration and Seventh Report and Order,* 11 FCC Rcd 2639, 2645–46 (1995) (*900 MHz SMR Rulemaking*); *see also* 47 CFR 90.814(b).

[63] *See* Letter to Michele C. Farquhar, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Philip Lader, Administrator, Small Business Administration (July 24, 1996).

[64] *See* Amendment of part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order,* FCC 97–223, PR Docket No. 93–144, 12 FCC Rcd 19079, paragraph 141 (1997) (*800 MHz Second Report and Order*); *see also* 47 CFR 90.912(b).

[65] *Id.*

[66] *Id.*

[67] *See* Letter from Aida Alvarez, Administration, Small Business Administration to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (Oct. 27, 1997) (Upper 200 channels). *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas Sugrue, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 10, 1999) (applying the size standards approved in SBA's Oct. 27, 1997 letter to the 800 MHz MSR, Lower 80 and 150 General channels).

[68] 13 CFR 121.201, North American Industry Classification System (NAICS) code 517212 (changed from 513322 in October 2002).

[69] Federal Communications Commission, 60th Annual Report, Fiscal Year 1994, at paragraph 116.

[70] 47 CFR part 101 (formerly, Part 21 of the Commission's Rules).

[71] Persons eligible under parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. *See* 47 CFR parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[72] Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission's Rules. *See* 47 CFR part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[73] 13 CDR 121.201, North American Industry Classification System (NAICS) code 517212 (changed from 513322 in October 2002).

entities under the SBA definition for radiotelephone (wireless) companies.

112. *Public Safety Radio Services.* Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[74] There are a total of approximately 127,540 licensees within these services. Governmental entities [75] as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.[76]

113. *Offshore Radiotelephone Service.* This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal areas of states bordering the Gulf of Mexico.[77] There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for ''Cellular and Other Wireless Telecommunications'' services.[78] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[79]

114. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (''WCS'') auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions.[80] The FCC auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees affected includes these eight entities.

115. *39 GHz Service.* The Commission defined ''small entity'' for 39 GHz licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[81] An additional classification for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These regulations defining ''small entity'' in the context of 39 GHz auctions have been approved by the SBA.[82] The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and polices adopted herein.

116. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service.* Multichannel Multipoint Distribution Service (''MMDS'') systems, often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (''MDS'') and Instructional Television Fixed Service (''ITFS'').[83] In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[84] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (''BTA''). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts.[85] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category total that had operated for the entire year.[86] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[87] Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

117. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (''LMDS'') is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[88] The auction of

[74] With the exception of the special emergency service, these services are governed by subpart B of part 90 of the Commission's Rules, 47 CFR 90.15 through 90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments that are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,0000 licensees in the Emergency Medical Radio Service (EMRS) use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 CFR 90.15 through 90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 CFR 90.33 through 90.55.

[75] 47 CFR 1.1162.

[76] 5 U.S.C. 601(5).

[77] This service is governed by subpart I of part 22 of the Commission's Rules. *See* 47 CFR 22.1001 through 22.1037.

[78] 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[79] *Id.*

[80] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division from A. Alvarez, Administrator, SBA (December 2, 1998).

[81] *See* Amendment of the Commission's Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Band, *Report and Order,* 12 FCC Rcd 18600 (1997).

[82] *See* Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

[83] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* MM Docket No. 94–131 and PP Docket No. 93–253, *Report and Order,* 10 FCC Rcd 9589, 9593, paragraph 7 (1995).

[84] 47 CFR 21.961(b)(1).

[85] 13 CFR 121.201, NAICS code 517510 (changed from 513220 in October 2002).

[86] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 513220 (issued October 2000).

[87] In addition, the term ''small entity'' within the SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4)–(6). We do not collect annual revenue data on ITFS licensees.

[88] *See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, to Reallocate the*

the 1,030 Local Multipoint Distribution Service licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined ''small entity'' for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[89] An additional classification for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[90] These regulations defining ''small entity'' in the context of LMDS auctions have been approved by the SBA.[91] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 small business winning bidders. Based on this information, we conclude that the number of small LMDS licenses includes the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

118. *218–219 MHz Service.* The first auction of 218–219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Areas (''MSA''). Of the 594 licenses, 557 were won by 170 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[92] In the *218–219 MHz Report and Order and Memorandum Opinion and Order,* we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years.[93] A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years.[94] We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, all of the licenses may be awarded to small businesses.

119. *24 GHz—Incumbent Licensees.* This rule change may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of ''Cellular and Other Wireless Telecommunications'' companies. This category provides that such a company is small if it employs no more than 1,500 persons.[95] According to Census Bureau data for 1997, there were 977 firms in this category that operated for the entire year.[96] Of this total, 965 firms had 999 or fewer employees, and an additional 12 firms had 1,000 employees or more.[97] Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[98] and TRW, Inc. It is our understanding that Teligent and its related companies have fewer than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

120. *24 GHz—Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for ''small business'' is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of $15 million.[99] ''Very small business'' in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[100] The SBA has approved these small business size standards.[101] These size standards will apply to the future auction, if held.

121. *Location and Monitoring Service (''LMS'').* Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $15 million.[102] A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $3 million.[103] These definitions have been approved by the SBA.[104] An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We conclude that the number of LMS licensees affected by this Report and Order includes these four entities. We cannot accurately predict the number of remaining licenses that could be awarded to small

29.5–30.0 GHz Frequency Band, and to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92–297, Second Report and Order, 12 FCC Rcd 12545 (1997).

[89] *See* Local Multipoint Distribution Service, *Second Report and Order,* 62 Fed. Reg. 23148 (April 29, 1997).

[90] *Id.*

[91] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

[92] Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP WT Docket No. 93–253, *Fourth Report and Order,* 59 Fed. Reg. 24947 (May 13, 1994); Amendment of part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218–219 MHz Service, *Report and Order and Memorandum Opinion and Order,* 15 FCC Rcd. 1497, 1583 (Sept. 10, 1999).

[93] Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218–219 MHz Service, WT Docket No. 98–169, *Report and Order and Memorandum Opinion and Order,* 64 Fed. Reg. 59656 (November 3, 1999).

[94] *Id.*

[95] 13 CFR 121.201, NAICS code 517212 (changed from 513322 in October 2002).

[96] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Employment Size of Firms Subject to Federal Income Tax: 1997,'' Table 5, NAICS code 513322 (issued Oct. 2000).

[97] *Id.* The census data do not provide a more precise estimate of the number of firms that have 1,500 or fewer employees; the largest category provided is ''Firms with 1,000 employees or more.''

[98] Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 18 GHz band whose license has been modified to require relocation to the 24 GHz band.

[99] *Amendments to parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz,* WT Docket No. 99–327, Report and Order, 15 FCC Rcd 16934, 16967 (2000); *see also* 47 CFR 101.538(a)(2).

[100] *Amendments to parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz,* WT Docket No. 99–327, Report and Order, 15 FCC Rcd at 16967; *see also* 47 CFR 101.538(a)(1).

[101] *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

[102] Amendment of part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order,* 13 FCC Rcd 15182 ¶ 20 (1998); *see also* 47 CFR 90.1103.

[103] *Id.*

[104] *See* Letter to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (Feb. 22, 1999).

entities in future LMS auctions. Media Services (Broadcast & Cable)

122. *Commercial Television Services.* The SBA defines a television broadcasting station that has no more than $12.0 million in annual receipts as a small business.[105] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[106] Included in this industry are commercial, religious, educational, and other television stations.[107] Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.[108]

123. There were 1,695 full-service television stations operating in the United States as of December 2001.[109] According to Census Bureau data for 1997, there were 906 Television Broadcasting firms, total, that operated for the entire year.[110] Of this total, 734 firms had annual receipts of $9,999,999.00 or less and an additional 71 had receipts of $10 million to $24,999,999.00.[111] Thus, under this standard, the majority of firms can be considered small.

124. *Commercial Radio Services.* The SBA defines a radio broadcasting station that has no more than $6 million in annual receipts as a small business.[112] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[113] Included in this industry are commercial, religious, educational, and other radio stations.[114] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[115] According to Census Bureau data for 1997, there were 4,476 Radio Stations (firms), total, that operated for the entire year.[116] Of this total 4,265 had annual receipts of $4,999,999.00 or less, and an additional 103 firms had receipts of $5 million to $9,999,999.00.[117] Thus, under this standard, the great majority of firms can be considered small.

125. *Cable Systems.* The Commission has developed, with SBA's approval, its own definition of small cable system operators. Under the Commission's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide.[118] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.[119] Since then, some of those companies may have grown to serve more than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the rules adopted herein.

126. The Communications Act also contains a definition of a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate less than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenue in the aggregate exceeds $250,000,000.''[120] The Commission has determined that there are 67,700,000 subscribers in the United States.[121] Therefore, we found that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[122] Based on available data, we find that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450.[123] Since we do not request nor collect information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

127. *Auxiliary, Special Broadcast and Other Program Distribution Services.* This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. The applicable definitions of small entities are those, noted previously, under the SBA rules applicable to radio broadcasting stations and television broadcasting stations. The SBA defines a television broadcasting station that has no more than $12.0 million in annual receipts as a small business,[124] and it defines a radio broadcasting station that has no more than $6 million in annual receipts as a small business.[125]

128. The Commission estimates that there are approximately 3,600 translators and boosters. The Commission does not collect financial information on any broadcast facility, and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most commercial translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business (either $6 million for a radio station or $12 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a ''small business concern'' because they are not independently owned and operated.

129. *Satellite Services.* The Commission has not developed a small

[105] 13 CFR 121.201, North American Industry Classification System (NAICS) code 515120.

[106] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92–S–1, Appendix A–9 (1995).

[107] *Id., see* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual,* at 13 CFR 121.201, North American Industry Classification System (NAICS) code 515120.

[108] 1992 Census Series UC92–S–1, at Appendix A–9.

[109] FCC News Release, Broadcast Station Totals as of December 31, 2001 (released May 21, 2002).

[110] 13 CFR 121.201, North American Industry Classification System (NAICS) code 515120.

[111] *Id.* The census data do not provide a more precise estimate.

[112] 13 CFR 121.201, North American Industry Classification System (NAICS) code 515112.

[113] 1992 Census, Series UC92–S–1, at Appendix A–9.

[114] *Id.*

[115] *Id.*

[116] 13 CFR 121.201, North American Industry Classification System (NAICS) code 515112.

[117] *Id.* The census data do not provide a more precise estimate.

[118] 47 CFR 67.901(3). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration,* 10 FCC Rcd 6393 (1995). 13 CFR 121.201, North American Industry Classification System (NAICS) code 515210.

[119] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[120] 47 U.S.C. 543(m)(2).

[121] FCC Announces New Subscriber Count for the Definition of Small Cable Operator, *Public Notice,* DA 01–158 (January 24, 2001).

[122] 47 CFR 76.1403(b).

[123] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[124] 13 CFR 121.201, North American Industry Classification System (NAICS) code 515120.

[125] 13 CFR 121.201, North American Industry Classification System (NAICS) code 515112.

business size standard applicable to licensees in the international services. However, the SBA has developed a small business size standard for Satellite Telecommunications, which consists of all such firms having $12.5 million or less in annual receipts.[126] According to Census Bureau data for 1997, in this category there was a total of 324 firms that operated for the entire year.[127] Of this total, 273 firms had annual receipts of under $10 million, and an additional twenty-four firms had receipts of $10 million to $24,999,999.[128] Thus, under this size standard, the majority of firms can be considered small.

130. *International Broadcast Stations.* Commission records show that there are approximately 19 international high frequency broadcast station authorizations. We do not request nor collect annual revenue information, and are unable to estimate the number of international high frequency broadcast stations that would constitute small businesses under the SBA definition.

131. *Fixed Satellite Transmit/Receive Earth Stations.* There are approximately 4,303 earth station authorizations, a portion of which are Fixed Satellite Transmit/Receive Earth Stations. We do not request nor collect annual revenue information, and are unable to estimate the number of the earth stations that would constitute small businesses under the SBA definition.

132. *Fixed Satellite Very Small Aperture Terminal (''VSAT'') Systems.* These stations operate on a primary basis, and frequency coordination with terrestrial microwave systems is not required. Thus, a single ''blanket'' application may be filed for a specified number of small antennas and one or more hub stations. There are 485 current VSAT System authorizations. We do not request nor collect annual revenue information, and are unable to estimate the number of VSAT systems that would constitute small businesses under the SBA definition.

133. *Mobile Satellite Stations.* There are 21 licensees. On February 10, 2003, the Commission released a *Report and Order and Notice of Proposed Rulemaking* allowing licensees in the Mobile Satellite Services to use their spectrum for Ancillary Terrestrial Communications (''ATC'').[129] Licensees may construct towers to provide ATC service. We do not request nor collect annual revenue information, and are unable to estimate the number of mobile satellite earth stations that would constitute small businesses under the SBA definition.

134. *Radio Determination Satellite Earth Stations.* There are four licensees. We do not request nor collect annual revenue information, and are unable to estimate the number of radio determination satellite earth stations that would constitute small businesses under the SBA definition.

135. *Digital Audio Radio Services (''DARS'').* Commission records show that there are 2 Digital Audio Radio Services authorizations. We do not request nor collect annual revenue information, and, therefore, we cannot estimate the number of small businesses under the SBA definition.

136. *Non-Licensee Tower Owners.* The Commission's rules require that any entity proposing to construct an antenna structure over 200 feet or within the glide slope of an airport must register the antenna structure with the Commission on FCC Form 854.[130] For this and other reasons, non-licensee tower owners may be subject to the requirements adopted in the *Report and Order* and the Nationwide Agreement. As of August 2004, approximately 96,778 towers were included in the Antenna Structure Registration database. This includes both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.[131] Moreover, the SBA has not developed a size standard for small businesses in the category ''Tower Owners.'' Therefore, we are unable to estimate the number of non-licensee tower owners that are small entities. We assume, however, that nearly all non-licensee tower companies are small businesses under the SBA's definition for cellular and other wireless telecommunications services.[132]

D. Description of Reporting, Recordkeeping, and Other Compliance Requirements

137. The Nationwide Agreement includes several compliance requirements, including recordkeeping and reporting requirements, applicable to regulatees. Under the Commission's rules, as they existed before the adoption of the *Report and Order,* applicants were required to determine whether their construction of ''facilities may affect districts, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or eligible for listing, in the National Register of Historic Places,'' consistent with the rules of the Council.[133] The Nationwide Agreement modifies and more clearly specifies the means by which applicants should make that determination.

138. Specific requirements that the Nationwide Agreement imposes on Applicants include making them determine whether an exclusion applies to their proposed construction project, thereby obviating the need to submit section 106 materials to the SHPO/THPO.[134] Accordingly, applicants should maintain records to verify the applicability of any exclusion should questions arise about the project after construction has started or has been completed.[135]

139. The Nationwide Agreement also requires that applicants follow specific steps to identify and initiate contact with Indian tribes and Native Hawaiian Organizations that may attach religious and cultural significance to potentially affected historic properties. These steps ensure that tribes and NHOs will be contacted in a respectful manner that conforms to their reasonable preferences and that offers them a full opportunity to participate in the process. These steps also ensure that Indian tribes' requests for government-to-government consultation, as well as cases of tribal or NHO disagreement or non-response, will be referred to the Commission. They also provide for confidentiality of private or sensitive information.[136]

140. The Nationwide Agreement establishes required procedures for seeking local government and public participation; for considering public comments before forwarding them to the SHPO/THPO; and for identifying

[126] 13 CFR 121.201, NAICS code 517410 (changed from 513340 in October 2002).

[127] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 513340 (issued October 2000).

[128] *Id.*

[129] In the Matter of Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands, *Report and Order and Notice of Proposed Rulemaking,* 18 FCC Rcd. 11,030 (2003).

[130] 47 CFR 17.4(a), 17.7(a).

[131] We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

[132] 13 CFR 121.201, North American Industry Classification System (NAICS) code 517212. Under this category, a business is small if it has 1,500 or fewer employees.

[133] *See* 47 CFR 1.1307(a)(4) and Note.

[134] Nationwide Agreement, Part III. As will be discussed below, the addition of exclusions, on balance, greatly reduces the overall burdens on the Applicant.

[135] *Id.*

[136] *Id.,* Part IV.

consulting parties.[137] In addition, the Nationwide Agreement establishes standards for applicants to apply in defining the area of potential effects (''APE'') for both direct and visual effects; in identifying and evaluating the significance of Historic Properties within the APE; and in assessing the effects of the Undertaking on Historic Properties.[138] Once identification, evaluation, and assessment are complete, the Nationwide Agreement requires Applicants to provide the SHPO/THPO and consulting parties with a Submission Packet that conforms to a standardized set of instructions, which require specific information about the Applicant, the project, and its review.[139]

141. The Nationwide Agreement also establishes procedures for Applicants to follow after receiving certain responses from the SHPO/THPO. For example, if the SHPO/THPO disagrees with the Applicant's finding of ''no Historic Properties affected,'' the Applicant is to engage in further discussions with the SHPO/THPO to resolve any disagreement, and, if that effort fails, the Applicant may submit the matter to the Commission for its effect determination. Additionally, the Nationwide Agreement provides procedures for developing Memoranda of Agreement to mitigate adverse effects (*e.g.*, painting a facility a specific color to reduce its visibility).[140] Finally, the Nationwide Agreement prescribes procedures for Applicants to follow in the event of inadvertent or post-review discoveries (*e.g.*, buried properties of archeological significance),[141] and delineates potential measures that the Commission may require Applicants to take in response to a complaint alleging construction prior to compliance with section 106 (*e.g.*, providing the Applicant with a copy of the complaint and requesting a written response within a reasonable time).[142]

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

142. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in developing its 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.[143]

143. As noted in section D, *supra,* under the Commission's rules, as they existed before the adoption of the *Report and Order,* applicants were required to perform historic preservation review in accordance with the rules of the Commission and the Council.[144] The Commission considered the potential impact of its rules on smaller entities throughout the process of negotiating and drafting the Nationwide Agreement. One of the Commission's goals has been to make its environmental review process more efficient and standardized so that entities with smaller staffs can learn and complete the process more quickly. The *NPRM* sought comment on the draft Nationwide Agreement, generally, including issues related to its potential economic impact on small entities, but we received no comments on this topic. Despite having received no comments with reference to issues that might affect small entities, the Commission continues to assess various options to relieve potential burdens on small entities.

144. The alternative of exempting small entities from the requirements proposed in the *NPRM* and draft Nationwide Agreement was not possible. The NHPA requires that *all* Federal Undertakings be evaluated for their potential effects on districts, sites, buildings, structures or objects, which are significant in American history, architecture, archeology, engineering or culture, and which are listed, or are eligible for listing, in the National Register of Historic Places. Neither the NHPA nor the Council's rules contemplates any exemption from review depending on the size or resources of the non-federal entity which initiates the undertaking. The direct impact of the requirements proposed in the draft Nationwide Agreement will be the same on all entities. Therefore, no special or extra burden will be placed on small entities.

145. Under the Nationwide Agreement burdens on small entities will be reduced in significant ways. First, the exclusions listed in Part III provide regulatory relief for those who intend to construct facilities that fall within the criteria listed therein (*e.g.*, certain types of facilities to be located within 50 feet of the outer boundary of certain types of rights-of-way).[145] The availability of exclusions for certain categories of projects, whereby those that qualify are exempted from section 106 review, offers a great reduction in burdens for some Applicants including many smaller entities. While a determination must be made as to whether the exclusion applies, in those instances in which the project is excluded from section 106 review, only record-keeping is required, thereby relieving the Applicant of any responsibility for identifying and assessing possible adverse effects on listed or eligible properties.

146. Additionally, the Commission recognizes that smaller entities do not have the economies of scale needed to sustain large environmental compliance staffs. Consequently, smaller entities will be unlikely to maintain in-house expertise on all facets of the review process needed for compliance with the rules of the Commission and the Council. Therefore, such firms will benefit more, relative to large entities, from the Part III exclusions. The exclusions allow smaller entities to forgo the costs associated with conducting the section 106 analysis of properties within the relevant Area of Potential Effects. Even though many entities contract out much section 106 work to historic preservation specialists, there are per project costs associated with the process of hiring a contractor, overseeing its work, and submitting the materials produced by the contractor to the SHPO that decrease as an entity is able to do this routinely and move up its learning curve by building more facilities. Similarly, the per unit cost for large entities declines as the cost of an in-house environmental compliance staff is spread over a greater number of units constructed. Furthermore, the cost charged by a historic preservation specialist to prepare a section 106 report will be determined by the complexity of the project, not by the size of the entity contracting for the historic preservation analysis. Consequently, in some instances, smaller entities will pay more for such work as a proportion of revenues than will the large firms. Smaller entities may also be injured proportionally more by delays in the section 106 process since more of their cash flow is tied up in each telecommunications facility being built. Thus, in assessing the general impact of section 106 exclusions the Commission

[137] *Id.,* Part V.

[138] *Id.,* Part VI.

[139] *Id.,* Part VII.A.1.

[140] *Id.,* sections VII.B.3, VII.C.2, VII.C.3, VII.C.6, and VII.D.

[141] *Id.,* Part IX.

[142] *Id.,* section X.C.

[143] 5 U.S.C. 603(c)(1)–(4).

[144] *See* 47 CFR 1.1307(a)(4) and Note.

[145] Nationwide Agreement, Part III.

believes that the Nationwide Agreement's Part III exclusions will reduce costs for small entities to a proportionally greater extent than they will for large entities.

147. Furthermore, the availability of the Part III exclusions will likely encourage the wireless infrastructure industry to direct its projects so that the projects fall within the scope of the Part III exclusions. Consequently, smaller entities may reap a competitive advantage precisely because they may be able to avoid having large in-house compliance staffs and will be able to price their services more cheaply.

148. Burdens on small entities will also be reduced because the Commission and Council have clarified the steps that need to be taken to perform the requisite section 106 review. For example, in those instances in which a Part III exclusion does not apply, Applicants will now submit a standardized submission packet to the SHPO/THPO that initiates the section 106 review. Previously, the absence of a standardized submission packet made it difficult for small entities that were unfamiliar with the process to quickly learn what was required for a proper submission. However, the submission packet's standardized instructions, either for new towers or collocations, will facilitate preparation of high-quality submissions on the first effort by firms that may not be large enough to employ an environmental or historic preservation staff. The standards set forth in Part VI will add predictability to the process,[146] and the procedures and the time frames for review in Part VII will reduce the likelihood of either uncertainty or suspension of projects.[147] Thus, the new submission packets will prevent the need for costly and time-consuming delays and resubmissions which may be especially burdensome for small entities who, with fewer ongoing projects generating revenue, cannot afford long delays in the review process.

149. We note that Applicants, whether large or small entities, routinely retain consultants to perform many of the steps associated with section 106 reviews. Consistent with the objectives of the NHPA, the Nationwide Agreement requires the use of professionals who meet the Secretary of the Interior's standards for tasks that implicate professional expertise.[148] We anticipate that the use of consultants to provide this expertise will continue to be prevalent under the Nationwide Agreement. Applicants will typically comply with the professional qualification requirements in the Nationwide Agreement by using consultants to perform specialized tasks due to their relative cost effectiveness and efficiency in completing section 106 reviews. We believe that the rules adopted herein will not impose any requirements on small entities that would make the use of consultants more burdensome than is currently the case. Indeed, by clarifying that certain tasks in the section 106 process do not require professional expertise, the Nationwide Agreement may, as described above, relieve burdens in this area to a relatively greater extent for small entities than for large.

150. In some instances, the Nationwide Agreement may impose specific burdens on all Applicants, including small entities. For example, standardized submission packets will now be submitted to the SHPO or THPO. However, we believe these burdens are the minimum necessary to accomplish the Nationwide Agreement's purpose. Thus, the Commission, after discussion with the members of the Telecommunications Working Group and after reviewing the record, believes that the forms include the minimum information necessary for appropriate review by a SHPO, THPO, or the Commission. Similarly, the provisions for tribal and public participation (Parts IV and V) are intended to embody the least burdensome procedures that will afford these parties a complete and legally sufficient opportunity to participate in the process.[149]

151. The new document submission and historic preservation review processes which constitute a core feature in the Nationwide Agreement are set forth in Part VII. These procedures have also been developed with the goal of reducing the burden of procedural uncertainty by delineating straightforward, repeatable processes for assessing the potential effects of proposed facilities on historic properties.

152. Any burdens imposed by the Nationwide Agreement will be more than outweighed by the benefits that will accrue to small entities from its provisions. The Commission has drafted the Nationwide Agreement with a commitment to reducing burdens on small entities. In closing, the Commission believes that the Nationwide Agreement conscientiously alleviates burdens on small entities in the ways discussed above.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

153. None. The Nationwide Agreement will modify and supplement the procedures set forth in the rules of the Council,[150] as expressly contemplated in those rules.[151]

G. Congressional Review Act

154. The Commission will send a copy of the *Report and Order,* including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[152] In addition, the Commission will send a copy of the *Order,* including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**. *See* 5 U.S.C. 604(b).

155. The Commission finds that the rule change contained in this *Report and Order* will not present a significant economic burden to small entities.

Ordering Clauses

156. Pursuant to sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303(r), 309(j), it is ordered that this *Report and Order* and the policies set forth herein are adopted and that part 1 of the Commission's rules, 47 CFR part 1 is amended, effective March 7, 2005. FCC Forms 620 and 621 contain information collections that have not been approved by the Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing the approval of these forms.

157. *It is ordered* that the Commission's Consumer Information Bureau, Reference Information Center, *shall send* a copy of the *Report and Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

158. *It is further ordered* that the Commission *shall send* a copy of this *Report and Order* to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

[146] Nationwide Agreement, Part VI.

[147] Nationwide Agreement, Part VII.

[148] Nationwide Agreement, sections VI.D.1.e, VI.D.2.b, VI.E.5; *compare id.,* Part III (no professional expertise required to invoke exclusions), section VI.D.1.d (no professional expertise required to identify historic properties within the APE for visual effects).

[149] Nationwide Agreement, Part IV; Nationwide Agreement, Part V.

[150] 36 CFR Part 800.

[151] 36 CFR 800.14(b).

[152] *See* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 1

Practice and procedure.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309, and 325(e).

■ 2. Section 1.1307 is amended by revising paragraph (a)(4) and removing the note to paragraph (a)(4) to read as follows:

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(a)* * *

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places. (See 16 U.S.C. 470w(5); 36 CFR part 60 and 800.) To ascertain whether a proposed action may affect properties that are listed or eligible for listing in the National Register of Historic Places, an applicant shall follow the procedures set forth in the rules of the Advisory Council on Historic Preservation, 36 CFR part 800, as modified and supplemented by the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Appendix B to Part 1 of this Chapter, and the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, Appendix C to Part 1 of this Chapter.

* * * * *

■ 3. Appendix B to Part 1 is added to read as follows:

Appendix B to Part 1—Nationwide Programmatic Agreement for the Collocation of Wireless Antennas

Nationwide Programmatic Agreement for the Collocation of Wireless Antennas

Executed by the Federal Communications Commission, the National Conference of State Historic Preservation Officers and the Advisory Council on Historic Preservation

Whereas, the Federal Communications Commission (FCC) establishes rules and procedures for the licensing of wireless communications facilities in the United States and its Possessions and Territories; and,

Whereas, the FCC has largely deregulated the review of applications for the construction of individual wireless communications facilities and, under this framework, applicants are required to prepare an Environmental Assessment (EA) in cases where the applicant determines that the proposed facility falls within one of certain environmental categories described in the FCC's rules (47 CFR 1.1307), including situations which may affect historical sites listed or eligible for listing in the National Register of Historic Places (''National Register''); and,

Whereas, Section 106 of the National Historic Preservation Act (16 U.S.C. 470 *et seq.*) (''the Act'') requires federal agencies to take into account the effects of their undertakings on historic properties and to afford the Advisory Council on Historic Preservation (Council) a reasonable opportunity to comment; and,

Whereas, Section 800.14(b) of the Council's regulations, ''Protection of Historic Properties'' (36 CFR 800.14(b)), allows for programmatic agreements to streamline and tailor the Section 106 review process to particular federal programs; and,

Whereas, in August 2000, the Council established a Telecommunications Working Group to provide a forum for the FCC, Industry representatives, State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs), and the Council to discuss improved coordination of Section 106 compliance regarding wireless communications projects affecting historic properties; and,

Whereas, the FCC, the Council and the Working Group have developed this Collocation Programmatic Agreement in accordance with 36 CFR 800.14(b) to address the Section 106 review process as it applies to the collocation of antennas (collocation being defined in Stipulation I.A below); and,

Whereas, the FCC encourages collocation of antennas where technically and economically feasible, in order to reduce the need for new tower construction; and,

Whereas, the parties hereto agree that the effects on historic properties of collocations of antennas on towers, buildings and structures are likely to be minimal and not adverse, and that in the cases where an adverse effect might occur, the procedures provided and referred to herein are proper and sufficient, consistent with Section 106, to assure that the FCC will take such effects into account; and

Whereas, the execution of this Nationwide Collocation Programmatic Agreement will streamline the Section 106 review of collocation proposals and thereby reduce the need for the construction of new towers, thereby reducing potential effects on historic properties that would otherwise result from the construction of those unnecessary new towers; and,

Whereas, the FCC and the Council have agreed that these measures should be incorporated into a Nationwide Programmatic Agreement to better manage the Section 106 consultation process and streamline reviews for collocation of antennas; and,

Whereas, since collocations reduce both the need for new tower construction and the potential for adverse effects on historic properties, the parties hereto agree that the terms of this Agreement should be interpreted and implemented wherever possible in ways that encourage collocation; and

Whereas, the parties hereto agree that the procedures described in this Agreement are, with regard to collocations as defined herein, a proper substitute for the FCC's compliance with the Council's rules, in accordance and consistent with Section 106 of the National Historic Preservation Act and its implementing regulations found at 36 CFR part 800; and

Whereas, the FCC has consulted with the National Conference of State Historic Preservation Officers (NCSHPO) and requested the President of NCSHPO to sign this Nationwide Collocation Programmatic Agreement in accordance with 36 CFR Section 800.14(b)(2)(iii); and,

Whereas, the FCC sought comment from Indian tribes and Native Hawaiian Organizations regarding the terms of this Nationwide Programmatic Agreement by letters of January 11, 2001 and February 8, 2001; and,

Whereas, the terms of this Programmatic Agreement do not apply on ''tribal lands'' as defined under Section 800.16(x) of the Council's regulations, 36 CFR 800.16(x) (''Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.''); and,

Whereas, the terms of this Programmatic Agreement do not preclude Indian tribes or Native Hawaiian Organizations from consulting directly with the FCC or its licensees, tower companies and applicants for antenna licenses when collocation activities off tribal lands may affect historic properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations; and,

Whereas, the execution and implementation of this Nationwide Collocation Programmatic Agreement will not preclude members of the public from filing complaints with the FCC or the Council regarding adverse effects on historic properties from any existing tower or any activity covered under the terms of this Programmatic Agreement.

Now therefore, the FCC, the Council, and NCSHPO agree that the FCC will meet its Section 106 compliance responsibilities for the collocation of antennas as follows.

Stipulations

The FCC, in coordination with licensees, tower companies and applicants for antenna licenses, will ensure that the following measures are carried out.

I. Definitions

For purposes of this Nationwide Programmatic Agreement, the following definitions apply.

A. ''Collocation'' means the mounting or installation of an antenna on an existing

tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.

B. ''Tower'' is any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities.

C.''Substantial increase in the size of the tower'' means:

(1) The mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or

(2) The mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or

(3) The mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or

(4) The mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

II. Applicability

A. This Nationwide Collocation Programmatic Agreement applies only to the collocation of antennas as defined in Stipulation I.A, above.

B. This Nationwide Collocation Programmatic Agreement does not cover any Section 106 responsibilities that federal agencies other than the FCC may have with regard to the collocation of antennas.

III. Collocation of Antennas on Towers Constructed on or Before March 16, 2001

A. An antenna may be mounted on an existing tower constructed on or before March 16, 2001 without such collocation being reviewed under the consultation process set forth under Subpart B of 36 CFR Part 800, unless:

1. The mounting of the antenna will result in a substantial increase in the size of the tower as defined in Stipulation I.C, above; or

2. The tower has been determined by the FCC to have an effect on one or more historic properties, unless such effect has been found to be not adverse through a no adverse effect finding, or if found to be adverse or potentially adverse, has been resolved, such as through a conditional no adverse effect determination, a Memorandum of Agreement, a programmatic agreement, or otherwise in compliance with Section 106 and Subpart B of 36 CFR Part 800; or

3. The tower is the subject of a pending environmental review or related proceeding before the FCC involving compliance with Section 106 of the National Historic Preservation Act; or

4. The collocation licensee or the owner of the tower has received written or electronic notification that the FCC is in receipt of a complaint from a member of the public, a SHPO or the Council, that the collocation has an adverse effect on one or more historic properties. Any such complaint must be in writing and supported by substantial evidence describing how the effect from the collocation is adverse to the attributes that qualify any affected historic property for eligibility or potential eligibility for the National Register.

IV. Collocation of Antennas on Towers Constructed After March 16, 2001

A. An antenna may be mounted on an existing tower constructed after March 16, 2001 without such collocation being reviewed under the consultation process set forth under Subpart B of 36 CFR Part 800, unless:

1. The Section 106 review process for the tower set forth in 36 CFR Part 800 and any associated environmental reviews required by the FCC have not been completed; or

2. The mounting of the new antenna will result in a substantial increase in the size of the tower as defined in Stipulation I.C, above; or

3. The tower as built or proposed has been determined by the FCC to have an effect on one or more historic properties, unless such effect has been found to be not adverse through a no adverse effect finding, or if found to be adverse or potentially adverse, has been resolved, such as through a conditional no adverse effect determination, a Memorandum of Agreement, a programmatic agreement, or otherwise in compliance with Section 106 and Subpart B of 36 CFR Part 800; or

4. The collocation licensee or the owner of the tower has received written or electronic notification that the FCC is in receipt of a complaint from a member of the public, a SHPO or the Council, that the collocation has an adverse effect on one or more historic properties. Any such complaint must be in writing and supported by substantial evidence describing how the effect from the collocation is adverse to the attributes that qualify any affected historic property for eligibility or potential eligibility for the National Register.

V. Collocation of Antennas on Buildings and Non-Tower Structures Outside of Historic Districts

A. An antenna may be mounted on a building or non-tower structure without such collocation being reviewed under the consultation process set forth under Subpart B of 36 CFR Part 800, unless:

1. The building or structure is over 45 years old;[1] or

2. The building or structure is inside the boundary of a historic district, or if the antenna is visible from the ground level of the historic district, the building or structure is within 250 feet of the boundary of the historic district; or

3. The building or non-tower structure is a designated National Historic Landmark, or listed in or eligible for listing in the National Register of Historic Places based upon the review of the licensee, tower company or applicant for an antenna license; or

4. The collocation licensee or the owner of the tower has received written or electronic notification that the FCC is in receipt of a complaint from a member of the public, a SHPO or the Council, that the collocation has an adverse effect on one or more historic properties. Any such complaint must be in writing and supported by substantial evidence describing how the effect from the collocation is adverse to the attributes that qualify any affected historic property for eligibility or potential eligibility for the National Register.

B. Subsequent to the collocation of an antenna, should the SHPO/THPO or Council determine that the collocation of the antenna or its associated equipment installed under the terms of Stipulation V has resulted in an adverse effect on historic properties, the SHPO/THPO or Council may notify the FCC accordingly. The FCC shall comply with the requirements of Section 106 and 36 CFR Part 800 for this particular collocation.

VI. Reservation of Rights

Neither execution of this Agreement, nor implementation of or compliance with any term herein shall operate in any way as a waiver by any party hereto, or by any person or entity complying herewith or affected hereby, of a right to assert in any court of law any claim, argument or defense regarding the validity or interpretation of any provision of the National Historic Preservation Act (16 U.S.C. 470 *et seq.*) or its implementing regulations contained in 36 CFR Part 800.

VII. Monitoring

A. FCC licensees shall retain records of the placement of all licensed antennas, including collocations subject to this Nationwide Programmatic Agreement, consistent with FCC rules and procedures.

B. The Council will forward to the FCC and the relevant SHPO any written objections it receives from members of the public regarding a collocation activity or general compliance with the provisions of this Nationwide Programmatic Agreement within thirty (30) days following receipt of the written objection. The FCC will forward a copy of the written objection to the appropriate licensee or tower owner.

VIII. Amendments

If any signatory to this Nationwide Collocation Programmatic Agreement believes that this Agreement should be amended, that signatory may at any time propose amendments, whereupon the

[1] Suitable methods for determining the age of a building include, but are not limited to: (1) obtaining the opinon of a consultant who meets the Secretary of Interior's Professional Qualifications Standards (36 CFR Part 61) or (2) consulting public records.

signatories will consult to consider the amendments. This agreement may be amended only upon the written concurrence of the signatories.

IX. Termination

A. If the FCC determines that it cannot implement the terms of this Nationwide Collocation Programmatic Agreement, or if the FCC, NCSHPO or the Council determines that the Programmatic Agreement is not being properly implemented by the parties to this Programmatic Agreement, the FCC, NCSHPO or the Council may propose to the other signatories that the Programmatic Agreement be terminated.

B. The party proposing to terminate the Programmatic Agreement shall notify the other signatories in writing, explaining the reasons for the proposed termination and the particulars of the asserted improper implementation. Such party also shall afford the other signatories a reasonable period of time of no less than thirty (30) days to consult and remedy the problems resulting in improper implementation. Upon receipt of such notice, the parties shall consult with each other and notify and consult with other entities that are either involved in such implementation or that would be substantially affected by termination of this Agreement, and seek alternatives to termination. Should the consultation fail to produce within the original remedy period or any extension, a reasonable alternative to termination, a resolution of the stated problems, or convincing evidence of substantial implementation of this Agreement in accordance with its terms , this Programmatic Agreement shall be terminated thirty days after notice of termination is served on all parties and published in the **Federal Register**.

C. In the event that the Programmatic Agreement is terminated, the FCC shall advise its licensees and tower construction companies of the termination and of the need to comply with any applicable Section 106 requirements on a case-by-case basis for collocation activities.

X. Annual Meeting of the Signatories

The signatories to this Nationwide Collocation Programmatic Agreement will meet on or about September 10, 2001, and on or about September 10 in each subsequent year, to discuss the effectiveness of this Agreement, including any issues related to improper implementation, and to discuss any potential amendments that would improve the effectiveness of this Agreement.

XI. Duration of the Programmatic Agreement

This Programmatic Agreement for collocation shall remain in force unless the Programmatic Agreement is terminated or superseded by a comprehensive Programmatic Agreement for wireless communications antennas.

Execution of this Nationwide Programmatic Agreement by the FCC, NCSHPO and the Council, and implementation of its terms, evidence that the FCC has afforded the Council an opportunity to comment on the collocation as described herein of antennas covered under the FCC's rules, and that the FCC has taken into account the effects of these collocations on historic properties in accordance with Section 106 of the National Historic Preservation Act and its implementing regulations, 36 CFR Part 800.

Federal Communications Commission

_____

Date: _____

Advisory Council on Historic Preservation

_____

Date: _____

National Conference of State Historic Preservation Officers

_____

Date: _____

■ 4. Appendix C to Part 1 is added to read as follows:

Appendix C to Part 1—Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process

Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission

Executed by the Federal Communications Commission, the National Conference of State Historic Preservation Officers and the Advisory Council on Historic Preservation

September 2004

Introduction

Whereas, Section 106 of the National Historic Preservation Act of 1966, as amended (''NHPA'') (codified at 16 U.S.C. 470f), requires federal agencies to take into account the effects of certain of their Undertakings on Historic Properties (see Section II, below), included in or eligible for inclusion in the National Register of Historic Places (''National Register''), and to afford the Advisory Council on Historic Preservation (''Council'') a reasonable opportunity to comment with regard to such Undertakings; and

Whereas, under the authority granted by Congress in the Communications Act of 1934, as amended (47 U.S.C. 151 *et seq.*), the Federal Communications Commission (''Commission'') establishes rules and procedures for the licensing of non-federal government communications services, and the registration of certain antenna structures in the United States and its Possessions and Territories; and

Whereas, Congress and the Commission have deregulated or streamlined the application process regarding the construction of individual Facilities in many of the Commission's licensed services; and

Whereas, under the framework established in the Commission's environmental rules, 47 CFR 1.1301–1.1319, Commission licensees and applicants for authorizations and antenna structure registrations are required to prepare, and the Commission is required to independently review and approve, a pre-construction Environmental Assessment (''EA'') in cases where a proposed tower or antenna may significantly affect the environment, including situations where a proposed tower or antenna may affect Historic Properties that are either listed in or eligible for listing in the National Register, including properties of religious and cultural importance to an Indian tribe or Native Hawaiian organization (''NHO'') that meet the National Register criteria; and

Whereas, the Council has adopted rules implementing Section 106 of the NHPA (codified at 36 CFR Part 800) and setting forth the process, called the ''Section 106 process,'' for complying with the NHPA; and

Whereas, pursuant to the Commission's rules and the terms of this Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (''Nationwide Agreement''), Applicants (*see* Section II.A.2) have been authorized, consistent with the terms of the memorandum from the Council to the Commission, titled ''Delegation of Authority for the Section 106 Review of Telecommunications Projects,'' dated September 21, 2000, to initiate, coordinate, and assist the Commission with compliance with many aspects of the Section 106 review process for their Facilities; and

Whereas, in August 2000, the Council established a Telecommunications Working Group (the ''Working Group'') to provide a forum for the Commission, the Council, the National Conference of State Historic Preservation Officers (''Conference''), individual State Historic Preservation Officers (''SHPOs''), Tribal Historic Preservation Officers (''THPOs''), other tribal representatives, communications industry representatives, and other interested members of the public to discuss improved Section 106 compliance and to develop methods of streamlining the Section 106 review process; and

Whereas, Section 214 of the NHPA (16 U.S.C. 470v) authorizes the Council to promulgate regulations implementing exclusions from Section 106 review, and Section 800.14(b) of the Council's regulations (36 CFR 800.14(b)) allows for programmatic agreements to streamline and tailor the Section 106 review process to particular federal programs, if they are consistent with the Council's regulations; and

Whereas, the Commission, the Council, and the Conference executed on March 16, 2001, the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (the ''Collocation Agreement''), in order to streamline review for the collocation of antennas on existing towers and other structures and thereby reduce the need for the construction of new towers (Attachment 1 to this Nationwide Agreement); and

Whereas, the Council, the Conference, and the Commission now agree it is desirable to further streamline and tailor the Section 106 review process for Facilities that are not excluded from Section 106 review under the Collocation Agreement while protecting Historic Properties that are either listed in or eligible for listing in the National Register; and

Whereas, the Working Group agrees that a nationwide programmatic agreement is a desirable and effective way to further streamline and tailor the Section 106 review process as it applies to Facilities; and

Whereas, this Nationwide Agreement will, upon its execution by the Council, the Conference, and the Commission, constitute a substitute for the Council's rules with respect to certain Commission Undertakings; and

Whereas, the Commission sought public comment on a draft of this Nationwide Agreement through a Notice of Proposed Rulemaking released on June 9, 2003;

Whereas, the Commission has actively sought and received participation and comment from Indian tribes and NHOs regarding this Nationwide Agreement; and

Whereas, the Commission has consulted with federally recognized Indian tribes regarding this Nationwide Agreement (*see* Report and Order, FCC 04–222, at ¶ 31); and

Whereas, this Nationwide Agreement provides for appropriate public notification and participation in connection with the Section 106 process; and

Whereas, Section 101(d)(6) of the NHPA provides that federal agencies ''shall consult with any Indian tribe or Native Hawaiian organization'' that attaches religious and cultural significance to properties of traditional religious and cultural importance that may be determined to be eligible for inclusion in the National Register and that might be affected by a federal undertaking (16 U.S.C. 470a(d)(6)); and

Whereas, the Commission has adopted a ''Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes'' dated June 23, 2000, pursuant to which the Commission: recognizes the unique legal relationship that exists between the federal government and Indian tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions; affirms the federal trust relationship with Indian tribes, and recognizes that this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian tribes; commits to working with Indian tribes on a government-to-government basis consistent with the principles of tribal self-governance; commits, in accordance with the federal government's trust responsibility, and to the extent practicable, to consult with tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect tribal governments, their land and resources; strives to develop working relationships with tribal governments, and will endeavor to identify innovative mechanisms to facilitate tribal consultations in the Commission's regulatory processes; and endeavors to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian tribes; and

Whereas, the Commission does not delegate under this Programmatic Agreement any portion of its responsibilities to Indian tribes and NHOs, including its obligation to consult under Section 101(d)(6) of the NHPA; and

Whereas, the terms of this Nationwide Agreement are consistent with and do not attempt to abrogate the rights of Indian tribes or NHOs to consult directly with the Commission regarding the construction of Facilities; and

Whereas, the execution and implementation of this Nationwide Agreement will not preclude Indian tribes or NHOs, SHPO/THPOs, local governments, or members of the public from filing complaints with the Commission or the Council regarding effects on Historic Properties from any Facility or any activity covered under the terms of the Nationwide Agreement; and

Whereas, Indian tribes and NHOs may request Council involvement in Section 106 cases that present issues of concern to Indian tribes or NHOs (*see* 36 CFR Part 800, Appendix A, Section (c)(4)); and

Whereas, the Commission, after consulting with federally recognized Indian tribes, has developed an electronic Tower Construction Notification System through which Indian tribes and NHOs may voluntarily identify the geographic areas in which Historic Properties to which they attach religious and cultural significance may be located, Applicants may ascertain which participating Indian tribes and NHOs have identified such an interest in the geographic area in which they propose to construct Facilities, and Applicants may voluntarily provide electronic notification of proposed Facilities construction for the Commission to forward to participating Indian tribes, NHOs, and SHPOs/THPOs; and

Whereas, the Council, the Conference and the Commission recognize that Applicants' use of qualified professionals experienced with the NHPA and Section 106 can streamline the review process and minimize potential delays; and

Whereas, the Commission has created a position and hired a cultural resources professional to assist with the Section 106 process; and

Whereas, upon execution of this Nationwide Agreement, the Council may still provide advisory comments to the Commission regarding the coordination of Section 106 reviews; notify the Commission of concerns raised by consulting parties and the public regarding an Undertaking; and participate in the resolution of adverse effects for complex, controversial, or other non-routine projects;

Now Therefore, in consideration of the above provisions and of the covenants and agreements contained herein, the Council, the Conference and the Commission (the ''Parties'') agree as follows:

I. Applicability and Scope of This Nationwide Agreement

A. This Nationwide Agreement (1) Excludes from Section 106 review certain Undertakings involving the construction and modification of Facilities, and (2) streamlines and tailors the Section 106 review process for other Undertakings involving the construction and modification of Facilities. An illustrative list of Commission activities in relation to which Undertakings covered by this Agreement may occur is provided as Attachment 2 to this Agreement.

B. This Nationwide Agreement applies only to federal Undertakings as determined by the Commission (''Undertakings''). The Commission has sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA. Nothing in this Agreement shall preclude the Commission from revisiting or affect the existing ability of any person to challenge any prior determination of what does or does not constitute an Undertaking. Maintenance and servicing of Towers, Antennas, and associated equipment are not deemed to be Undertakings subject to Section 106 review.

C. This Agreement does not apply to Antenna Collocations that are exempt from Section 106 review under the Collocation Agreement (*see* Attachment 1). Pursuant to the terms of the Collocation Agreement, such Collocations shall not be subject to the Section 106 review process and shall not be submitted to the SHPO/THPO for review. This Agreement does apply to collocations that are not exempt from Section 106 review under the Collocation Agreement.

D. This Agreement does not apply on ''tribal lands'' as defined under Section 800.16(x) of the Council's regulations, 36 CFR § 800.16(x) (''Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.''). This Nationwide Agreement, however, will apply on tribal lands should a tribe, pursuant to appropriate tribal procedures and upon reasonable notice to the Council, Commission, and appropriate SHPO/THPO, elect to adopt the provisions of this Nationwide Agreement. Where a tribe that has assumed SHPO functions pursuant to Section 101(d)(2) of the NHPA (16 U.S.C. 470(d)(2)) has agreed to application of this Nationwide Agreement on tribal lands, the term SHPO/THPO denotes the Tribal Historic Preservation Officer with respect to review of proposed Undertakings on those tribal lands. Where a tribe that has not assumed SHPO functions has agreed to application of this Nationwide Agreement on tribal lands, the tribe may notify the Commission of the tribe's intention to perform the duties of a SHPO/THPO, as defined in this Nationwide Agreement, for proposed Undertakings on its tribal lands, and in such instances the term SHPO/THPO denotes both the State Historic Preservation Officer and the tribe's authorized representative. In all other instances, the term SHPO/THPO denotes the State Historic Preservation Officer.

E. This Nationwide Agreement governs only review of Undertakings under Section 106 of the NHPA. Applicants completing the Section 106 review process under the terms of this Nationwide Agreement may not initiate construction without completing any environmental review that is otherwise required for effects other than historic preservation under the Commission's rules (*See* 47 CFR 1.1301–1.1319). Completion of the Section 106 review process under this Nationwide Agreement satisfies an Applicant's obligations under the Commission's rules with respect to Historic Properties, except for Undertakings that have been determined to have an adverse effect on Historic Properties and that therefore require preparation and filing of an Environmental Assessment (*See* 47 CFR 1.1307(a)(4)).

F. This Nationwide Agreement does not govern any Section 106 responsibilities that

agencies other than the Commission may have with respect to those agencies' federal Undertakings.

II. Definitions

A. The following terms are used in this Nationwide Agreement as defined below:

1. Antenna. An apparatus designed for the purpose of emitting radio frequency (''RF'') radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a Tower, structure, or building as part of the original installation of the antenna. For most services, an Antenna will be mounted on or in, and is distinct from, a supporting structure such as a Tower, structure or building. However, in the case of AM broadcast stations, the entire Tower or group of Towers constitutes the Antenna for that station. For purposes of this Nationwide Agreement, the term Antenna does not include unintentional radiators, mobile stations, or devices authorized under Part 15 of the Commission's rules.

2. Applicant. A Commission licensee, permittee, or registration holder, or an applicant or prospective applicant for a wireless or broadcast license, authorization or antenna structure registration, and the duly authorized agents, employees, and contractors of any such person or entity.

3. Area of Potential Effects (''APE''). The geographic area or areas within which an Undertaking may directly or indirectly cause alterations in the character or use of Historic Properties, if any such properties exist.

4. Collocation. The mounting or installation of an Antenna on an existing Tower, building, or structure for the purpose of transmitting radio frequency signals for telecommunications or broadcast purposes.

5. Effect. An alteration to the characteristics of a Historic Property qualifying it for inclusion in or eligibility for the National Register.

6. Experimental Authorization. An authorization issued to conduct experimentation utilizing radio waves for gathering scientific or technical operation data directed toward the improvement or extension of an established service and not intended for reception and use by the general public. ''Experimental Authorization'' does not include an ''Experimental Broadcast Station'' authorized under Part 74 of the Commission's rules.

7. Facility. A Tower or an Antenna. The term Facility may also refer to a Tower and its associated Antenna(s).

8. Field Survey. A research strategy that utilizes one or more visits to the area where construction is proposed as a means of identifying Historic Properties.

9. Historic Property. Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or NHO that meet the National Register criteria.

10. National Register. The National Register of Historic Places, maintained by the Secretary of the Interior's office of the Keeper of the National Register.

11. SHPO/THPO Inventory. A set of records of previously gathered information, authorized by state or tribal law, on the absence, presence and significance of historic and archaeological resources within the state or tribal land.

12. Special Temporary Authorization. Authorization granted to a permittee or licensee to allow the operation of a station for a limited period at a specified variance from the terms of the station's permanent authorization or requirements of the Commission's rules applicable to the particular class or type of station.

13. Submission Packet. The document to be submitted initially to the SHPO/THPO to facilitate review of the Applicant's findings and any determinations with regard to the potential impact of the proposed Undertaking on Historic Properties in the APE. There are two Submission Packets: (a) The New Tower Submission Packet (FCC Form 620) (*See* Attachment 3) and (b) The Collocation Submission Packet (FCC Form 621) (*See* Attachment 4). Any documents required to be submitted along with a Form are part of the Submission Packet.

14. Tower. Any structure built for the sole or primary purpose of supporting Commission-licensed or authorized Antennas, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that Tower but not installed as part of an Antenna as defined herein.

B. All other terms not defined above or elsewhere in this Nationwide Agreement shall have the same meaning as set forth in the Council's rules section on Definitions (36 CFR 800.16) or the Commission's rules (47 CFR Chapter I).

C. For the calculation of time periods under this Agreement, ''days'' mean ''calendar days.'' Any time period specified in the Agreement that ends on a weekend or a Federal or State holiday is extended until the close of the following business day.

D. Written communications include communications by e-mail or facsimile.

III. Undertakings Excluded From Section 106 Review

Undertakings that fall within the provisions listed in the following sections III.A. through III.F. are excluded from Section 106 review by the SHPO/THPO, the Commission, and the Council, and, accordingly, shall not be submitted to the SHPO/THPO for review. The determination that an exclusion applies to an Undertaking should be made by an authorized individual within the Applicant's organization, and Applicants should retain documentation of their determination that an exclusion applies. Concerns regarding the application of these exclusions from Section 106 review may be presented to and considered by the Commission pursuant to Section XI.

A. Enhancement of a tower and any associated excavation that does not involve a collocation and does not substantially increase the size of the existing tower, as defined in the Collocation Agreement. For towers constructed after March 16, 2001, this exclusion applies only if the tower has completed the Section 106 review process and any associated environmental reviews required by the Commission.

B. Construction of a replacement for an existing communications tower and any associated excavation that does not substantially increase the size of the existing tower under elements 1–3 of the definition as defined in the Collocation Agreement (*see* Attachment 1 to this Agreement, Stipulation 1.c.1–3) and that does not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction or involve excavation outside these expanded boundaries or outside any existing access or utility easement related to the site. For towers constructed after March 16, 2001, this exclusion applies only if the tower has completed the Section 106 review process and any associated environmental reviews required by the Commission's rules.

C. Construction of any temporary communications Tower, Antenna structure, or related Facility that involves no excavation or where all areas to be excavated will be located in areas described in Section VI.D.2.c.i below, including but not limited to the following:

1. A Tower or Antenna authorized by the Commission for a temporary period, such as any Facility authorized by a Commission grant of Special Temporary Authority (''STA'') or emergency authorization;

2. A cell on wheels (COW) transmission Facility;

3. A broadcast auxiliary services truck, TV pickup station, remote pickup broadcast station (*e.g.*, electronic newsgathering vehicle) authorized under Part 74 or temporary fixed or transportable earth station in the fixed satellite service (*e.g.*, satellite newsgathering vehicle) authorized under Part 25;

4. A temporary ballast mount Tower;

5. Any Facility authorized by a Commission grant of an experimental authorization.

For purposes of this Section III.C, the term ''temporary'' means ''for no more than twenty-four months duration except in the case of those Facilities associated with national security.''

D. Construction of a Facility less than 200 feet in overall height above ground level in an existing industrial park,[1] commercial strip mall,[2] or shopping center[3] that occupies a

[1] A tract of land that is planned, developed, and operated as an integrated facility for a number of individual industrial uses, with consideration to transportation facilities, circulation, parking, utility needs, aesthetics and compatibility.

[2] A structure or grouping of structures, housing retail business, set back far enough from the street to permit parking spaces to be placed between the building entrances and the public right of way.

[3] A group of commercial establishments planned, constructed, and managed as a total entity, with customer and employee parking provided on-site,

total land area of 100,000 square feet or more, provided that the industrial park, strip mall, or shopping center is not located within the boundaries of or within 500 feet of a Historic Property, as identified by the Applicant after a preliminary search of relevant records. Proposed Facilities within this exclusion must complete the process of participation of Indian tribes and NHOs pursuant to Section IV of this Agreement. If as a result of this process the Applicant or the Commission identifies a Historic Property that may be affected, the Applicant must complete the Section 106 review process pursuant to this Agreement notwithstanding the exclusion.

E. Construction of a Facility in or within 50 feet of the outer boundary of a right-of-way designated by a Federal, State, local, or Tribal government for the location of communications Towers or above-ground utility transmission or distribution lines and associated structures and equipment and in active use for such purposes, provided:

1. The proposed Facility would not constitute a substantial increase in size, under elements 1–3 of the definition in the Collocation Agreement, over existing structures located in the right-of-way within the vicinity of the proposed Facility, and;

2. The proposed Facility would not be located within the boundaries of a Historic Property, as identified by the Applicant after a preliminary search of relevant records.

Proposed Facilities within this exclusion must complete the process of participation of Indian tribes and NHOs pursuant to Section IV of this Agreement. If as a result of this process the Applicant or the Commission identifies a Historic Property that may be affected, the Applicant must complete the Section 106 review process pursuant to this Agreement notwithstanding the exclusion.

F. Construction of a Facility in any area previously designated by the SHPO/THPO at its discretion, following consultation with appropriate Indian tribes and NHOs, as having limited potential to affect Historic Properties. Such designation shall be documented by the SHPO/THPO and made available for public review.

IV. Participation of Indian Tribes and Native Hawaiian Organizations in Undertakings Off Tribal Lands

A. The Commission recognizes its responsibility to carry out consultation with any Indian tribe or NHO that attaches religious and cultural significance to a Historic Property if the property may be affected by a Commission undertaking. This responsibility is founded in Sections 101(d)(6)(a–b) and 106 of the NHPA (16 U.S.C. 470a(d)(6)(a–b) and 470f), the regulations of the Council (36 CFR Part 800), the Commission's environmental regulations (47 CFR 1.1301–1.1319), and the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions. This historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes. (Commission Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes).

B. As an initial step to enable the Commission to fulfill its duty of consultation, Applicants shall use reasonable and good faith efforts to identify any Indian tribe or NHO that may attach religious and cultural significance to Historic Properties that may be affected by an Undertaking. Applicants should be aware that frequently, Historic Properties of religious and cultural significance to Indian tribes and NHOs are located on ancestral, aboriginal, or ceded lands of such tribes and organizations and Applicants should take this into account when complying with their responsibilities. Where an Indian tribe or NHO has voluntarily provided information to the Commission's Tower Construction Notification System regarding the geographic areas in which Historic Properties of religious and cultural significance to that Indian tribe or NHO may be located, reference to the Tower Construction Notification System shall constitute a reasonable and good faith effort at identification with respect to that Indian tribe or NHO. In addition, such reasonable and good faith efforts may include, but are not limited to, seeking relevant information from the relevant SHPO/THPO, Indian tribes, state agencies, the U.S. Bureau of Indian Affairs (''BIA''), or, where applicable, any federal agency with land holdings within the state (*e.g.*, the U.S. Bureau of Land Management). Although these agencies can provide useful information in identifying potentially affected Indian tribes, contacting BIA, the SHPO or other federal and state agencies is not a substitute for seeking information directly from Indian tribes that may attach religious and cultural significance to a potentially affected Historic Property, as described below.

C. After the Applicant has identified Indian tribes and NHOs that may attach religious and cultural significance to potentially affected Historic Properties, the Commission has the responsibility, and the Commission imposes on the Applicant the obligation, to ensure that contact is made at an early stage in the planning process with such Indian tribes and NHOs in order to begin the process of ascertaining whether such Historic Properties may be affected. This initial contact shall be made by the Commission or the Applicant, in accordance with the wishes of the Indian tribe or NHO. This contact shall constitute only an initial effort to contact the Indian tribe or NHO, and does not in itself fully satisfy the Applicant's obligations or substitute for government-to-government consultation unless the Indian tribe or NHO affirmatively disclaims further interest or the Indian tribe or NHO has otherwise agreed that such contact is sufficient. Depending on the preference of the Indian tribe or NHO, the means of initial contact may include, without limitation:

1. Electronic notification through the Commission's Tower Construction Notification System;

2. Written communication from the Commission at the request of the Applicant;

3. Written, e-mail, or telephonic notification directly from the Applicant to the Indian tribe or NHO;

4. Any other means that the Indian Tribe or NHO has informed the Commission are acceptable, including through the adoption of best practices pursuant to Section IV.J, below; or

5. Any other means to which an Indian tribe or NHO and an Applicant have agreed pursuant to Section IV.K, below.

D. The Commission will use its best efforts to ascertain the preferences of each Indian tribe and NHO for initial contact, and to make these preferences available to Applicants in a readily accessible format. In addition, the Commission will use its best efforts to ascertain, and to make available to Applicants, any locations or types of construction projects, within the broad geographic areas in which Historic Properties of religious and cultural significance to an Indian tribe or NHO may be located, for which the Indian tribe or NHO does not expect notification. To the extent they are comfortable doing so, the Commission encourages Indian tribes and NHOs to accept the Tower Construction Notification System as an efficient and thorough means of making initial contact.

E. In the absence of any contrary indication of an Indian tribe's or NHO's preference, where an Applicant does not have a pre-existing relationship with an Indian tribe or NHO, initial contact with the Indian tribe or NHO shall be made through the Commission. Unless the Indian tribe or NHO has indicated otherwise, the Commission may make this initial contact through the Tower Construction Notification System. An Applicant that has a pre-existing relationship with an Indian tribe or NHO shall make initial contact in the manner that is customary to that relationship or in such other manner as may be accepted by the Indian tribe or NHO. An Applicant shall copy the Commission on any initial written or electronic direct contact with an Indian tribe or NHO, unless the Indian tribe or NHO has agreed through a best practices agreement or otherwise that such copying is not necessary.

F. Applicants' direct contacts with Indian tribes and NHOs, where accepted by the Indian tribe or NHO, shall be made in a sensitive manner that is consistent with the reasonable wishes of the Indian tribe or NHO, where such wishes are known or can be reasonably ascertained. In general, unless an Indian tribe or NHO has provided guidance to the contrary, Applicants shall follow the following guidelines:

1. All communications with Indian tribes shall be respectful of tribal sovereignty;

2. Communications shall be directed to the appropriate representative designated or identified by the tribal government or other governing body;

3. Applicants shall provide all information reasonably necessary for the Indian tribe or NHO to evaluate whether Historic Properties of religious and cultural significance may be affected. The parties recognize that it may be neither feasible nor desirable to provide complete information about the project at the time of initial contact, particularly when

provision for goods delivery separated from customer access, aesthetic considerations and protection from the elements, and landscaping and signage in accordance with an approved plan.

initial contact is made early in the process. Unless the Indian tribe or NHO affirmatively disclaims interest, however, it shall be provided with complete information within the earliest reasonable time frame;

4. The Applicant must ensure that Indian tribes and NHOs have a reasonable opportunity to respond to all communications. Ordinarily, 30 days from the time the relevant tribal or NHO representative may reasonably be expected to have received an inquiry shall be considered a reasonable time. Should a tribe or NHO request additional time to respond, the Applicant shall afford additional time as reasonable under the circumstances. However, where initial contact is made automatically through the Tower Construction Notification System, and where an Indian tribe or NHO has stated that it is not interested in reviewing proposed construction of certain types or in certain locations, the Applicant need not await a response to contact regarding proposed construction meeting that description;

5. Applicants should not assume that failure to respond to a single communication establishes that an Indian tribe or NHO is not interested in participating, but should make a reasonable effort to follow up.

G. The purposes of communications between the Applicant and Indian tribes or NHOs are: (1) To ascertain whether Historic Properties of religious and cultural significance to the Indian tribe or NHO may be affected by the undertaking and consultation is therefore necessary, and (2) where possible, with the concurrence of the Indian tribe or NHO, to reach an agreement on the presence or absence of effects that may obviate the need for consultation. Accordingly, the Applicant shall promptly refer to the Commission any request from a federally recognized Indian tribe for government-to-government consultation. The Commission will then carry out government-to-government consultation with the Indian tribe. Applicants shall also seek guidance from the Commission in the event of any substantive or procedural disagreement with an Indian tribe or NHO, or if the Indian tribe or NHO does not respond to the Applicant's inquiries. Applicants are strongly advised to seek guidance from the Commission in cases of doubt.

H. If an Indian tribe or NHO indicates that a Historic Property of religious and cultural significance to it may be affected, the Applicant shall invite the commenting tribe or organization to become a consulting party. If the Indian tribe or NHO agrees to become a consulting party, it shall be afforded that status and shall be provided with all of the information, copies of submissions, and other prerogatives of a consulting party as provided for in 36 CFR 800.2.

I. Information regarding Historic Properties to which Indian tribes or NHOs attach religious and cultural significance may be highly confidential, private, and sensitive. If an Indian tribe or NHO requests confidentiality from the Applicant, the Applicant shall honor this request and shall, in turn, request confidential treatment of such materials or information in accordance with the Commission's rules and Section 304 of the NHPA (16 U.S.C. 470w–3(a)) in the event they are submitted to the Commission. The Commission shall provide such confidential treatment consistent with its rules and applicable federal laws. Although the Commission will strive to protect the privacy interests of all parties, the Commission cannot guarantee its own ability or the ability of Applicants to protect confidential, private, and sensitive information from disclosure under all circumstances.

J. In order to promote efficiency, minimize misunderstandings, and ensure that communications among the parties are made in accordance with each Indian tribe or NHO's reasonable preferences, the Commission will use its best efforts to arrive at agreements regarding best practices with Indian tribes and NHOs and their representatives. Such best practices may include means of making initial contacts with Indian tribes and NHOs as well as guidelines for subsequent discussions between Applicants and Indian tribes or NHOs in fulfillment of the requirements of the Section 106 process. To the extent possible, the Commission will strive to achieve consistency among best practice agreements with Indian tribes and NHOs. Where best practices exist, the Commission encourages Applicants to follow those best practices.

K. Nothing in this Section shall be construed to prohibit or limit Applicants and Indian tribes or NHOs from entering into or continuing pre-existing arrangements or agreements governing their contacts, provided such arrangements or agreements are otherwise consistent with federal law and no modification is made in the roles of other parties to the process under this Nationwide Agreement without their consent. Documentation of such alternative arrangements or agreements should be filed with the Commission.

V. Public Participation and Consulting Parties

A. On or before the date an Applicant submits the appropriate Submission Packet to the SHPO/THPO, as prescribed by Section VII, below, the Applicant shall provide the local government that has primary land use jurisdiction over the site of the planned Undertaking with written notification of the planned Undertaking.

B. On or before the date an Applicant submits the appropriate Submission Packet to the SHPO/THPO, as prescribed by Section VII, below, the Applicant shall provide written notice to the public of the planned Undertaking. Such notice may be accomplished (1) through the public notification provisions of the relevant local zoning or local historic preservation process for the proposed Facility; or (2) by publication in a local newspaper of general circulation. In the alternative, an Applicant may use other appropriate means of providing public notice, including seeking the assistance of the local government.

C. The written notice to the local government and to the public shall include: (1) The location of the proposed Facility including its street address; (2) a description of the proposed Facility including its height and type of structure; (3) instruction on how to submit comments regarding potential effects on Historic Properties; and (4) the name, address, and telephone number of a contact person.

D. A SHPO/THPO may make available lists of other groups, including Indian tribes, NHOs and organizations of Indian tribes or NHOs, which should be provided notice for Undertakings to be located in particular areas.

E. If the Applicant receives a comment regarding potentially affected Historic Properties, the Applicant shall consider the comment and either include it in the initial submission to the SHPO/THPO, or, if the initial submission has already been made, immediately forward the comment to the SHPO/THPO for review. An Applicant need not submit to the SHPO/THPO any comment that does not substantially relate to potentially affected Historic Properties.

F. The relevant SHPO/THPO, Indian tribes and NHOs that attach religious and cultural significance to Historic Properties that may be affected, and the local government are entitled to be consulting parties in the Section 106 review of an Undertaking. The Council may enter the Section 106 process for a given Undertaking, on Commission invitation or on its own decision, in accordance with 36 CFR Part 800, Appendix A. An Applicant shall consider all written requests of other individuals and organizations to participate as consulting parties and determine which should be consulting parties. An Applicant is encouraged to grant such status to individuals or organizations with a demonstrated legal or economic interest in the Undertaking, or demonstrated expertise or standing as a representative of local or public interest in historic or cultural resources preservation. Any such individual or organization denied consulting party status may petition the Commission for review of such denial. Applicants may seek assistance from the Commission in identifying and involving consulting parties. All entities granted consulting party status shall be identified to the SHPO/THPO as part of the Submission Packet.

G. Consulting parties are entitled to: (1) Receive notices, copies of submission packets, correspondence and other documents provided to the SHPO/THPO in a Section 106 review; and (2) be provided an opportunity to have their views expressed and taken into account by the Applicant, the SHPO/THPO and, where appropriate, by the Commission.

VI. Identification, Evaluation, and Assessment of Effects

A. In preparing the Submission Packet for the SHPO/THPO and consulting parties pursuant to Section VII of this Nationwide Agreement and Attachments 3 and 4, the Applicant shall: (1) Define the area of potential effects (APE); (2) identify Historic Properties within the APE; (3) evaluate the historic significance of identified properties as appropriate; and (4) assess the effects of the Undertaking on Historic Properties. The standards and procedures described below

shall be applied by the Applicant in preparing the Submission Packet, by the SHPO/THPO in reviewing the Submission Packet, and where appropriate, by the Commission in making findings.

B. Exclusion of Specific Geographic Areas from Review.

The SHPO/THPO, consistent with relevant State or tribal procedures, may specify geographic areas in which no review is required for direct effects on archeological resources or no review is required for visual effects.

C. Area of Potential Effects.

1. The term ''Area of Potential Effects'' is defined in Section II.A.3 of this Nationwide Agreement. For purposes of this Nationwide Agreement, the APE for direct effects and the APE for visual effects are further defined and are to be established as described below.

2. The APE for direct effects is limited to the area of potential ground disturbance and any property, or any portion thereof, that will be physically altered or destroyed by the Undertaking.

3. The APE for visual effects is the geographic area in which the Undertaking has the potential to introduce visual elements that diminish or alter the setting, including the landscape, where the setting is a character-defining feature of a Historic Property that makes it eligible for listing on the National Register.

4. Unless otherwise established through consultation with the SHPO/THPO, the presumed APE for visual effects for construction of new Facilities is the area from which the Tower will be visible:

a. Within a half mile from the tower site if the proposed Tower is 200 feet or less in overall height;

b. Within ¾ of a mile from the tower site if the proposed Tower is more than 200 but no more than 400 feet in overall height; or

c. Wthin 1 ½ miles from the proposed tower site if the proposed Tower is more than 400 feet in overall height.

5. In the event the Applicant determines, or the SHPO/THPO recommends, that an alternative APE for visual effects is necessary, the Applicant and the SHPO/THPO may mutually agree to an alternative APE.

6. If the Applicant and the SHPO/THPO, after using good faith efforts, cannot reach an agreement on the use of an alternative APE, either the Applicant or the SHPO/THPO may submit the issue to the Commission for resolution. The Commission shall make its determination concerning an alternative APE within a reasonable time.

D. Identification and Evaluation of Historic Properties.

1. Identification and Evaluation of Historic Properties Within the APE for Visual Effects.

a. Except to identify Historic Properties of religious and cultural significance to Indian tribes and NHOs, Applicants shall identify Historic Properties within the APE for visual effects by reviewing the following records. Applicants are required to review such records only to the extent they are available at the offices of the SHPO/THPO or can be found in publicly available sources identified by the SHPO/THPO. With respect to these properties, Applicants are not required to undertake a Field Survey or other measures other than reviewing these records in order to identify Historic Properties:

i. Properties listed in the National Register;

ii. Properties formally determined eligible for listing by the Keeper of the National Register;

iii. Properties that the SHPO/THPO certifies are in the process of being nominated to the National Register;

iv. Properties previously determined eligible as part of a consensus determination of eligibility between the SHPO/THPO and a Federal Agency or local government representing the Department of Housing and Urban Development (HUD); and

v. Properties listed in the SHPO/THPO Inventory that the SHPO/THPO has previously evaluated and found to meet the National Register criteria, and that are identified accordingly in the SHPO/THPO Inventory.

b. At an early stage in the planning process and in accordance with Section IV of this Nationwide Agreement, the Commission or the Applicant, as appropriate, shall gather information from Indian tribes or NHOs identified pursuant to Section IV.B to assist in identifying Historic Properties of religious and cultural significance to them within the APE for visual effects. Such information gathering may include a Field Survey where appropriate.

c. Based on the sources listed above and public comment received pursuant to Section V of this Nationwide Agreement, the Applicant shall include in its Submission Packet a list of properties it has identified as apparent Historic Properties within the APE for visual effects.

i. During the review period described in Section VII.A, the SHPO/THPO may identify additional properties included in the SHPO/THPO Inventory and located within the APE that the SHPO/THPO considers eligible for listing on the National Register, and notify the Applicant pursuant to Section VII.A.4.

ii. The SHPO/THPO may also advise the Applicant that previously identified properties on the list no longer qualify for inclusion in the National Register.

d. Applicants are encouraged at their discretion to use the services of professionals who meet the Secretary of the Interior's Professional Qualification Standards when identifying Historic Properties within the APE for visual effects.

e. Applicants are not required to evaluate the historic significance of properties identified pursuant to Section VI.D.1.a., but may rely on the previous evaluation of these properties. Applicants may, at their discretion, evaluate whether such properties are no longer eligible for inclusion in the National Register and recommend to the SHPO/THPO their removal from consideration. Any such evaluation shall be performed by a professional who meets the Secretary of the Interior's Professional Qualification Standards.

2. Identification and Evaluation of Historic Properties Within the APE for Direct Effects.

a. In addition to the properties identified pursuant to Section VI.D.1, Applicants shall make a reasonable good faith effort to identify other above ground and archeological Historic Properties, including buildings, structures, and historic districts, that lie within the APE for direct effects. Such reasonable and good faith efforts may include a Field Survey where appropriate.

b. Identification and evaluation of Historic Properties within the APE for direct effects, including any finding that an archeological Field Survey is not required, shall be undertaken by a professional who meets the Secretary of the Interior's Professional Qualification Standards. Identification and evaluation relating to archeological resources shall be performed by a professional who meets the Secretary of the Interior's Professional Qualification Standards in archeology.

c. Except as provided below, the Applicant need not undertake a Field Survey for archeological resources where:

i. the depth of previous disturbance exceeds the proposed construction depth (excluding footings and other anchoring mechanisms) by at least 2 feet as documented in the Applicant's siting analysis; or

ii. geomorphological evidence indicates that cultural resource-bearing soils do not occur within the project area or may occur but at depths that exceed 2 feet below the proposed construction depth.

d. At an early stage in the planning process and in accordance with Section IV of this Nationwide Agreement, the Commission or the Applicant, as appropriate, shall gather information from Indian tribes or NHOs identified pursuant to Section IV.B to assist in identifying archeological Historic Properties of religious and cultural significance to them within the APE for direct effects. If an Indian tribe or NHO provides evidence that supports a high probability of the presence of intact archeological Historic Properties within the APE for direct effects, the Applicant shall conduct an archeological Field Survey notwithstanding Section VI.D.2.c.

e. Where the Applicant pursuant to Sections VI.D.2.c and VI.D.2.d finds that no archeological Field Survey is necessary, it shall include in its Submission Packet a report substantiating this finding. During the review period described in Section VII.A, the SHPO/THPO may, based on evidence that supports a high probability of the presence of intact archeological Historic Properties within the APE for direct effects, notify the Applicant that the Submission Packet is inadequate without an archeological Field Survey pursuant to Section VII.A.4.

f. The Applicant shall conduct an archeological Field Survey within the APE for direct effects if neither of the conditions in Section VI.D.2.c applies, or if required pursuant to Section VI.D.2.d or e. The Field Survey shall be conducted in consul-tation with the SHPO/THPO and consulting Indian tribes or NHOs.

g. The Applicant, in consultation with the SHPO/THPO and appropriate Indian tribes or NHOs, shall apply the National Register criteria (36 CFR Part 63) to properties identified within the APE for direct effects that have not previously been evaluated for National Register eligibility, with the exception of those identified pursuant to Section VI.D.1.a.

3. Dispute Resolution. Where there is a disagreement regarding the identification or eligibility of a property, and after attempting in good faith to resolve the issue the Applicant and the SHPO/THPO continue to disagree, the Applicant or the SHPO/THPO may submit the issue to the Commission. The Commission shall handle such submissions in accordance with 36 CFR 800.4(c)(2).

E.Assessment of Effects

1. Applicants shall assess effects of the Undertaking on Historic Properties using the Criteria of Adverse Effect (36 CFR 800.5(a)(1)).

2. In determining whether Historic Properties in the APE may be adversely affected by the Undertaking, the Applicant should consider factors such as the topography, vegetation, known presence of Historic Properties, and existing land use.

3. An Undertaking will have a visual adverse effect on a Historic Property if the visual effect from the Facility will noticeably diminish the integrity of one or more of the characteristics qualifying the property for inclusion in or eligibility for the National Register. Construction of a Facility will not cause a visual adverse effect except where visual setting or visual elements are character-defining features of eligibility of a Historic Property located within the APE.

4. For collocations not excluded from review by the Collocation Agreement or this Agreement, the assessment of effects will consider only effects from the newly added or modified Facilities and not effects from the existing Tower or Antenna.

5. Assessment pursuant to this Agreement shall be performed by professionals who meet the Secretary of the Interior's Professional Qualification Standards.

VII. Procedures

A. Use of the Submission Packet

1. For each Undertaking within the scope of this Nationwide Agreement, the Applicant shall initially determine whether there are no Historic Properties affected, no adverse effect on Historic Properties, or an adverse effect on Historic Properties. The Applicant shall prepare a Submission Packet and submit it to the SHPO/THPO and to all consulting parties, including any Indian tribe or NHO that is participating as a consulting party.

2. The SHPO/THPO shall have 30 days from receipt of the requisite documentation to review the Submission Packet.

3. If the SHPO/THPO receives a comment or objection, in accordance with Section V.E, more than 25 but less than 31 days following its receipt of the initial submission, the SHPO/THPO shall have five calendar days to consider such comment or objection before the Section 106 process is complete or the matter may be submitted to the Commission.

4. If the SHPO/THPO determines the Applicant's Submission Packet is inadequate, or if the SHPO/THPO identifies additional Historic Properties within the APE, the SHPO/THPO will immediately notify the Applicant and describe any deficiencies. The SHPO/THPO may close its file without prejudice if the Applicant does not resubmit an amended Submission Packet within 60 days following the Applicant's receipt of the returned Submission Packet. Resubmission of the Submission Packet to the SHPO/THPO commences a new 30 day period for review.

B. Determinations of No Historic Properties Affected

1. If the SHPO/THPO concurs in writing with the Applicant's determination of no Historic Properties affected, it is deemed that no Historic Properties exist within the APE or the Undertaking will have no effect on any Historic Properties located within the APE. The Section 106 process is then complete, and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required.

2. If the SHPO/THPO does not provide written notice to the Applicant that it agrees or disagrees with the Applicant's determination of no Historic Properties affected within 30 days following receipt of a complete Submission Packet, it is deemed that no Historic Properties exist within the APE or the Undertaking will have no effect on Historic Properties. The Section 106 process is then complete and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required.

3. If the SHPO/THPO provides written notice within 30 days following receipt of the Submission Packet that it disagrees with the Applicant's determination of no Historic Properties affected, it should provide a short and concise explanation of exactly how the criteria of eligibility and/or criteria of Adverse Effect would apply. The Applicant and the SHPO/THPO should engage in further discussions and make a reasonable and good faith effort to resolve their disagreement.

4. If the SHPO/THPO and Applicant do not resolve their disagreement, the Applicant may at any time choose to submit the matter, together with all relevant documents, to the Commission, advising the SHPO/THPO accordingly.

C. Determinations of No Adverse Effect

1. If the SHPO/THPO concurs in writing with the Applicant's determination of no adverse effect, the Facility is deemed to have no adverse effect on Historic Properties. The Section 106 process is then complete and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required.

2. If the SHPO/THPO does not provide written notice to the Applicant that it agrees or disagrees with the Applicant's determination of no adverse effect within thirty days following its receipt of a complete Submission Packet, the SHPO/THPO is presumed to have concurred with the Applicant's determination. The Applicant shall, pursuant to procedures to be promulgated by the Commission, forward a copy of its Submission Packet to the Commission, together with all correspondence with the SHPO/THPO and any comments or objections received from the public, and advise the SHPO/THPO accordingly. The Section 106 process shall then be complete unless the Commission notifies the Applicant otherwise within 15 days after the Commission receives the Submission Packet and accompanying material electronically or 25 days after the Commission receives this material by other means.

3. If the SHPO/THPO provides written notice within 30 days following receipt of the Submission Packet that it disagrees with the Applicant's determination of no adverse effect, it should provide a short and concise explanation of the Historic Properties it believes to be affected and exactly how the criteria of Adverse Effect would apply. The Applicant and the SHPO/THPO should engage in further discussions and make a reasonable and good faith effort to resolve their disagreement.

4. If the SHPO/THPO and Applicant do not resolve their dispute, the Applicant may at any time choose to submit the matter, together with all relevant documents, to the Commission, advising the SHPO/THPO accordingly.

5. Whenever the Applicant or the Commission concludes, or a SHPO/THPO advises, that a proposed project will have an adverse effect on a Historic Property, after applying the criteria of Adverse Effect, the Applicant and the SHPO/THPO are encouraged to investigate measures that would avoid the adverse effect and permit a conditional ''No Adverse Effect'' determination.

6. If the Applicant and SHPO/THPO mutually agree upon conditions that will result in no adverse effect, the Applicant shall advise the SHPO/THPO in writing that it will comply with the conditions. The Applicant can then make a determination of no adverse effect subject to its implementation of the conditions. The Undertaking is then deemed conditionally to have no adverse effect on Historic Properties, and the Applicant may proceed with the project subject to compliance with those conditions. Where the Commission has previously been involved in the matter, the Applicant shall notify the Commission of this resolution.

D. Determinations of Adverse Effect

1. If the Applicant determines at any stage in the process that an Undertaking would have an adverse effect on Historic Properties within the APE(s), or if the Commission so finds, the Applicant shall submit to the SHPO/THPO a plan designed to avoid, minimize, or mitigate the adverse effect.

2. The Applicant shall forward a copy of its submission with its mitigation plan and the entire record to the Council and the Commission. Within fifteen days following receipt of the Applicant's submission, the Council shall indicate whether it intends to participate in the negotiation of a Memorandum of Agreement by notifying both the Applicant and the Commission.

3. Where the Undertaking would have an adverse effect on a National Historic Landmark, the Commission shall request the Council to participate in consultation and shall invite participation by the Secretary of the Interior.

4. The Applicant, SHPO/THPO, and consulting parties shall negotiate a Memorandum of Agreement that shall be sent to the Commission for review and execution.

5. If the parties are unable to agree upon mitigation measures, they shall submit the

matter to the Commission, which shall coordinate additional actions in accordance with the Council's rules, including 36 CFR 800.6(b)(1)(v) and 800.7.

E. Retention of Information

The SHPO/THPO shall, subject to applicable state or tribal laws and regulations, and in accordance with its rules and procedures governing historic property records, retain the information in the Submission Packet pertaining to the location and National Register eligibility of Historic Properties and make such information available to Federal agencies and Applicants in other Section 106 reviews, where disclosure is not prevented by the confidentiality standards in 36 CFR 800.11(c).

F. Removal of Obsolete Towers

Applicants that construct new Towers under the terms of this Nationwide Agreement adjacent to or within the boundaries of a Historic Property are encouraged to disassemble such Towers should they become obsolete or remain vacant for a year or more.

VIII. Emergency Situations

Unless the Commission deems it necessary to issue an emergency authorization in accordance with its rules, or the Undertaking is otherwise excluded from Section 106 review pursuant to the Collocation Agreement or Section III of this Agreement, the procedures in this Agreement shall apply.

IX. Inadvertent or Post-Review Discoveries

A. In the event that an Applicant discovers a previously unidentified site within the APE that may be a Historic Property that would be affected by an Undertaking, the Applicant shall promptly notify the Commission, the SHPO/THPO and any potentially affected Indian tribe or NHO, and within a reasonable time shall submit to the Commission, the SHPO/THPO and any potentially affected Indian tribe or NHO, a written report evaluating the property's eligibility for inclusion in the National Register. The Applicant shall seek the input of any potentially affected Indian tribe or NHO in preparing this report. If found during construction, construction must cease until evaluation has been completed.

B. If the Applicant and SHPO/THPO concur that the discovered resource is eligible for listing in the National Register, the Applicant will consult with the SHPO/THPO, and Indian tribes or NHOs as appropriate, to evaluate measures that will avoid, minimize, or mitigate adverse effects. Upon agreement regarding such measures, the Applicant shall implement them and notify the Commission of its action.

C. If the Applicant and SHPO/THPO cannot reach agreement regarding the eligibility of a property, the matter will be referred to the Commission for review in accordance with Section VI.D.3. If the Applicant and the SHPO/THPO cannot reach agreement on measures to avoid, minimize, or mitigate adverse effects, the matter shall be referred to the Commission for appropriate action.

D. If the Applicant discovers any human or burial remains during implementation of an Undertaking, the Applicant shall cease work immediately, notify the SHPO/THPO and Commission, and adhere to applicable State and Federal laws regarding the treatment of human or burial remains.

X. Construction Prior to Compliance With Section 106

A. The terms of Section 110(k) of the National Historic Preservation Act (16 U.S.C. 470h–2(k)) (''Section 110(k)'') apply to Undertakings covered by this Agreement. Any SHPO/THPO, potentially affected Indian tribe or NHO, the Council, or a member of the public may submit a complaint to the Commission alleging that a facility has been constructed or partially constructed after the effective date of this Agreement in violation of Section 110(k). Any such complaint must be in writing and supported by substantial evidence specifically describing how Section 110(k) has been violated. Upon receipt of such complaint the Commission will assume responsibility for investigating the applicability of Section 110(k) in accordance with the provisions herein.

B. If upon its initial review, the Commission concludes that a complaint on its face demonstrates a probable violation of Section 110(k), the Commission will immediately notify and provide the relevant Applicant with copies of the Complaint and order that all construction of a new tower or installation of any new collocations immediately cease and remain suspended pending the Commission's resolution of the complaint.

C. Within 15 days of receipt, the Commission will review the complaint and take appropriate action, which the Commission may determine, and which may include the following:

1. Dismiss the complaint without further action if the complaint does not establish a probable violation of Section 110(k) even if the allegations are taken as true;

2. Provide the Applicant with a copy of the complaint and request a written response within a reasonable time;

3. Request from the Applicant a background report which documents the history and chronology of the planning and construction of the Facility;

4. Request from the Applicant a summary of the steps taken to comply with the requirements of Section 106 as set forth in this Nationwide Agreement, particularly the application of the Criteria of Adverse Effect;

5. Request from the Applicant copies of any documents regarding the planning or construction of the Facility, including correspondence, memoranda, and agreements;

6. If the Facility was constructed prior to full compliance with the requirements of Section 106, request from the Applicant an explanation for such failure, and possible measures that can be taken to mitigate any resulting adverse effects on Historic Properties.

D. If the Commission concludes that there is a probable violation of Section 110(k) (*i.e.*, that ''with intent to avoid the requirements of Section 106, [an Applicant] has intentionally significantly adversely affected a Historic Property''), the Commission shall notify the Applicant and forward a copy of the documentation set forth in Section X.C. to the Council and, as appropriate, the SHPO/THPO and other consulting parties, along with the Commission's opinion regarding the probable violation of Section 110(k). The Commission will consider the views of the consulting parties in determining a resolution, which may include negotiating a Memorandum of Agreement (MOA) that will resolve any adverse effects. The Commission, SHPO/THPO, Council, and Applicant shall sign the MOA to evidence acceptance of the mitigation plan and conclusion of the Section 106 review process.

E. Nothing in Section X or any other provision of this Agreement shall preclude the Commission from continuing or instituting enforcement proceedings under the Communications Act and its rules against an Applicant that has constructed a Facility prior to completing required review under this Agreement. Sanctions for violations of the Commission's rules may include any sanctions allowed under the Communications Act and the Commission's rules.

F. The Commission shall provide copies of all concluding reports or orders for all Section 110(k) investigations conducted by the Commission to the original complainant, the Applicant, the relevant local government, and other consulting parties.

G. Facilities that are excluded from Section 106 review pursuant to the Collocation Agreement or Section III of this Agreement are not subject to review under this provision. Any parties who allege that such Facilities have violated Section 110(k) should notify the Commission in accordance with the provisions of Section XI, Public Comments and Objections.

XI. Public Comments and Objections

Any member of the public may notify the Commission of concerns it has regarding the application of this Nationwide Agreement within a State or with regard to the review of individual Undertakings covered or excluded under the terms of this Agreement. Comments related to telecommunications activities shall be directed to the Wireless Telecommunications Bureau and those related to broadcast facilities to the Media Bureau. The Commission will consider public comments and following consultation with the SHPO/THPO, potentially affected Indian tribes and NHOs, or Council, where appropriate, take appropriate actions. The Commission shall notify the objector of the outcome of its actions.

XII. Amendments

The signatories may propose modifications or other amendments to this Nationwide Agreement. Any amendment to this Agreement shall be subject to appropriate public notice and comment and shall be signed by the Commission, the Council, and the Conference.

XIII. Termination

A. Any signatory to this Nationwide Agreement may request termination by written notice to the other parties. Within

sixty (60) days following receipt of a written request for termination from a signatory, all other signatories shall discuss the basis for the termination request and seek agreement on amendments or other actions that would avoid termination.

B. In the event that this Agreement is terminated, the Commission and all Applicants shall comply with the requirements of 36 CFR Part 800.

XIV. Annual Review

The signatories to this Nationwide Agreement will meet annually on or about the anniversary of the effective date of the Agreement to discuss the effectiveness of this Agreement, including any issues related to improper implementation, and to discuss any potential amendments that would improve the effectiveness of this Agreement.

XV. Reservation of Rights

Neither execution of this Agreement, nor implementation of or compliance with any term herein, shall operate in any way as a waiver by any party hereto, or by any person or entity complying herewith or affected hereby, of a right to assert in any court of law any claim, argument or defense regarding the validity or interpretation of any provision of the NHPA or its implementing regulations contained in 36 CFR Part 800.

XVI. Severability

If any section, subsection, paragraph, sentence, clause or phrase in this Agreement is, for any reason, held to be unconstitutional or invalid or ineffective, such decision shall not affect the validity or effectiveness of the remaining portions of this Agreement.

In witness whereof, the Parties have caused this Agreement to be executed by their respective authorized officers as of the day and year first written above.

Federal Communications Commission

_____

Chairman

Date _____

Advisory Council on Historic Preservation

_____

Chairman

Date _____

National Conference of State Historic Preservation Officers

_____

Date _____

[FR Doc. 05–5 Filed 1–3–05; 8:45 am]

BILLING CODE 6712–01–P

Federal Register

Tuesday,
January 4, 2005

Part V

Department of Transportation

Federal Highway Administration

49 CFR Part 24

Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 24

[FHWA Docket No. FHWA–2003–14747]

RIN 2125–AE97

Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is revising the regulation that sets forth governmentwide requirements for implementing the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act). These changes will clarify present requirements, meet modern needs and improve the service to individuals and businesses affected by Federal or federally-assisted projects while at the same time reducing the burdens of government regulations. The regulation has not been fully reviewed or updated since it was issued in 1989. These amendments to the Uniform Act regulation will affect the land acquisition and displacement activities of 18 Federal Agencies including the new Department of Homeland Security.

DATES: *Effective Date:* February 3, 2005.

FOR FURTHER INFORMATION CONTACT: Mamie L. Smith, Office of Real Estate Services, HEPR, (202) 366–2529; Reginald K. Bessmer, Office of Real Estate Services, HEPR, (202) 366–2037; or JoAnne Robinson, Office of the Chief Counsel, HCC–30, (202) 366–1346, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

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Background

Title 49, CFR, part 24 implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. 4601 *et seq.*, (the Uniform Act). The Uniform Act applies to all acquisitions of real property or displacements of persons resulting from Federal or federally-assisted programs or projects and affects 18 Federal Agencies. This regulation has not been comprehensively revised or updated since its initial publication in 1989.

The FHWA, as the lead Federal Agency, hosted an all-Agency meeting in 2001 to begin discussions about a comprehensive review of this regulation because of numerous requests from various Agencies to update 49 CFR Part 24. The FHWA worked with the 18 other Federal Agencies to form a Federal Interagency Task Force to explore the need to revise this regulation. The FHWA then hosted five nationwide public listening sessions to gather public input into the need for regulatory reform.

After receiving public input, working with the Interagency Task Force and incorporating recommendations from all 18 Federal Agencies, the FHWA published a notice of proposed rulemaking (NPRM) on December 17, 2003 (68 FR 70342). The NPRM proposed revisions to the Uniform Act regulation that would clarify present requirements, meet modern needs and improve the service to the individuals and businesses affected by Federal or federally-assisted projects while at the same time reducing the burdens of government regulations. An extensive history of the Uniform Act's implementation, and a comprehensive narrative outlining the efforts to update this regulation is discussed in the preamble to the NPRM in great detail.

Public Meetings

During the comment period to the NPRM, the FHWA hosted three additional public meetings (in Washington, DC; Atlanta, GA; and Lakewood, CO) to discuss the proposed changes to the regulation as outlined in the NPRM. The meetings were held to assure that every opportunity was offered to encourage additional public and stakeholder comment on the proposed changes. A total of 60 individuals and organizations attended the three public meetings. Also, during the comment period, the FHWA posted on its Web site a pre-addressed comment form for easy access and mailing to the docket.

Discussion of Comments Received to the Notice of Proposed Rulemaking (NPRM)

In response to the NPRM published on December 17, 2003, the FHWA received 775 comments to the docket. The 775 comments were received from 80 individual commenters. The commenters included a variety of groups and organizations, such as local public Agencies, State Highway Administrations, private real estate and environmental consulting firms and interested individuals.

Of the 775 docket comments, 62 were positive and supportive of the proposed changes and 58 were on subjects where no change had been proposed. Thirty comments were programmatic questions and will be answered through a follow-up question and answer memorandum, and 26 comments requested increases in statutory limits that cannot be addressed in the regulations. On March 3, 2004, all 18 Federal Agencies were invited and encouraged to send representatives to an Interagency Federal Task Force (IFTF) meeting to review and respond to the 775 comments. Of the 18 Federal Agencies, 12 responded by sending one or more representatives. Following the initial meeting, four additional IFTF meetings were held and all 775 comments were categorized into subparts discussed individually, and evaluated. The FHWA, as Lead Agency, would like to thank the Department of Housing and Urban Development (HUD) who worked closely with FHWA to organize and share in hosting the work group meetings to assure that all comments were carefully considered.

Section-by-Section Discussion Changes

Subpart A—General

Section 24.1(b)

One commenter indicated that § 24.1(b) should include an anti-discrimination purpose.

A number of Federal statutes (notably the Civil Rights Acts of 1964 and 1968) and Executive Orders apply to Agencies carrying out Federal or federally-assisted programs, and prohibit discrimination on the basis of race, color, sex, age, religion, national origin or disability. These legal authorities are self-executing and do not require specific mention in a rule implementing the Uniform Act to find effect. Any explicit listing of such provisions in this regulation runs the risk of inadvertent omission, creating the implication that any legal authority not referenced is somehow inapplicable.

Section 24.2 Definitions and Acronyms

Two commenters suggested various formatting changes. One suggested that clarity and readability would be improved by stating each defined term only once, rather than entry as a heading, followed by repeating the term

in the definition. Another suggested that we adopt simplified formatting.

We appreciate these comments, however, we will keep the same format in this final rule.

Section 24.2(a) Personal Property

One commenter requested that we add a definition of personal property.

We considered the request, however, after surveying the varying State laws that define personal property, we have determined that it would not be feasible to provide a single definition that would fit within all State laws. Therefore, whether an item is personal property or real property will continue to be left to State law.

Section 24.2(a)(5) Citizen

One commenter requested that we define or clarify the term ''noncitizen national'' used in the definition of ''citizen'' in § 24.2(a)(5).

The term ''noncitizen national'' was added to the definition of citizen in 1999 (64 FR 7130). The term includes persons from certain United States possessions, such as American Samoa, who are considered citizens for purpose of this part. Accordingly, no change in the final rule is necessary.

Section 24.2(a)(6)(ii) Comparable Replacement Dwelling

Ten comments were made on the proposal to remove the phrase ''style of living'' from the definition of comparable replacement dwelling. The majority of the comments were in favor of removing the phrase; however, two commenters were concerned that the displaced person's rights would be diminished if the phrase is deleted.

We carefully considered removing ''style of living'' from the definition of comparability, and we determined that the displaced person would not suffer any erosion of protections provided by existing comparability requirements. The phrase ''style of living'' has sometimes been misused and has proven to be confusing.

Occasionally, the phrase has been used out of context and interpreted to require identical unique features found in acquired dwellings. In such cases, the standard for replacement housing has been raised to a level above ''comparable.'' This interpretation can make it nearly impossible to find appropriate replacement housing and could result in replacement housing payments greater than those intended by the Congress.

A more complete explanation can be found in the preamble to the NPRM (68 FR 70344). The Congress recognized that strict and absolute adherence to an exhaustive, detailed, feature-by-feature comparison can result in rigidities. We believe other criteria currently under the definition of comparability will adequately cover the factors covered by ''style of living'' and, therefore, have not included this phrase in the final rule.

Section 24.2(a)(6)(viii) Deductions from Rent

One commenter objected to the proposed addition of language in § 24.2(a)(6)(viii) that would have allowed rent owed to an Agency to be taken into account when determining whether a comparable replacement dwelling is within a displaced person's financial means. The comment noted that State landlord/tenant laws normally govern disputes over rent, and that § 24.2(a)(6)(viii) should not, in effect, supercede the tenant protections contained in such laws in determining a displaced person's financial means.

We agree with this comment, and accordingly have not adopted the language that would have considered any rent owed the Agency in determining financial means.

Section 24.2(a)(6)(viii) Financial Means

The Uniform Act requires that comparable replacement dwellings must be ''within the financial means'' of a displaced person. This term is defined further within the definition of comparable replacement dwelling. The NPRM proposed simplifying the definition of financial means by consolidating it from three paragraphs to a single paragraph. No change in meaning was intended.

We received 12 comments on this proposed change. The commenters expressed two major concerns. First, several comments indicated that consolidating the separate paragraphs relating to owners and tenants was confusing and might, in some cases, result in changes to replacement housing payments.

After further consideration, we believe these comments are correct, and, accordingly, have not adopted the proposed consolidation. (We have, however, deleted some redundant language relating to welfare assistance programs that designate amounts for shelter and utilities, since this is now addressed in § 24.402(b)(2)(iii).)

Secondly, because of other related changes in the NPRM, several commenters stated that the proposal would no longer adequately address the benefits to be provided to a person who is not eligible to receive replacement-housing payments because of a failure to meet the necessary length of occupancy requirements. Such persons are still entitled to receive comparable replacement housing within their financial means.

Besides proposing to simplify the description of financial means, the NPRM also proposed changing the way the rental replacement housing payment would be computed by revising the description of ''base monthly rent'' in § 24.402(b)(2), and removing the reference to 30 percent of income in § 24.404(c)(3) (which describes the eligibility of persons that fail to meet the length of occupancy requirements). The later two changes have been adopted, as discussed further in this preamble.

We agree that the proposed changes left it unclear as to the benefits that were to be provided to persons who failed to meet length of occupancy requirements. Accordingly, we have retained a paragraph (§ 24.2(a)(6)(viii)(C)), within the description of financial means, that addresses those persons, described in § 24.404(c)(3), who do not meet length of occupancy requirements. It is similar to the current provision, and provides that the payment to such persons shall be the amount, if any, by which the rent at the replacement dwelling exceeds the base monthly rent described in § 24.402(b)(2), over a period of 42 months.

Section 24.2(a)(6)(ix) Subsidized Housing

Several commenters took issue with the proposed change to apply a government housing subsidy program's unit size restrictions when providing comparable replacement housing.

It appears that several of the commenters did not understand how the government subsidy programs work. The choice of a replacement dwelling is always left to a displaced person, but a displaced tenant's eligibility for relocation assistance is premised upon the selection of a decent, safe and sanitary ''comparable'' dwelling. The existing regulations have long provided that a comparable dwelling, in the case of a person displaced from housing receiving certain project-based or voucher based subsidies, is another dwelling unit receiving the same or a similar subsidy.

In such cases the HUD program requirements for subsidized housing, may limit the unit size of available subsidized housing by applying a determination as to a family's current needs, even though the displacement dwelling may have been larger. This final rule acknowledges these requirements, and provides in § 24.2(a)(6)(ix) that the requirements of government housing assistance

programs, relating to the size of the dwelling unit that may be provided, apply when such housing is used as a comparable replacement dwelling.

A person displaced from a subsidized unit may elect to relocate to housing available on the private market without subsidy, but the available relocation payment will be limited by a computation using a comparable subsidized unit. In most cases, the long-term housing subsidy available to someone displaced from a subsidized unit, will be more advantageous than a relocation payment based on the selection of a dwelling available on the private market. The relocation payment for a dwelling on the private market is limited to a rental differential for a 42-month period by the Uniform Act.

Section 24.2(a)(8)(ii) Decent, Safe and Sanitary

Twenty comments were received concerning the inclusion of standards relating to deteriorated paint or lead-based paint in the definition of ''decent, safe, and sanitary dwelling'' in § 24.2(a)(8). While all of these comments were favorable, there is no legal authority for mandating these standards in connection with the referral to comparable private market replacement housing under the Uniform Act. Accordingly, this language has been removed from the list of the mandatory elements of ''decent, safe, and sanitary'' replacement housing appearing in this regulation. Instead, we have included in appendix A a suggestion that such standards may be required by local housing and occupancy codes, and may, in any event be highly desirable in protecting the health and safety of displaced persons and their families.

Section 24.2(a)(8)(iv) Housing and Occupancy Codes

Of the seven comments received on § 24.2(a)(8)(iv) having to do with using local housing and occupancy codes to determine whether the unit is decent, safe and sanitary, most were concerned with determining the number of rooms and living space per individual. One commenter requested that the FHWA set a minimum number of square feet in a bedroom for each occupant as well as set an age standard for bedrooms occupied by siblings of opposite gender.

The protection of the public health, safety and welfare is an essential power of a sovereign government specifically reserved to the States. Accordingly, this regulation references local housing and occupancy codes as the primary source for defining ''standard'' housing. (In the case of certain federally subsidized replacement housing, federally-issued ''housing quality standards'' may be employed where such codes do not exist or are not applied to such housing.)

As was noted in the preamble to the NPRM, the existing regulatory policy on this subject would apply only in the absence of local codes. This has been clarified in § 24.2(a)(8)(iv). Questions of whether contrary or more restrictive housing and occupancy standards than those found in a local code, imposed by State law, must be deemed to override these local standards must be determined as a matter of State law by courts of competent jurisdiction or by the State's Attorney General, and cannot be addressed in these regulations.

Section 24.2(a)(8)(vi) Egress to Safe Open Space

We received three comments concerning the removal of the requirement that replacement housing units have two means of egress when replacement units are on the second story or above and have direct access to a common corridor. One was in favor of the change, a second was uncertain as to the purpose of the requirement and another was against the change for fear of the safety risks to the displaced person.

This is an area best handled through local fire and building codes and does not require Federal guidelines to assure the safety of displaced persons. There was overwhelming support for removing the requirement from our five national Public Listening Sessions that we held leading up to preparations of the NPRM. Therefore, no change was made to the language proposed in the NPRM.

Section 24.2(a)(8)(vii) Disability

Thirteen commenters requested that the definitions of Comparable Replacement Dwelling and Decent Safe and Sanitary Dwelling (and the corresponding provisions of appendix A) go into more detail regarding the needs of persons with disabilities, as well as a variety of disabilities.

Because the needs of persons who are disabled are addressed by other Federal or local statutory and regulatory requirements, which may or may not apply to any individual project which triggers the Uniform Act, we believe it is unnecessary to elaborate further in this rule except as noted in appendix A. The final rule addresses the need to accommodate the displaced person's needs in terms of unit size, location, access to services and amenities, reasonable ingress, egress or use of a replacement unit, and therefore, we do not believe additional detail is necessary.

We agree that there is a need to revise some of the language in appendix A, § 24.2(a)(8)(vii) to address the physical attributes of replacement housing for persons with physical disabilities beyond those dependent on a wheelchair. Therefore, we have broadened the language in the final rule to include persons with a physical impairment that substantially limits one or more of the major life activities of such individual. We have not addressed the needs of other nonphysical disabilities (such as mental impairment) in this rule since it is unclear what unit attributes would need to be addressed for this class of persons and any needs of such persons would be more appropriately addressed by other statutory and regulatory requirements.

Section 24.2(a)(9)(ii)(D) Temporary Relocation

In 1987, the Uniform Act was amended to cover displacement from Federal and federally-assisted programs or projects as a direct result of rehabilitation. To counter the disincentive this might create for a tenant temporarily displaced from a residence while that residence is being rehabilitated, we considered such a person not to be displaced, if, and only if, certain stringent protections are applied. These included covering moving expenses to and from the temporary location, payment of increased housing costs during the period of relocation, the guarantee of a return to the same unit, or to another suitable unit in the same building or complex, and a limitation on a rental increase at the rehabilitated replacement unit.

We believe that this interpretation of the law, to create an exception to its general applicability, must be limited and strictly applied, in order to meet the intent of Congress. Accordingly, the NPRM proposed that displacement for a period exceeding 12 months must ordinarily be considered significant enough to fall within the general rule pertaining to displacement as a direct result of rehabilitation, and not to come within the limited exception to the definition of ''displaced person'' which the law establishes. Therefore, the language proposed in the NPRM will not change.

We received eleven comments on the proposed language further describing temporary relocation in § 24.2(a)(9)(ii)(D) of appendix A. Two comments supported this change. However, we are seriously concerned that several of the commenters appear to believe that a person who is displaced by a project that triggers the Uniform

Act can somehow be exempted from full relocation assistance benefits as a displaced person if the Agency terms his/her relocation ''temporary'', regardless of the required length of time or hardship caused to the displaced person. We are further concerned that some commenters seem to consider the cost to their project more important than the protection provided by the Uniform Act. This may indicate that appropriate project and relocation planning is not taking place. It is for this reason that additional clarity concerning temporary relocation has been added to the rule.

Several commenters referenced the HUD policies on temporary relocation. HUD has indicated for years that it has always restricted ''temporary relocation'' to situations where the Uniform Act trigger was rehabilitation. In such cases, a tenant was guaranteed the right to return to a unit in the project prior to moving from the displacement dwelling. In recent years, HUD has permitted grantees to consider up to one year as acceptable temporary relocation duration, but again, only where the Uniform Act trigger is rehabilitation. However, HUD reports that some HUD grantees may have abused this policy and stretched it to apply in situations which are clearly beyond the scope of ''temporary,'' where an entire building or group of buildings is being demolished and will be replaced with fewer units. In this situation, displaced persons cannot be guaranteed a unit in the new building(s) at the time they are required to move from the displacement unit for reasons including: there may be insufficient units rebuilt; former tenant may not meet newly adopted return criteria, and, return to the project may not be for years simply because of the massive demolition and rebuilding that must take place. While many of these sorts of projects purport to allow displaced tenants to return, the reality is that few can. We do not support advising tenants that they are only being temporarily relocated, and are not displaced, when their actual return to a unit in the project is in doubt, and/or may not be for an extended period of time. Further, permanently displacing a person and providing them with full relocation assistance under the Uniform Act should not automatically negate their ability to apply for or return to the site of the HUD funded project that caused their displacement. Many HUD projects give preference to former tenants who want to return.

The rule, now requires that any residential tenant who has been temporarily relocated for a period beyond one year must be contacted by the Agency and offered all permanent relocation assistance.

One commenter suggested imposing the same one-year requirement upon owner occupants and nonresidential occupants. The final rule adopts language in the proposed rule that provides that ''temporary relocation should not extend beyond one year before the person is returned to his or her previous unit or location.'' We believe this establishes a sound policy that should be followed in most cases. We recognize, however, that in some situations, involving temporary relocations caused by disasters or public health emergencies, Agencies may not be able to provide permanent relocation benefits to such occupants within one year, if ever, because of statutory or programmatic limitations.

We also agree with the commenter who suggested that a temporary move of personal property is not intended to be covered by the one-year limitation on temporary moves.

We expanded the language in appendix A, § 24.2(a)(9)(ii)(D), to cover ''rehabilitation or demolition'' as suggested by one of the commenters. As noted, we are not changing the language relative to ''one year'' as we believe this is a reasonable time for any tenant to be in temporary housing (one year is a fairly common initial lease period across the United States). After the one-year period, the final rule requires that a residential tenant be offered permanent relocation assistance. Such tenants may be given the opportunity to choose to continue to remain temporarily relocated for an agreed to period (based on new information about when they can return to the displacement unit), choose to permanently relocate to the unit which has been their temporary unit, and/or choose to permanently relocate elsewhere with Uniform Act assistance. It is expected that temporary relocations will be rare, and, for HUD funded projects, clearly planned for in the development of the project, and used only where a tenant is guaranteed a replacement unit in the project or unit from which they were displaced.

Section 24.2(a)(9)(ii)(M) American Dream Downpayment Initiative (ADDI)

A new paragraph, § 24.2(a)(9)(ii)(M), has been added to the list of ''persons not displaced'' to reflect a provision, added by Section 102 of the American Dream Downpayment Act (Pub. L. 108–186; codified at 42 U.S.C. 12821) provides that the Uniform Act does not apply to the American Dream Downpayment Initiative (ADDI), a downpayment assistance program administered by the Department of Housing and Urban Development.

Section 24.2(a)(11) Dwelling Site

We received nine comments in response to the proposed definition of dwelling site. Most agreed that it was needed. Six commenters asked that additional information be provided on what constitutes a dwelling site.

We agree and are revising the definition for clarity. We have provided specific examples in appendix A as to when its use is appropriate.

Section 24.2(a)(12) Eviction For Cause

We received nine comments on the proposal to simplify the eviction for cause provisions in § 24.206 by moving some of them to a new definition in § 24.2(a)(12). Several commenters found this proposal to be confusing, and believed that it resulted in substantive changes to the eviction for cause provisions. This was not our intent, and accordingly we have not adopted the changes to § 24.206 and the new definition that were proposed in the NPRM. We have retained the current regulatory language in § 24.206.

One commenter objected to a clarifying sentence proposed in § 24.206 of appendix A, which simply stated that an eviction related to project development does not affect entitlement to relocation benefits. The commenter felt that this conflicted with the current eviction for cause provisions. However, we have retained the language in appendix A to make it clear that evictions related to scheduled project development, to gain possession of property, do not affect relocation eligibility. As noted in § 24.206, a person who is a lawful occupant on the date of initiation of negotiations is presumed to be entitled to relocation benefits, and can only be denied relocation benefits if the person had received an eviction notice prior to the initiation of negotiations, or is evicted thereafter ''for serious or repeated violations of material terms of the lease or occupancy agreement.'' We do not consider an eviction resulting from a failure to move or relocate when asked to do so, or to cooperate in the relocation process for a federally funded project, to be based on a ''serious or repeated violation of material terms'' of a lease or agreement.

If an eviction is ''for the project'' (resulting from a failure to move or relocate when asked to do so, or to cooperate in the relocation process) such an eviction cannot be considered as ''serious or repeated violation of material terms'' of a lease or agreement unless, prior to executing the lease, the

tenant was notified in writing of the proposed project and its possible impact on him/her and that he/she would not be eligible for relocation payments. While public housing leases may have a clause requiring that a tenant move or cooperate in a move, these provisions are included for the purpose of adjusting unit size as necessary for changes in family composition, and do not negate the tenant's eligibility for relocation benefits caused by a federally-assisted project which triggers the Uniform Act.

Section 24.2(a)(13) Financial Assistance/Lease Payments

One commenter objected to the proposed addition of the term ''lease payment'' in the definition of ''Federal financial assistance'' in § 24.2(a)(13). The commenter noted that this term is not included in the statutory definition of ''Federal financial assistance'' and its addition could have major consequences that were not mentioned or considered in the NPRM. We agree and have deleted the term.

Section 24.2(a)(14) Household Income

We received 16 comments concerning the new definition of household income. Most of the comments were positive and in support of the new definition. However, four commenters requested that we go further in our definition of household income by adding additional examples. Several of the same commenters also requested that the examples given in appendix A be moved to the definition in § 24.2(a)(14).

Because the sources of household income constantly change and vary by household, we will not produce a more definitive list of income sources. Based on the experience of other Federal Agencies that use definitions of income, such definitions can never be totally comprehensive or timely, and could render the regulations outdated within a short period of time. Displacing Agencies need to determine income for each individual or family based on whatever financial resources are available (earned, unearned, benefits, etc.). When a question arises as to whether something should be considered as income, the Federal Agency administering the program should be contacted for its assessment. To further assist in the determination of income exclusions, the FHWA has provided a Web site, (*see* appendix A, § 24.2(a)(14)), of income exclusions that are federally mandated. The income exclusions change periodically based on congressional action and the FHWA will update the Web site as necessary.

We are opposed to moving the examples in appendix A to the definition. The examples are to support the definition and should not be a part of the definition. Therefore, they will remain in appendix A.

One commenter suggested that we change the language in the definition to assure that income claimed is actually received. It is our position that the responsibility for verifying income should be left to the acquiring Agency.

One commenter raised the concern that we have not made provisions for changes that may occur in the income stream throughout a 12 month period. We suggest that if the income changes before the relocation offer is made, that an adjustment be made based upon verification of the change in income. Otherwise, we suggest using the income stream in existence at the time of the relocation offer. The amount of a displaced tenant's replacement housing payment should not be adjusted if the tenant's income later changes. The Uniform Act envisions a rental assistance payment that is determined once, and which is not affected by subsequent events. Replacement Housing Payments under the Uniform Act are not to be confused with rental or homeownership subsidy programs. There is no statutory provision for adjusting relocation claims or payments based on changes in income after the eligibility determination has been made.

Section 24.2(a)(15) Initiation of Negotiations

The NPRM proposed adding paragraph (iv) to the definition of Initiation of Negotiations (ION) in § 24.2(a)(15), to address ION for acquisitions that occur amicably, without recourse to the power of eminent domain. The intent was to avoid establishing a tenant's relocation eligibility before there was any certainty that the property would actually be acquired.

We received 21 comments on this change. A major concern was that delaying tenant eligibility in these cases, until the owner accepts an offer to purchase, might have an adverse effect on such tenants by, for example, their being forced to move as part of the pre-acquisition negotiations, as well as otherwise increasing uncertainty in program management.

In response, we have revised paragraph (iv) in the final rule to provide that ION means the actions described in paragraphs (i) and (ii), for routine Agency acquisitions, except that, in the case of amicable acquisitions covered in paragraph (iv), the ION does not become effective for purposes of establishing relocation eligibility until there is a written agreement between the Agency and the owner to purchase the property. This would establish the potential relocation entitlement of tenants at the time negotiations begin, but would not provide relocation benefits in the event no agreement was reached to acquire the property. Such tenants should be fully informed of their potential eligibility.

In response to a comment we also changed the reference to ''acceptance of the Agency's offer to purchase the real property'' to ''written agreement between the Agency and the owner to purchase the real property,'' for greater clarity and specificity.

At the request of the Environmental Protection Agency (EPA), the language in § 24.2(a)(15)(iii), concerning the initiation of negotiations on superfund related projects, has been updated and clarified, primarily to delete references to a ''Federal or federally-coordinated health advisory.'' Such health advisories are general in nature and are rarely related to determinations that relocation is necessary. Rather, the action that triggers relocation is a fact-based determination by the EPA, or the Federal Agency conducting an action under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (Pub. L. 96–510 or Superfund) (CERCLA), that temporary relocation or acquisition is necessary because there is a threat to an individual's health or safety. Typically, on such projects, temporary relocation occurs first, and then, if warranted by the circumstances, it may be followed by permanent relocation. Similar clarifications have also been made in appendix A, § 24.2(a)(15)(iii).

Section 24.2(a)(17) Mobile/Manufactured Homes

A new definition for the term ''mobile home'' has been added to this section. Six comments were received on this proposed addition. Five commenters agreed that the definition was needed, and three comments proposed changes to the definition to differentiate between mobile homes, manufactured housing and recreational vehicles. The term ''mobile home'' includes both manufactured homes and recreational vehicles used as residences. Appendix A explains that ''mobile homes'' and ''manufactured homes'' are recognized as synonymous by HUD for that Agency's programs, and for purposes of this regulation will be considered the same. Appendix A also includes further requirements that recreational vehicles must meet in order to qualify as replacement housing in appendix A.

(Subpart F continues to include an explanation of the different methods of computing relocation assistance when a mobile home has been determined to be personal property, and when it is determined to be real property.)

Section 24.2(a)(22) Program or Project

One commenter requested a more detailed definition of the term ''project.'' Federal Agency experience over the years has amply demonstrated that it is not feasible to devise a common definition of ''project'' which could apply to all Federal and federally-assisted programs subject to the Uniform Act. Widely varying legislative and administrative histories of the various programs currently covered, as well as (in some cases) decades of practice, have led to the conclusion that the broad definition of ''project'' should remain unchanged. To alter the present definition might prove highly disruptive to the administration of many programs administered by Federal Agencies.

However, Federal Agencies should always interpret the term ''project'' in a way that will ensure that persons who are forced to move as a result of Federal or federally-assisted activities are covered by the Uniform Act.

Section 24.2(a)(30) Utility Costs

Two commenters suggested further clarifying the expenses that are included in the definition of utility costs. In response, we have replaced the reference to heat and light with a reference to electricity, gas, and other heating and cooking fuels.

Section 24.4(a)(3) Assurances

We received two comments opposing the changes proposed in the NPRM to § 24.4(a)(3) of the NPRM. One commenter was concerned that the proposed language would exempt Agencies undertaking arm's length acquisitions from required compliance with the Uniform Act. Similarly, a second commenter brought to our attention that the proposed language may nullify the conditions set forth in CFR 49 Part 24.101(b)(1). We did not intend to undermine the requirements of other sections of the regulations, therefore, after careful review, we agree that the proposed language may be perceived to conflict with the provisions in § 24.101(b)(1), and have not adopted the proposal in the final rule.

Section 24. 8 Compliance with Other Laws and Regulations

Several commenters suggested the inclusion of additional laws and regulations within § 24.8.

The existing regulatory language requires the implementation of this part to be in compliance with other applicable Federal laws and implementing regulations, including, but not limited to the laws and regulations cited. The list is merely a representative sample of some significant laws and regulations and is by no means intended to be a comprehensive listing of all applicable laws and regulations. An applicable law or regulation is not required to be cited in this section to be applicable to this part. Therefore, no change is considered necessary. However, for clarity, we have corrected two existing laws. We have added, ''as amended'' after the reference to the Robert T. Stafford Disaster Relief and Emergency Assistance Act in § 24.8(n); and, we have added a reference to EO 12892, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing (January 17, 1994), § 24.8(o). EO 12892 replaced EO 12259.

Section 24.9 Records and Reports

We received twelve comments on the proposed revisions to § 24.9(c), which proposed to require each Federal Agency to submit an annual report summarizing its relocation and acquisition activities. One commenter supported this change and one sought further clarification. The remaining ten commenters opposed this change, primarily on the grounds that it would impose significant administrative burdens and would have little apparent value.

It was not our intent to increase administrative burdens. As was noted in the NPRM, our primary interest was in obtaining more accurate information, to more effectively monitor implementation of the Uniform Act. However, due to the negative comments received, we have decided not to adopt the proposed change.

Further, since no comments objected to the proposed simplification of the report form in appendix B, we have adopted the proposed form and the instructions for its use. The simplification of the form may lead to greater use by Agencies.

Outside the context of Part 24, the lead Agency will explore the possibility of obtaining such additional acquisition and displacement information from other Federal Agencies as may result from routine Agency operations and oversight.

Subpart B—Real Property Acquisition

We received a comment that the NPRM proposed change to replace the term ''fair market value'' with ''market value'' throughout Subpart B to better reflect current appraisal terminology was neither minor nor reflected universally accepted eminent domain terminology throughout the country.

Upon further examination, we determined that ''fair market value'' terminology is consistent with Uniform Act language and it appears that Federal courts see no difference in the terms ''fair market value'' and ''market value.'' Accordingly, we have retained the terminology ''fair market value'' throughout the subpart, except for § 24.101(b)(1) through (5), where eminent domain is not applicable. But we have added language to appendix A noting that for Federal eminent domain purposes, the two terms may be synonymous.

Section 24.101(a) Direct Federal Program or Project

Federal Agencies advised us voluntary transaction provisions were being used to a significant extent and suggested that these exceptions should no longer apply to acquisitions by Federal Agencies. Their proposal to eliminate this provision for Federal agencies direct purchases is consistent with section 305(b)(2) (42 U.S.C. 4655(b)(2)) of the Uniform Act, which allows these exceptions for recipients of Federal financial assistance, but provides no such exceptions for Federal Agencies themselves. We included the Agencies' suggested revision in the NPRM.

Formerly, the two major exceptions to real property acquisition requirements in Subpart B were voluntary transactions and acquisitions in which the Agency does not have the power of eminent domain. We restructured this section to clarify the application of the real property acquisition requirements set forth in this subpart, and to revise the exceptions to those requirements.

We have adopted the Agencies' proposed change in the final rule, but the exceptions for federally-assisted projects and programs remains in § 24.101(b).

One commenter objected to excluding direct Federal acquisitions from voluntary transaction procedures because the commenter believed that where an Agency acquired a property that was listed for sale, it would create a windfall for that property owner by allowing the owner to receive Uniform Act benefits.

However, as noted elsewhere in this rule (*See* § 24.2(a)(9)(ii)(E) and (H) and 24.101(a)(2)), if a property owner voluntarily conveys his or her property, without recourse to the power of eminent domain, he or she would

continue to be ineligible for relocation benefits.

Based on a comment we added the word ''direct'' to the title of § 24.101(a) for clarity. We also added language to appendix A to further clarify the applicability of this paragraph.

We updated language in the rule and in appendix A to reflect the Rural Utilities Service, successor Agency to the Rural Electrification Administration.

We added § 24.101(a)(2) to make it clear that, despite the rule change to make all direct Federal acquisitions undertaken without recourse to the power of eminent domain subject to the provisions of Subpart B, the owners of property acquired voluntarily by direct Federal acquisition, continue to be ineligible for relocation assistance benefits.

Section 24.101(c) Less-Than-Full-Fee Interest in Real Property

There was a comment suggesting we move the language from appendix A, discussing Agencies applying these regulations to any less-than-full-fee acquisition, into the body of the rule itself for greater clarity.

We agree, and the final rule reflects this change.

Section 24.102 Basic Acquisition Policies

We received a comment stating that § 24.102 relates only to acquisitions under the threat of eminent domain, and should be retitled to reflect that.

We respectfully disagree with this comment and note the exceptions to the applicability of Subpart B, Real Property Acquisition, are in 49 CFR 24.101.

Section 24.102(c)(2) Appraisal, Waiver thereof, and Invitation to Owner

We received 28 comments on the NPRM appraisal waiver provisions. Twelve support the changes proposed in the NPRM.

Five commenters disagree with the proposed ''two-tier'' waiver threshold, especially the provision that the property owner be given the option to have an appraisal if the Agency wishes to use a waiver threshold between $10,000 and $25,000. These comments expressed the position that this procedure would be confusing and not really accomplish much.

In response to the language proposed in the NPRM, we received comments requesting waiver thresholds far in excess of $10,000. However, the Agencies are not comfortable with a waiver threshold over the proposed $10,000 limit without additional safeguards for the property owner. Part of this caution is based on the regulatory history of the present policy, which links the appraisal waiver threshold to the cost of appraisal, i.e., a concern that appraisal costs were exceeding acquisition costs. The final rule does not change the NPRM proposal. We point out that use of the appraisal waiver provision is optional for an Agency, so if appraisal waiver provisions become burdensome or ineffective, the Agency need not implement them.

Two commenters expressed concern that appraisal waiver provisions risked property owner protection and were inconsistent with OMB Circular 92–06, which states, ''Agencies should prepare real estate appraisal and appraisal review reports in accordance with written and approved agency standards consistent with the Uniform Standards of Professional Appraisal Practice (USPAP), sections (sic) I–III, as developed by the Appraisal Standards Board of the Appraisal Foundation.''

We point out that appraisal waivers for low value acquisitions are specifically authorized by the Uniform Act, Section 301(2). We share the concern that property owners retain protections intended by the Uniform Act. That is one reason why we did not raise the waiver threshold to any higher level. As for the issue of consistency with USPAP, appraisal waiver is not an appraisal performance issue, but an issue about when an appraisal is needed under Federal law.

A question was also raised as to whether the threshold applies to the value of the larger parcel (before value) or the value of the proposed acquisition.

The regulation states that it applies to the ''anticipated value of the proposed acquisition.''

One commenter suggested removing the ''on a case-by-case basis'' language from proposed § 24.102(c)(ii) because it created confusion.

We did remove the ''on a case-by-case-basis'' language from the final rule as it was unclear.

There was one comment expressing concern about situations where a high percentage of an Agency's acquisitions may be through appraisal waiver procedures.

The FHWA shares that concern and is considering initiating research to examine this issue as it applies to our partner State DOTs; however, it is beyond the scope of this rulemaking action.

Two commenters pointed out (and support) that the NPRM proposed adding language that the determination to use an appraisal waiver must be made by a qualified person.

We are pleased to see not only support for this provision, but that it was significant enough to comment on it.

Because of the number of comments indicating confusion in general as to the appraisal waiver provisions, we have added further explanation in appendix A.

Section 24.102(f) Basic Negotiation Procedures

Two commenters suggested that ''reasonable opportunity'' provided to an owner to consider and respond to an offer should be defined with a specific time frame (such as 30 days).

We did not include a required time frame, but appendix A does discuss the issue, stating that, depending on the circumstances, 30 days would seem to be a minimum time frame. We are reluctant to specify a time frame because we believe that circumstances can dramatically impact what is an appropriate reasonable opportunity to consider an offer and present information.

One commenter stated that giving property owners ''a reasonable opportunity to consider the offer'' has the potential to slow down project times.

We recognize this potential, however, we believe this statement reflects the primary purpose of the Uniform Act and this regulation, which is to assist and protect property owners and occupants.

One commenter suggested that Agencies should provide the owner and/or his/her appraiser a copy of the Agency's appraisal requirements and inform them that their appraisal should be based on those requirements.

This is an excellent idea, and we have included language to encourage Agencies to do this in appendix A.

One commenter suggested adding the word ''all'' to ''reasonable efforts to contact the owner.''

We agree and added the word ''all'' to the final rule for greater clarity.

Section 24.102(i) Administrative Settlement

Comments indicated support for this section, but noted that not much was changed. We agree. The revised language focuses more on clearly stating the supporting justification for settlements.

One commenter suggested that § 24.107, certain legal expenses, should be cross-referenced in this section.

Since the topics and issues are different, we did not make that change.

We have revised the language to require more specific information in the written justification (''state'' rather than ''indicate'') and deleted specific suggestions (''appraisals, recent court

awards, estimated trial costs, or valuation problems'') in favor of requesting ''what available information, including trial risks, supports the settlement.''

Section 24.102(n) Conflict of Interest

The NPRM proposed expansion of this section to include all persons making waiver valuations under § 24.102(c)(2). This change would bring equal conflict of interest standards to all individuals valuing real property, whether their work is waiver valuations, appraisal, or appraisal review, and would clarify who is covered.

We received 24 comments on the proposed revision to this section. The majority of comments referenced the proposal that any person functioning as a negotiator shall not supervise or formally evaluate the appraiser, review appraiser or person making waiver valuations.

Comments received focused on the impacts on Agency operations. A major concern was how an Agency could comply with the requirement that an appraiser, review appraiser or anyone making a waiver valuation not be supervised or evaluated by anyone negotiating for the property since currently most, if not all, managers frequently become involved in negotiations.

This is a difficult issue, but we, as well as the other affected Federal Agencies, continue to support the provision providing independence for appraisers from officials negotiating to acquire the property.

One commenter recommended that no Agencies be exempted from appraiser independence provisions and suggested that streamlined appraisals and reports could be used to meet budgetary needs.

The exemption is not based on financial considerations, but rather on recognition that some small Agencies, especially Federal-assistance recipients such as local public Agencies, do not have the staffing levels that are needed to support the separation of functions.

One commenter wondered about the impact on consultants of providing independence for appraisers from officials negotiating to acquire the property, and suggested the ethical controls in the Uniform Standards of Professional Appraisal Practice (USPAP)[1] are sufficient.

We note that USPAP controls apply to the appraiser, whose only recourse to inappropriate pressure from a manager or supervisor is refusal to do the assigned task. We believe that this does not adequately address conflict of interest concerns. Policing conflict of interest should not be the appraiser's responsibility. The impact on a consultant will ultimately be up to the funding Agency, which may waive this provision if it believes it appropriate to do so. Again, the responsibility to prevent undue pressure on an appraiser is on the Agency.

One commenter suggested the same (Agency) person should be able to procure contract appraisal services and serve as a negotiator.

This comment was from a local public Agency, which, as such, would be eligible for a waiver if granted by the Federal funding Agency, therefore we did not incorporate such a change.

One commenter expressed a concern that a Federal Agency could give itself a waiver from the requirement that negotiators may not supervise appraisers.

We believe the regulation is clear that the waiver is only for ''a program or project receiving Federal financial assistance.'' This precludes the Federal Agency from granting itself a waiver.

One commenter supported the exception in the last paragraph, which allows the appraiser, the review appraiser and preparer of a waiver valuation to also act as negotiator when the offer to acquire is $10,000 or less. However, another commenter objected to this exception, stating the issue was too important to allow a waiver.

Another commenter suggested the $10,000 threshold be raised to match the appraisal waiver threshold.

One commenter objected to allowing appraisers to act as negotiators in acquisitions under $10,000.

We did not change the threshold amount because the participating Federal Agencies continue to believe that the $10,000 limit provides a reasonable and appropriate exception for low value transactions. The rule adopts the conflict of interest language proposed in the NPRM.

Section 24.103 Criteria for Appraisals

One commenter asked if there is some way we could require that all appraisals prepared for use under the Uniform Act meet appraisal requirements in this rule. The commenter was referring to appraisals made other than for the Agency, such as for property owners.

Many jurisdictions grant broad authority to property owners to express their opinions about their property, and some even compensate them for the costs of an independent appraisal. We see no way we can require appraisal requirements in this rule for property owners' appraisals or other valuation opinions. We suggest Agencies make available their appraisal requirements to property owners so at the least they will know what the requirements are for the Agency's appraisal(s).

The revisions relating to appraisals in §§ 24.103 and 24.104 are the first since The Appraisal Foundation published the USPAP in 1989. Considerable confusion and misunderstanding as to the applicability of the USPAP provisions to Uniform Act real property acquisitions have existed ever since USPAP was first published. The Uniform Act and 49 CFR part 24 set the requirements for appraisal and appraisal review in support of Federal and federally-assisted acquisition of real property for government projects. Many of the revised provisions of §§ 24.103 and 24.104 are intended to assist the appraiser, the Agency and others in understanding the requirements of these subparts in light of the USPAP.

We changed the terminology throughout this section from ''standards'' to ''requirements'' to avoid confusion with USPAP standards rules. We also added the phrase ''Federal and federally-assisted program'' to more accurately identify the type of appraisal practices that are to be referenced, and to differentiate them from private sector, especially mortgage lending, appraisal practice.

One commenter suggested we use USPAP Standards 1, 2 and 3 for several reasons. Certified and licensed appraisers in most States are required to comply with USPAP, and although the Jurisdictional Exception may be used where the USPAP is contrary to law or public policy, that complicates matters unnecessarily. Also, USPAP standards are already in place, and this would assure the Federal government, taxpayers and property owners that appraisals and appraisal reports comply with certain minimum standards.

Uniform Act appraisal requirements have been in place for some time and actually predate USPAP. They were put in place to do what the commenter suggests: provide assurance that when an Agency needs real property, all the parties involved are treated fairly. That is the primary purpose of the Uniform Act. As for the USPAP Jurisdictional Exception, we believe any ''complication'' is mostly based in misunderstanding of how it works. In any case, USPAP Jurisdictional Exceptions are by definition based in law or public policy and the Agency has

[1] Uniform Standards of Professional Appraisal Practice (USPAP). Published by The Appraisal Foundation, a nonprofit educational organization. Copies may be ordered from The Appraisal Foundation at the following URL: *http://www.appraisalfoundation.org/html/USPAP2004/toc.htm.*

very little, if any, flexibility for optional compliance with the Uniform Act.

Section 24.103(a) Appraisal Requirements

In the NPRM we proposed stating that these regulations set forth the requirements for real property acquisition appraisals for Federal and federally-assisted programs to make it clear that other performance standards, such as USPAP and those issued by professional appraisal societies, do not directly govern programs covered by the Uniform Act. Based on the comments we received, this proposed language clarified the relationship between the appraisal requirements in this rule and USPAP and we have included that language in the final rule. Additionally, we have added further explanatory language in appendix A.

The NPRM proposed adding a requirement for a scope of work statement in each appraisal. The scope of work replaces the former appraisal problem statement. It also renders obsolete the former ''minimum standards'' and ''detailed'' appraisals, replacing them with an infinitely variable standard driven by the circumstances of each acquisition. We have included in appendix A a discussion on preparing the scope of work.

We received several comments supporting the adoption of the scope of work. One commenter suggested that the scope of work for Uniform Act purposes needs to be clearly differentiated from the scope of work required by USPAP.

As of the publication of this regulation, the Appraisal Standards Board has not finalized the scope of work in USPAP, so it would be premature to attempt to differentiate. It is our hope that the two concepts will be consistent and that a scope of work written in compliance with this rule will be compatible with any future scope of work requirement in USPAP.

One commenter said that the appraiser should not be able to unilaterally determine the scope of the assignment or what the appraiser will provide the Agency. However, another commenter suggested that the appraiser should decide the scope of work, perhaps in consultation with the client (Agency). This comment was made as part of a discussion about the Agency instructing the appraiser that in certain circumstances, the sales comparison approach would be the only approach to value to be used.

We point out that Agencies have had input to the appraisal process under the old rule. First, the ''sales comparison approach only'' option has been available to Agencies for many years and has, to our knowledge, caused no problems. Second, these requirements are written on the basis that the Agency is a ''knowledgeable user'' of appraisal services. That is, the Agency is familiar with both the appraisal process and its own needs, and is capable of participating in a legitimate statement of work to solve the appraisal problem. Accordingly, we believe that appraisers should not be given final authority over the appraisal process for an Agency. We believe it is appropriate that this option continue to be retained by the Agency.

One commenter said it believes the purpose and/or function of the appraisal, a definition of the estate being appraised, and if it is market value, its applicable definition, and the assumptions and limiting conditions should be stated separately, and not be in the scope of work.

We believe the scope of work, as a vehicle of agreement between the appraiser and the Agency, is the appropriate place to include these items. They should also be included in the appraisal report, as part of the scope of work statement.

One commenter questioned the meaning of ''the extent appropriate'' for application of the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA).[2]

The UASFLA is a publication that summarizes Federal eminent domain appraisal case and statute law. So, to the extent that an Agency either follows Federal eminent domain practices, or voluntarily adopts UASFLA as its appraisal guidelines, it may be applicable.

Another commenter recommended that the appraisal clearly define and list which items are considered as real property and which are considered as personal property.

We agree and the regulation and appendix A have been revised to reflect this suggestion.

Still another commenter suggested the five-year sales history be changed to ten years since the property may not have changed hands in the last five years.

Although we did not change the requirement in the regulation, we point out that its requirements are minimums. If the appraiser or the Agency believes higher levels of performance are necessary, then the appraisal scope of work should reflect that.

Section 24.103(a)(2)(ii) Appraisal Requirements

A commenter suggested that USPAP compliance would require appraisers to invoke the USPAP Departure Provision to use only the sales comparison approach.

We disagree with this evaluation. At the present time, a State certified or licensed appraiser who is requested by an Agency to provide only the sales comparison approach would, in our opinion, be doing so under the USPAP Jurisdictional Exception Rule, since the Agency's request would be pursuant to the authority granted it under its law and public policy, which is the basis for a USPAP Jurisdictional Exception.

Section 24.103(d) Qualifications of Appraisers and Review Appraisers

One commenter suggested the rule should recognize that appraisal professional organizations' designations provide an indication of an appraiser's abilities.

We have added language to § 24.103(d)(1) and corresponding text to appendix A to emphasize the need for appraisers and review appraisers to be qualified and competent, and that State licensing or certification, and professional designations can help provide an indication of an appraiser's abilities.

Section 24.103(d)(1)

While the majority of the comments on the proposed changes to this section were positive, we did receive several comments that recommended that appraisers and review appraisers be required to be State certified.

Although we have not adopted that suggestion, we recognize the need for appraisers and review appraisers to be qualified and competent, and that State licensing or certification, and professional designations can help provide an indication of an appraiser's abilities. Therefore, we have added certification and licensing to the list of items to be considered by an Agency in determining the qualification of an appraiser (or review appraiser). We also note that some States have specifically excluded certain State Agency appraisers from State licensing/certification requirements.

Section 24.104 Review of Appraisals

For consistency, the term review appraiser is used throughout this rule to refer to the person performing appraisal reviews. We also added language that

[2] The ''Uniform Appraisal Standards for Federal Land Acquisitions'' is published by the Interagency Land Acquisition Conference. It is a compendium of Federal eminent domain appraisal law, both case and statute, regulations and practices. It is available at *http://www.usdoj.gov/enrd/land-ack/toc.htm* or in soft cover format from the Appraisal Institute at *http://www.appraisalinstitute.org/ecom/publications/default.asp* and select ''Legal/Regulatory'' or call 888–570–4545.

will clarify and specify the responsibilities, authorities and expectations associated with appraisal review.

One commenter stated that the NPRM significantly expands appraisal review responsibilities and requirements.

We believe the final rule more accurately elucidates what was commonly assumed to be appraisal review responsibilities and requirements.

A commenter suggested that the final rule should allow administrative reviews performed by appraisers or non-appraisers where the values are less than $50,000.

We disagree because only a technical review can provide the basis for approving an appraisal for valuation purposes.

There was an objection to the discussion in the first two paragraphs of appendix A as being promotional and self-serving.

This discussion provides information on the concept of appraisal review as it is used by public Agencies and we believe it is necessary.

One commenter said the proposed change to allow the review appraiser to support and approve a different value without any oversight or review is not a good policy. This could result in the review appraiser being pressured to increase or reduce appraised values without oversight.

First, the policy allowing the review appraiser to support and approve a value different from that of the appraisal being reviewed has been part of the preceding rule and is not new. Second, at the Agency's option, the Agency official who establishes the amount believed to be just compensation to be offered to the property owner may be someone other than the review appraiser.

Section 24.104(a) Review Appraisers

Several commenters responded to the three options available for the appraisal review.

One commenter expressed concern for using the term ''rejected.''

We agree and replaced the term ''rejected'' proposed in the NPRM with ''not accepted.'' This more clearly reflects that such appraisals, while they may meet others' standards or requirements, do not meet the requirements of this rule and the Agency.

One commenter suggested that the type and level of review should be left to the discretion of the acquiring client Agency.

We agree that the Agency should have some discretion as to the review, and we believe that is included in the appraisal review provisions. However, we also believe the amount of appraisal review discipline specified in this rule is necessary to assure compliance with the Uniform Act requirement that the offer believed to be just compensation be based on an approved appraisal.

The same commenter also suggested that the rule delete the requirement that all appraisals must be reviewed.

We do not believe we have flexibility under the Uniform Act to make appraisal review optional. The Uniform Act calls for an approved appraisal, which this rule interprets and implements as requiring a technically reviewed appraisal. We note that while the Uniform Act specifically grants authority for waiver of the appraisal, it does not do so for approving an appraisal.

There were two comments saying the appraisal review provisions should be consistent with USPAP. One specifically cited that having the review appraiser approve the appraisal was not consistent with USPAP, and should be changed unless there is a compelling reason to be different.

We believe, first of all, that it is not inconsistent with USPAP for the review appraiser to be requested to approve the appraisal. We believe the requirement for approving the appraisal is within the bounds of USPAP's Standard Rule 3–1(c) where identification of the scope of the (review appraisal) work to be performed is discussed. Second, if there is any question as to consistency, we point out that the requirement for an ''approved appraisal'' is in the Uniform Act and would appear to qualify as a USPAP Jurisdictional Exception, based on being ''law or public policy.''

One commenter suggested that the phrase ''accepted (but not used)'' could raise questions in condemnation litigation as to why a report met ''government standards'' was not used, perhaps implying the Agency shopped for the value it wanted to get.

The appraisal review report should discuss why one of two or more reports was selected as approved for best supporting an offer believed to be just compensation.

Another commenter stated that references to the review appraiser setting just compensation is inaccurate and should be deleted.

The language in § 24.104 was carefully written to follow the Uniform Act. A staff review appraiser may be authorized to ''develop and report the amount believed to be just compensation,'' not ''set'' just compensation, which we acknowledge is the purview of the courts.

One commenter raised a concern that the review appraiser should be required to develop an opinion on whether or not the report complies with Standards 1, 2 and 3 of USPAP as well as an opinion of market value.

As we have noted, while this regulation is intended to be consistent with USPAP, it implements the Uniform Act and its requirements only; it is not a vehicle for implementing USPAP.

A commenter suggested that the owner be offered the opportunity to accompany the review appraiser on the inspection of the property.

An on-site inspection by the review appraiser is not a specific requirement of these regulations, so inviting the property owner would be inappropriate. The necessity of an onsite inspection by the review appraiser depends on the appraisal problem, the appraisal(s), and Agency policy.

One commenter asked what was the background of accepted, approved and rejected.

The three appraisal review results options specified reflect the results that were always needed, but never specifically cited. They are directly related to the needs of the acquisition process specified in the Uniform Act. Additional language has been added to appendix A to further clarify that process.

Section 24.104(b) Review of Appraisals

One commenter expressed the position that it is not good policy to allow the review appraiser, as part of the appraisal review process, to develop independent valuation information if he/she could not approve any submitted appraisal. Concern was expressed that there was potential for undue coercion to be exerted on the review appraiser without oversight.

We believe that newly introduced provisions to enhance appraiser and review appraiser independence will mitigate this risk. We point out that the provisions allowing the review appraiser to develop an independent valuation are carried over from the previous rule.

Section 24.104(c) Written Report

One commenter requested clarification that only a duly authorized Agency staff person can make the approved appraisal decision, because Agencies sometimes mistakenly believe they have no choice but to accept the review appraiser's conclusion.

This is clarified in the final rule.

Another commenter asked if an appraisal report which has had its value conclusion modified in some fashion

during review, maintains its status as approved.

This would come into play primarily when, subsequent to submission by a fee appraiser, the reviewer modifies the recommended (or approved) amount due to a plan revision or other similar reason. For the purposes of the Uniform Act and this regulation, the review appraiser could adjust the recommended or approved amount to reflect changes without voiding the acceptance of the reviewed appraisal report, if those changes are not so substantial as to change the appraisal problem.

Still another commenter asked whether the requirement that any damages or benefits to any remaining property be identified in the review appraiser's report is to be just a simple allocation between damages and benefits or whether discussion is implied.

The requirement is to ''identify'' any damages or benefits. Therefore, if some discussion may be needed to explain an allocation, such discussion should be included, too, but is not explicitly required.

Two commenters objected to authorizing the review appraiser to determine the amount believed to be just compensation, opining that is a management determination.

We agree it is a management determination, but it is also appropriate to give management the option of delegating this responsibility to a staff review appraiser.

Section 24.105 Acquisition of Tenant-Owned Improvements.

One commenter stated that some tenant-owned improvements or modifications made to accommodate a tenant's disability or the disability of a household member, such as ramps, may have no market value or salvage value because they are of limited use to anyone but the tenant who installed them. In such situations, the regulations should require that the household be compensated for the replacement value of the improvements.

We did not change the provision in § 24.105 for such a situation because the residential occupant would be ''made whole'' through relocation assistance provisions of this regulation.

Section 24.106 Expenses Incidental to Transfer of Title to the Agency

One commenter stated that we should add a new paragraph describing ''other related costs incurred'', solely as a result of transfer of real property to the Agency. The regulation can allow only those expenses specified by the Uniform Act, section 303, therefore, this change was not made.

Subpart C—General Relocation Requirements

Section 24.202 Applicability

One commenter suggested we change the word ''benefits'' to ''entitlements.'' We feel that since the word ''assistance'' is used throughout the Uniform Act that we will change the word ''benefits'', when feasible, to ''assistance'' to be more in line with the language used in the Uniform Act. The Uniform Act program is not an entitlement program but rather a reimbursement program to assist in relocating to a new site.

Section 24.203(b) Notice of Relocation Eligibility

One commenter requested that we further define ''promptly'' in § 24.203(b), suggesting that it refers to the prompt notification of all occupants/tenants after the initiations of negotiations and, therefore, should be defined to not exceed 7 calendar days or perhaps up to 10 calendar days at most. We consider promptly meaning ''as soon as practicable'' and do not believe that further elaboration is necessary. Displacing Agencies may wish to further define the term in their operational procedures. (The FHWA has issued guidance in the past to the State Highway Agencies suggesting that, as used in this section, ''promptly'' means 7 to 10 days).

Section 24.203(d) Notice of Intent to Acquire

The NPRM proposed moving the definition of notice of intent to acquire from the ''Definitions'' section to the ''Notices'' section of the regulations. The intent was to group all relocation notices in one place for consistency. A minor revision in wording for clarity was also proposed. No change in the meaning of the term was intended.

We received four comments on this proposed change. One commenter proposed alternative wording for the term that has not been adopted. Three commenters expressed confusion over the intent of this term, therefore, further explanation is warranted here.

The notice of intent to acquire is one of three actions (the other two being initiation of negotiations for acquisition, and actual acquisition) that can establish a person's eligibility for relocation assistance (see § 24.2(a)(9)(i)(A)). Unlike the other notices described in § 24.203, a notice of intent to acquire is not mandatory. As was noted when the 1989 final rule was issued (54 FR 8916), its purpose ''is to clearly establish a displaced person's eligibility for relocation benefits. However, it should be understood that the absence of such a notice does not deprive the person of eligibility for relocation benefits.''

A notice of intent to acquire may be used to establish a person's eligibility for relocation assistance prior to the initiations of negotiations and sometimes prior to commitment of Federal-financial assistance. A notice of intent to acquire is a means by which displacing Agencies may establish a person's relocation eligibility in advance of the typical acquisition and relocation process in order to conduct orderly relocation, minimize adverse impacts on displaced persons and to expedite project advancement and completion.

One commenter suggested that the notice of intent to acquire could be confused with the ''notice to owner'' found in § 24.102(b). A notice to owner is merely an Agency's notice informing the owner of the Agency's interest in acquiring the property; it is not a commitment and does not establish relocation eligibility. Whereas a notice of intent to acquire is an Agency's written notice provided to a person to be displaced; it is a commitment and clearly establishes relocation eligibility in advance of the normal acquisition and relocation process.

One commenter was uncertain as to the relationship between the notice of intent to acquire, and the notice of relocation eligibility, described in § 24.203(b). While the notice of intent to acquire is one of three possible actions that establish eligibility for relocation assistance, the notice of relocation eligibility is a mandatory notice that notifies persons when they become eligible for relocation assistance. For greater clarity and consistency we have added references to the notice of intent to acquire and actual acquisition in § 24.203(b) to make it clear that the notice of relocation eligibility must be provided after whichever Agency action first triggers a person's eligibility for relocation assistance.

Section 24.204(b)(1) Disaster Relief Act and Section 24.204(c) Basic Conditions of Emergency Move

For clarity, we have updated the citation to the Robert Stafford Disaster and Emergency Assistance Relief Act, as amended, (42 U.S.C. 5122) in § 24.204(b)(1). We have also added a reference to ''displacement dwelling'' in § 24.204(c) to emphasize that we are referring to relocations from such dwellings.

Section 24.205 Relocation Planning, Advisory Services, and Coordination

One commenter asked whether changes in § 24.205 were intended to preclude so-called ''global settlements.'' Another comment, focusing primarily on § 24.207(f) (which prohibits Agencies from requesting that displaced persons waive relocation benefits), recommended that the regulation would preclude the use of such settlements. The comment described ''global settlements'' as ''the packaging of relocation entitlements (in some cases moving, mortgage interest, price differential, etc.) with the fair market value to reach an administrative settlement of the acquisition.''

The changes to § 24.205 are not intended to reflect ''global settlements.'' We do not believe that such settlements are consistent with the requirements of the Uniform Act or this part.

The Uniform Act and this part require that relocation payments be determined in accordance with specific fact based criteria. For example, a homeowner's replacement housing payment shall be based on the ''amount, if any'' that must be added to ''the acquisition cost of the dwelling acquired'' to equal the reasonable cost of a comparable dwelling. It is therefore impossible to accurately determine the amount of a displaced homeowner's replacement housing payment until the actual acquisition cost of the acquired dwelling is established. Furthermore, a replacement housing payment can only be made to a displaced homeowner if the homeowner purchases and occupies a decent safe and sanitary replacement dwelling within one year after he or she receives final payment for the acquired dwelling. Accordingly, under the Uniform Act and this part, a homeowner's replacement housing payment cannot be determined until the actual acquisition cost is known.

In addition, actual reasonable moving expenses often cannot be determined until after the move has been completed. Relocation benefits provided under the Uniform Act and this part must be determined in accordance with the applicable requirements contained therein, and any ''settlement'', related to relocation benefits, that does not do so would not be consistent with statutory and regulatory requirements.

Both §§ 24.205 and 24.207(f) are drafted to ensure that displaced persons are fully advised of all relocation assistance benefits that are available to them, and that a displaced person is offered all the assistance and benefits for which he or she is eligible. This applies to both residential and nonresidential displacements.

Section 24.205(c)(2)(i)(A–F) General Planning

We received eleven comments on the proposed requirement for obtaining information from the displaced business owners concerning a business's needs during the relocation process to enable the acquiring Agency to assist the business in successfully relocating to a replacement site. Most were in favor of the new informational requirements. Three commenters expressed concerns, stating that their planning process was undertaken early, during the early environmental studies, and that the information would be obsolete prior to the actual relocation process.

We included this requirement so that the interviews, where the six informational items are to be obtained, are conducted during the advisory assistance process. This process is to be undertaken when relocation can be expected to begin within a short interval of time.

One commenter was concerned that some business owners employed legal counsel that advised the businesses not to provide any information to the displacing Agency. In such cases, acquiring Agencies should explain to business owners that the intent of the interview questions is to obtain data that will enable the Agency to better assist the displaced business, and that the Agency is required to seek such information by a Federal regulation implementing the Uniform Act.

Section 24.205(c)(2)(i)(C)

We received two comments recommending we change the wording in § 24.205(c)(2)(i)(C) concerning the resolution of personalty/realty issues, in order that the provision apply to all businesses not just tenant businesses. We agree with the recommendation and have removed ''tenant'' from § 24.205(c)(2)(i)(C).

We received six comments to the proposed change to § 24.205(c)(2)(i)(C), concerning identification and resolution of realty/personalty items prior to an appraisal of the property.

All commenters agreed that this is a problem area and that a change is needed. However, all commenters shared a common concern, that requiring resolution prior to the appraisal of the property is sometimes not possible.

One commenter suggested ''should'' be used in place of ''must.'' Several commenters reminded us that most Agencies are aware of the problem and make every effort to identify and resolve these issues as early as possible, but that sometimes it is not possible given the reluctance of tenants and owners to cooperate.

We received many comments from the public prior to the NPRM requesting a stronger position be taken on resolving realty/personalty issues early in the process. However, we recognize the valid concerns reflected in the comments and, therefore, have changed § 24.205(c)(2)(i)(C) to provide that ''every effort must be made'' to identify and resolve realty/personalty issues prior to ''or at the time of'' the appraisal.

Section 24.205(c)(2)(i)(E)

We received three comments on § 24.205(c)(2)(i)(E) which proposed that interviews with displaced business owners include an estimate of a business searching expense payment based on the estimated difficulty in locating a replacement site. The comments questioned the purpose of obtaining an estimate of searching expenses and asked whether the acquiring Agency or the business owner should prepare it.

There are two general purposes for this provision. The first is to generate a discussion of the anticipated problems faced by the business to enable the acquiring Agency to determine the time required for the move; and, second, to factor in the time and costs of investigating a replacement site. These costs include those necessary to obtain permits, attend zoning hearings and negotiate the purchase of a replacement site. Our primary intent was to identify problems in locating a replacement site. For clarity, and in response to the comments, we have deleted the requirement that an estimate of the searching expense payment be provided.

Section 24.205(c)(2)(ii)

Several commenters noted the incorrect placement of a sentence concerning business interviews within the residential portion of this section of the regulations, at the end of § 24.205(c)(2)(ii). This sentence was erroneously repeated from the preceding business interview discussion, and has been deleted from the final rule.

One commenter recommended that the regulations provide that reasonable accommodations be made for disabled displaced persons in the interview process and with regard to transportation. The NPRM did not propose any changes in this area and we believe none are necessary. Agencies must make every effort to provide reasonable accommodations for all displaced persons, including the

disabled, in order to minimize any adverse impacts. This is not a new requirement; it is a fundamental principle of relocation advisory services. As such, no additional changes were adopted.

Section 24.205(c)(2)(ii)(D)

We received 12 comments regarding the proposal that an Agency, which has a program objective of providing minority persons with an opportunity to relocate outside of areas of minority concentration, may determine to provide a reasonable and justifiable increase in the payment to facilitate such a move. Every comment disagreed with the addition of this flexibility for various reasons, many because it was perceived as a mandate to provide additional payments rather than an option based on an Agency's program goals. Based on further consideration, and in response to the comments, we removed this language from the final rule.

Section 24.205(c)(2)(ii)(E)

We received six comments on § 24.205(c)(2)(ii)(E), which concerns transportation to inspect replacement housing. One commenter suggested that such transportation should be ''need based'' for only certain individuals, such as those with health limitations or disabilities. Another commenter wanted to add the wording ''as appropriate.'' Still another commenter wanted the decision to provide this transportation to be at the discretion of the Agency.

The requirement to offer transportation to all displaced persons is not new. A minor clarification was proposed to emphasize that all displaced persons are entitled to such transportation. It has been our experience that most people will provide their own transportation, but in fairness to all, transportation shall be offered to all displaced persons equally.

One commenter voiced concern about government liability in transporting non-government persons, and suggested designating other forms of transportation. We purposely did not designate a mode of transportation. It is the responsibility of the Agency to decide how they will transport a displaced person. If liability is a concern, there are other means of transportation available such as a taxicab or rental car.

Section 24.206 Eviction for Cause

See the explanation under Subpart A, definitions, § 24.2(a)(12), in this preamble.

Section 24.207(f) Waiver of Benefits

We received 17 comments on § 24.207(f), which provides that displacing Agencies shall not propose or request that a displaced person waive his or her relocation benefits. This section complements §§ 24.205(c) and 24.203(a), (b) and (c) which describe the information and notices that must be provided to persons prior to displacement.

The comments were virtually unanimous in support of § 24.207(f). However, it appears that a few commenters did not fully understand this provision. As we noted in the preamble to the NPRM (68 FR 70348–70349), because the Uniform Act imposes requirements on displacing Agencies to provide relocation assistance, a person to be displaced cannot relieve an Agency from the Uniform Act's requirements by agreeing to waive his or her relocation assistance and benefits.

Appendix A, § 24.207(f), provides that a person, after they have been fully advised of all relocation payments and assistance to which they are entitled, may, in a written statement, choose not to accept some or all of such benefits. In the unlikely event that a person simply refuses to accept some or all payments and assistance, and refuses to provide any written statement to that affect, the Agency should document such refusal in writing.

We have made two minor changes to § 24.207(f) in response to comments. We have inserted ''No'' as the first word of the section's title, to emphasize that this provision is not intended to encourage any waiver of benefits. We have also changed the phrase ''relocation assistance and payments provided by the Uniform Act,'' to ''relocation assistance and benefits provided by the Uniform Act,'' to avoid any implication that this section would apply to payments for the acquisition of real property, which are addressed in detail in subpart B.

Section 24.207(g) Expenditure of Payments

We received five comments on proposed § 24.207(g). These generally requested minor editorial changes or further clarification. This section expresses longstanding practice and understanding by stating that relocation payments provided to a displaced person are not ''Federal financial assistance'' for purposes of this part, and therefore, their expenditure is not subject to the Uniform Act. In response to the comments received minor changes have been made to improve clarity.

Subpart D—Payments for Moving and Related Expenses

Section 24.301(b) Moves From a Dwelling

We received 13 comments on § 24.301(b), moving from a dwelling. Most of the commenters were unclear on what is meant by the phrase ''but not by the lower of two bids or estimates'' in § 24.301(b). It has long been our position that a residential displaced person cannot be paid for a self-move based on the lower of two bids or estimates. This has always been a moving option reserved for businesses. There are only three types of moving options available for residential moves, that are described in §§ 24.301(b)(1) and (2)(i) and (ii). After careful consideration of the comments we agree that the proposed language in § 24.301(b) could be misunderstood and have made changes to better clarify that a residential self-move cannot be based on the lower of two bids or estimates.

Two commenters questioned why we allow an actual cost move, supported by receipted bills, to equal the hourly rate that a commercial mover would receive. In response to that, the rate a commercial mover would pay is only there as a comparison, to ensure that the rate charged is not excessive. The rate may be less than the prevailing commercial rate.

One commenter suggested that we make it clear that the hourly rate for equipment rental be based on the actual cost of the equipment rental, but not exceed the cost a commercial mover would charge. We agree and have added language to §§ 24.301(b)(2)(ii) and 24.301(d)(2)(ii) to reflect this clarification.

Section 24.301(b)(2)(iii) and (c)(2)(iii) Moving Cost Finding

We received 20 comments on the proposed new method of moving personal property that would allow a qualified Agency staff person to estimate and determine the cost of a small uncomplicated personal property move up to $3,000, with the informed consent of the displaced person (NPRM § 24.301(b)(2)(iii).)

The comments varied from those who supported the proposal to those who opposed it. Others found it confusing and questioned the legality of our actions. Six commenters requested we increase the amount anywhere from $5,000 to $10,000 with one commenter suggesting the amount be set individually by each State. Four

commenters requested additional explanation as to what determines a ''qualified'' staff person and two commenters questioned the legality of such a move indicating that there is no statutory support for creating a different type of move.

One commenter suggested we tie the amount to a meaningful index to be evaluated periodically similar to the Fixed Residential Moving Costs Schedule and one commenter requested an explanation of how we arrived at $3,000.

This proposed change was intended to provide greater flexibility. However, because of the apparent misunderstanding of the purpose of the proposal, and the range of confusion and concern expressed, we have decided not to adopt this proposal.

Section 24.301(d) Moves From a Business, Farm or Nonprofit organization

One commenter brought to our attention that we had inadvertently left out actual cost moves as one of the options for business moves. We agree and thank the commenter for bringing it to our attention. We have added it back in the regulations as part of § 24.301(d)(2)(ii).

Two commenters requested additional information on hourly rates. We feel hourly rates are adequately explained in Actual Cost Self-Move.

Section 24.301(d)(2) Self-Move

One commenter objected to the elimination of ''qualified staff'' to estimate actual, reasonable moving expenses, especially in low-cost uncomplicated moves. While we recognize that it is sometimes difficult to receive an accurate estimate from a professional mover, the use of such an estimate, wherever possible, is valuable in establishing accuracy. We understand that occasionally it is necessary to consult trade associations representing specialty movers on a case-by-case basis. As a result, we did not make any changes to the rule.

Section 24.301(e) Personal Property Only

We received seven comments concerning the new paragraph on personal property, § 24.301(e). All were positive comments, however, four commenters requested additional explanation of what is covered by the new paragraph. The four commenters were concerned that, as proposed, § 24.301(e), personal property, would be limited to eligible expenses as described in § 24.301(g)(1) through (g)(7) and not be eligible for expenses in § 24.301(g)(8) through (g)(18). Thus, in effect eliminating the use of actual direct loss of tangible personal property, substitute personal property, searching expense, and other normally eligible business expenses.

As explained in the preamble to the NPRM, this provision was only intended to be used for moving personal property from property acquired for a Federal or federally-assisted project, where there was no need for a full relocation of a residence, business, farm or nonprofit organization. It was not intended to cover the eligible moving items in § 24.301(g)(8) through (g)(18). However, upon further consideration, eligibility for payment based on § 24.301(g)(18) Low Value/High Bulk is determined to be appropriate for inclusion in a personal property only move. As such, we have revised this section of the regulations to include § 24.301(g)(18) as an eligible actual moving expense as part of a nonresidential personal property only move.

It should also be noted that personal property only moves do not trigger eligibility for reestablishment expense payments, nor are they eligible for actual moving expense payments under § 24.301(g)(8) through (g)(17).

For moving options and examples of the types of personal property only relocations, see appendix A, § 24.301(e).

Section 24.301(g)(3) Eligible Moving Expenses

We received 19 comments regarding compliance with code requirements at the replacement site of a small business, farm or nonprofit organization. The commenters requested that we consider moving more criteria from § 24.304 to either §§ 24.301 or 24.303.

Nine of the commenters urged moving the provision providing payments for ''repairs or improvements to the replacement real property as required by Federal, State or local law, code or ordinance'' from the reestablishment expense § 24.304, which provides a reestablishment payment not to exceed $10,000, to § 24.303, where the reimbursement provision is not limited. Four commenters suggested that we should move additional criteria from § 24.304 to other sections that provide payment for actual, reasonable and necessary expenses.

We do not believe these suggestions are appropriate since we believe actual moving cost expenses for businesses should be limited to personal property items, while expenses for improving business real property should be reimbursed under reestablishment provisions of § 24.304. However, we note that three provisions which were formerly under reestablishment limitations, and which do not fall within the category of realty or personalty, have been moved to revised § 24.303, and can be considered for reimbursement without a defined dollar limitation.

Four commenters requested further clarification of the reference to modifications of personal property in § 24.301(g)(3). To clarify, the provision for displaced businesses, permitting modifications to the personal property within the replacement structure, provides payment for costs necessary to adapt personal property to the replacement site, and includes modifications mandated by Federal, State or local law, code, or ordinance. This includes circumstances when such property and equipment was ''grandfathered'' in the displacement structure, but changes or upgrading of the personalty is required by the Americans with Disabilities Act (ADA), the Occupational Safety and Health Administration (OSHA), other Federal laws, State or local law, code or ordinances at the replacement site. The modifications authorized for reimbursement must be clearly and directly associated with the reinstallation of the personal property and cannot be for general repairs or upgrading of equipment because of the personal choice of the business owner. Finally, the expenditures for authorized modifications must be reasonable and necessary.

Two commenters were concerned that we may have gone too far in moving some items from §§ 24.304 to 24.303, instead suggesting that more attention should be given to the level of service provided to businesses as proposed in § 24.205. Their concern is that it is questionable whether having no cost limits will always improve the percentage of successful business relocations. We considered their concern but have elected to make the proposed changes.

To further clarify § 24.301(g)(3) we have restructured the existing wording to distinguish residential and nonresidential items and added a reference to Federal, State or local law, code or ordinance.

Section 24.301(g)(12)

We received one comment recommending that § 24.301(g)(12) further define the limits of eligible fees for professional services. The commenter recommended that such eligible fees be limited to fees related to actually moving the personal property, and not include fees related to

conceptual building or site layouts intended for construction/reconstruction at the replacement property.

No changes have been made to this section. The professional services described in this section only include those that are directly related to moving personal property. Conceptual building or site layouts intended for construction/reconstruction at the replacement property are not considered eligible expenses under this section. Professional services related to these types of expenses may be considered eligible expenses under § 24.303(b), related nonresidential eligible expenses, if the Agency determines them to be actual, reasonable and necessary.

Section 24.301(g)(14) and (g)(14)(i)

We received 13 comments recommending that we clarify § 24.301(g)(14) relating to the actual direct loss of tangible personal property. In particular commenters expressed confusion about the meaning of the phrase ''value in place as is for continued use,'' with two comments suggesting that the regulation include a definition of an appraisal method to estimate this in-place value. Two comments requested clarification as to whether reconnect charges should be included with the estimated moving cost.

The term ''value in place as is for continued use'' means the depreciated value of the item as it is installed at the displacement site as of the date of the acquisition. We have modified Appendix A, § 24.301(g)(14) to clarify the correct value considerations to estimate in-place value. Generally, an item will be valued based on the current cost of the item as installed on the displacement site, and depreciated to reflect the current condition and estimated remaining useful life. Standard professional personal property appraisal methods would be acceptable. The in-place value at its ''as is'' condition may not include costs that reflect code or other requirements that were not actually in effect at the displacement site; or include installation costs for machinery or equipment that is not operable or not installed at the displacement site.

The estimated moving cost for an item is also to be limited to the ''as is'' condition of the item at the displacement site. Therefore, estimated reconnect costs may not include costs to meet code or other requirements that would only be necessary to relocate the item to a replacement site. Since the item is claimed as a loss and is not to be relocated, allowable reconnect costs may only reflect an estimate of the cost that would be incurred to install the item as it currently exists at the displacement site. Also the moving cost estimate may not include reconnect costs for an item that is not operable or installed at the displacement site.

We believe that the provision proposed in the NPRM, as further explained in appendix A, is correct and consistent with this intent of the Uniform Act, to provide moving benefits that are actual, reasonable and necessary. Therefore, we have included this provision in the final rule.

Section 24.301(g)(17)

We received twelve comments concerning § 24.301(g)(17), which proposed raising the searching expense limit from $1,000 to $2,500. One commenter was not in favor of the increase. Other commenters wanted a greater increase on the allowable limit, no limitation, or urged that it be indexed. The remaining commenters expressed agreement with the increase and/or sought clarifications.

Two commenters asked whether the actual fees assessed for permits are payable under § 24.301(g)(17)(v). This provision includes the actual time and effort required to obtain permits and to attend zoning hearings, not the assessed fees for the permits.

Section 24.301(g)(17) also includes the time spent in negotiating the purchase of a replacement business site based on a reasonable salary or earnings rate. We have added paragraph (g)(17)(vi) to provide for these expenses. In addition, fees necessary in obtaining such permits are eligible costs but should be based on a pre-approved hourly rate that is reasonable and necessary.

Section 24.301(g)(18)

We received ten comments on § 24.301(g)(18) concerning low value/high bulk personal property. Most comments concerned basing the moving payments on the lesser of the amount received if sold, and the replacement cost at the new location of the business. Two commenters stated that a determination as to whether items should be moved should be a joint decision between business operator and the displacing Agency.

We have adopted the proposed language providing for payment of the lesser of the described amounts. We believe that the business owner should be permitted to make the decision on whether the material is to be moved to the new business location. However, the amount of the reimbursement in the move cost should be limited to that set forth in the final rule. Also, there was concern that the items listed in the last sentence of § 24.301(g)(18) are the only items that can be moved under this provision. However, that was not the intent. The items listed are only examples and there certainly can be other items that qualify under this provision. We have made a minor clarification to address this concern.

Section 24.301(h)(12)

We received six comments on § 24.301(h)(12). Two commenters objected to listing refundable security and utility deposits as ineligible moving expenses. While a good argument might be made for providing reimbursement for these expenses, the Uniform Act provides no authority for their reimbursement and we therefore cannot include them in the regulatory description of ''actual, reasonable moving expenses,'' without a legislative change. The fact that they are refundable would remove them from eligibility.

Section 24.302 Fixed Payment For Moving Expenses—Residential Moves

We received one comment on the proposed changes to § 24.302, Fixed Residential Moving Cost Schedule (FRMCS). The commenter requested that the amounts be updated annually or biannually. The same commenter requested that the amount be increased to be more in line with what a professional commercial mover would receive.

The purpose of the FRMCS is not to be in competition with professional commercial movers, but rather to offer an option to the commercial move. There are currently three methods to move personal property from a dwelling; a professional commercial mover, the fixed residential moving cost schedule, or an actual cost move based on receipted bills (*See* § 24.301(b).) The Fixed Residential Moving Cost Schedule is updated every three years. The language in the final rule will remain as proposed in the NPRM.

Section 24.303(b) Related Nonresidential Eligible Expenses

We received 7 comments requesting further clarification of eligible professional services mentioned in § 24.303(b). There was confusion as to whether professional services included attorneys' fees and other professional services relating to costs of negotiating to acquire property, closing costs, etc.

Generally, professional services performed prior to the purchase or lease of a replacement site, to determine it's suitability for the displaced person's

business operation, would be eligible for reimbursement; provided the Agency determines that they are actual, reasonable and necessary. Such professional services include, but are not limited to, soil testing, feasibility and marketing studies, and may be based on a pre-approved hourly rate. Fees and commissions directly related to the purchase or lease of the site, such as realtor commissions or finder's fees are ineligible for reimbursement.

Moving expenses for businesses sometimes include the cost of obtaining outside professional services made necessary only by the relocation. For example, attorneys' fees for representation before zoning authorities, or the cost of obtaining a soil analysis necessary in the preparation of a replacement site are directly related to relocation, and may be considered eligible expenses. By contrast, if these services are provided by regular employees of the displaced business, (such as staff engineers,) or professional contractors ordinarily used by the business for its everyday operations (such as legal counsel on retainer), these services are considered ordinary costs of doing business, and cannot be recognized among eligible moving expenses.

One commenter suggested we revise the wording in this section for clarity. We concur and have made some minor modifications.

Section 24.304 Reestablishment Expenses—Nonresidential Moves

Three comments suggested that § 24.303 be expanded to include costs necessary to satisfy requirements of Federal, State or local law, code or ordinance, including the Americans with Disabilities Act (ADA). In the NPRM we considered such costs to be among those listed as reestablishment expenses in § 24.304(a). As mentioned above, reestablishment expenses are, by statute, available to displaced farms, nonprofits, and small businesses, and are limited to $10,000.

In the NPRM we proposed increasing assistance to businesses and farms by changing some of the costs that had been considered to be reestablishment expenses, to actual reasonable moving expenses, which are not subject to the $10,000 cap. However, the proposed changes only included those costs that were unrelated to improvements to the replacement site. Costs related to improving the replacement real property were more clearly considered to be ''reestablishment expenses,'' and accordingly, were retained in § 24.304.

We continue to believe that this approach provides the most reasonable interpretation of the Uniform Act's requirements and, therefore, in the final rule we have left costs of repairs or improvements to the replacement real property, required by Federal, State or local law or codes, in § 24.304, as reestablishment expenses.

Section 24.304(a)(2)

We received one comment pointing out that § 24.304(a)(2), which concerns necessary modifications to the replacement property, seems to apply to existing buildings which are purchased or leased and must be renovated to some extent, and asked if this section applied to new construction.

The cost of constructing a new business building on the vacant replacement property is considered a capital expenditure and, as provided in § 24.304(b)(1), is generally ineligible for reimbursement as a reestablishment expense. In those rare instances when a business cannot relocate without construction of a replacement structure, a displacing Agency may request a waiver from the funding Agency of § 24.304(b)(1) under the provisions of 49 CFR part 24.7.

Subpart E—Replacement Housing Payments

Section 24.401(a) Eligibility

One commenter assumed that appendix A is not regulatory. This is not accurate. Appendix A is an integral part of the regulation, and, while it does not impose mandatory requirements, it does provide important additional guidance and information concerning the purpose and intent of a number of the provisions in part 24.

Section 24.401(e) Incidental Expenses

One commenter suggested that the payment of actual reasonable expenses incidental to the purchase of a replacement dwelling, described in § 24.401(e), would be simplified by providing a single payment for a displaced homeowner's actual closing costs up to a fixed amount, such as $3,000. While this suggestion might simplify the computation of this component of the replacement housing payment, it was not proposed for public comment in the NPRM and, therefore, it is outside the scope of this rulemaking. However, this suggestion could be addressed in a future rulemaking effort to update 49 CFR part 24.

Section 24.401(f) Rental Assistance for 180-day Homeowner

We received nine comments on the change in proposed in § 24.401(f) that would allow a rental assistance payment for a displaced 180-day homeowner (who elects to rent instead of purchase a replacement dwelling) to exceed $5,250 if the difference in the estimated market rent of the acquired dwelling and the rent for a comparable replacement dwelling support a higher figure. The NPRM also proposed that the rental supplemental payment not be allowed to exceed the amount the 180-day homeowner would have received as a housing (purchase) supplemental payment under § 24.401(b).

Three of the nine commenters suggested clarification as to the maximum amount of assistance to which the displaced 180-day homeowner is entitled. In response, we have made several minor changes to this section. The rental assistance payment cannot exceed the amount the 180-day homeowner would have received under § 24.401(b)(1) (see also § 24.401(c)) which describes how that amount is determined. The payment cannot include costs for expenses under §§ 24.401(b)(2) and (3) (also see §§ 24.401(d) and (e)) as it is not possible to calculate what the 180-day homeowner who rents would have received for increased mortgage interest costs and incidental costs if the person does not actually purchase a replacement dwelling.

Section 24.402(b)(2) Base Monthly Rental for Replacement Dwelling

We received 23 comments on the proposed change in § 24.402(b)(2) that reflects more closely the statutory requirement that only a low-income displaced person's income shall be taken into consideration when calculating rental assistance payments for a comparable replacement dwelling (42 U.S.C. 4624(a)). We have adopted this change in the final rule and it is more in line with the intent of the Uniform Act in that it assures consideration of income for low-income persons. The procedures in § 24.402(b)(2)(ii) will continue to use 30 percent of monthly gross household income, but only for displaced persons who qualify as low income under the U.S. Department of Housing and Urban Development's Annual Survey of Income Limits.[3]

Of the 23 comments, thirteen strongly favored the change; five expressed concern about increased administrative burden; three commenters requested that we drop the 30 percent altogether; one expressed concern that the change would deny replacement housing

[3] A link to the applicable URA Low Income Limit is available on FHWA's Web site at the following URL: *http://www.fhwa.dot.gov/realestate/ua/ualic.htm.*

assistance to tenants; and one commenter pointed out that there would be variations of income by county and State.

We have carefully considered each comment and for the following reasons, we have adopted the proposed change in the final rule. Regarding the increased administrative burden, we have requested several of our field offices to use the HUD Annual Survey of Income Limits and find it relatively user friendly. The initial attempt, as in any new procedure, was awkward, but additional tests became increasingly easier. The request to drop the 30 percent requirement completely would not be in compliance with the Uniform Act, as noted above. The concern by one commenter that the change would eliminate those who are most in need of the assistance is incorrect. We believe that we would be reaching out specifically to those who are truly in need of additional assistance. Those tenants that do not fall into the low-income category will be offered a comparable dwelling based on a rent-to-rent comparison.

Section 24.402(c) Downpayment Assistance Payment

We received eight comments on the proposed change in the criteria to receive a downpayment. Four commenters expressed support for the proposed change to the discussion of § 24.402(c) in appendix A. The proposal would remove language that indicated that an Agency should limit the amount of downpayment assistance to an amount ordinarily required for conventional loan financing. The proposed change allows a displaced person to apply the full amount of the rental replacement housing payment as a downpayment towards the purchase price of the replacement dwelling and related incidental expenses, regardless of any limitation on what is ordinarily required for conventional loan financing. No negative responses were received and the change has been adopted.

Two commenters stated that § 24.404(c)(1)(viii), (concerning possible differences between a rental assistance payment and a downpayment when providing housing of last resort) was inconsistent with the proposed change to appendix A, § 24.402(c), described above. We agree and, accordingly, have deleted § 24.404(c)(1)(viii).

Section 24.403(a) Determining Cost of Comparable Replacement Dwelling

The NPRM proposed that the homeowner's replacement housing payment be broadened to include any increase in real property taxes at the replacement dwelling during the first two years of ownership. We received 31 widely varying comments on this proposal. Nine comments opposed the proposed change. Six comments supported the proposal. Eleven comments supported the concept, but either disagreed with the details of the proposal, or also wanted to include any increases in such costs as insurance, utilities and homeowner's association fees. The remaining comments asked for clarification or expressed no opinion.

Comments that opposed the proposal mentioned such factors as; the addition of substantial administrative burdens, with relatively little benefit; the difficulty in factoring in various State or local provisions that grant property tax relief based on age, income, disability or other factors; and the view that an increase in real property taxes is not really part of the ''cost'' of the replacement dwelling for purposes of the Uniform Act.

We have carefully considered the comments and have decided not to adopt this proposed change. Our decision is based primarily on the general administrative burdens mentioned in the comments, as well as on the difficulty, suggested in the comments, of trying to develop a reasonably equitable and manageable system for providing short term compensation for property tax increases. We believe that it would be difficult for such a system to easily take into account the variable and inconsistent nature of such taxes resulting from provisions of State and local law that often provide reduced taxes in certain circumstances or to certain groups. Our decision was also influenced by the lack of any clear indication in the Uniform Act that real property taxes were intended to be included as part of the cost of a comparable dwelling.

Not including this proposal in the final rule does not affect the ability of any displacing Agency to compensate displaced homeowners for increased property taxes and similar costs if otherwise authorized to do so.

Section 24.403(a)(1)

The NPRM proposed removing the requirement that Agencies adjust the asking price of comparable replacement dwellings in computing a homeowner's replacement housing payment. That adjustment was considered burdensome for displacing Agencies, as well as for displaced homeowners by, in effect, forcing the homeowner to negotiate for a price lower than the asking price when purchasing a replacement dwelling.

We received 14 comments on this proposal. Ten supported it, and three asked for some further clarification. One commenter requested the right to continue adjusting the comparable. We have adopted the proposal without change. Accordingly, since the requirement to adjust asking prices has been deleted from the rule, there is no longer any authority or basis for Agencies operating under the Uniform Act to make such adjustments (which would reduce the amount of the homeowner's replacement housing payment). Displacing Agencies must now use the asking price of a comparable dwelling in computing the replacement housing payment.

Section 24.403(a)(6)

In the NPRM, we proposed to include language in § 24.2(a)(6)(viii) that would have allowed rent owed to an Agency to be taken into account when determining whether a comparable replacement dwelling is within a displaced person's financial means. Because we received a comment objecting to similar language in § 24.2(a)(6)(viii), we have decided to remove this language from both 24.403(a)(6) and § 24.2(a)(6)(viii).

Subpart F—Mobile Homes

Sections 24.501 through 24.502

We received seven comments on Subpart F, Mobile Homes, concerning clarifications of §§ 24.501 and 24.502. Four commenters identified incorrect wording in §§ 24.502(a)(1)(iii) and 24.502(b)(2). The error concerned the replacement housing payment eligibility computation for an eligible homeowner that is displaced from his/her mobile home. We agree that the wording did not accurately transpose in formatting the NPRM and the error has been corrected in §§ 24.502(a)(1)(iii) and 24.502(b)(2).

Two commenters suggested a simplification of the terms describing a displaced homeowners application of a rental assistance payment and concerning a homeowner who is not displaced from their mobile home. After reviewing these provisions we have determined that they are clear as proposed in the NPRM; however, to further clarify the comparable replacement home site we have moved the existing §§ 24.502(d) to 24.502(b)(3).

Distributions Tables

For ease of reference, distribution and derivation tables are provided for the current sections and the proposed sections as follows:

DERIVATION TABLE

New section	Old section
24.1	24.1.
24.2(a)(1)	24.2 Agency.
24.2(a)(2)	24.2 Alien not lawfully present in the United States.
24.2(a)(3)	24.2 Appraisal.
24.2(a)(4)	24.2 Business.
24.2(a)(5)	24.2 Citizen.
24.2(a)(6)	24.2 Comparable replacement dwelling.
24.2(a)(6)(i) through (vii).	24.2 Comparable replacement dwelling (1) through (7).
24.2(a)(6)(viii)(A) through (C).	24.2 Comparable replacement dwelling (8)(i) through (iii).
24.2(a)(6)(ix)	None.
24.2(a)(7)	24.2 Contribute materially.
24.2(a)(8)	24.2 Decent, safe, and sanitary dwelling.
24.2(a)(9)	24.2 Displaced person.
24.2(a)(9)(ii)(M)	None.
24.2(a)(10)	24.2 Dwelling.
24.2(a)(11)	None.
24.2(a)(12)	24.2 Farm operation.
24.2(a)(13)	24.2 Federal financial assistance.
24.2(a)(14)	None.
24.2(a)(15)	24.2 Initiation of negotiations.
24.2(a)(15)(iv)	None.
24.2(a)(16)	24.2 Lead Agency.
24.2(a)(17)	None.
24.2(a)(18)	24.2 Mortgage.
24.2(a)(19)	24.2 Nonprofit organization.
24.2(a)(20)	24.2 Owner of a dwelling.
24.2(a)(21)	24.2 Person.
24.2(a)(22)	24.2 Program or project.
24.2(a)(23)	24.2 Salvage value.
24.2(a)(24)	24.2 Small business.
24.2(a)(25)	24.2 State.
24.2(a)(26)	24.2 Tenant.
24.2(a)(27)	24.2 Uneconomical remnant.
24.2(a)(28)	24.2 Uniform Act.
24.2(a)(29)	24.2 Unlawful occupancy.
24.2(a)(30)	24.2 Utility costs.
24.2(a)(31)	24.2 Utility facility.
24.2(a)(32)	24.2 Utility relocation.
24.2(a)(33)	None.
24.2(b)	None.
24.8(m)	None.
24.8(n)	None.
24.8(o)	None.
24.101(a) and (b)	24.101(a).
24.101(b)(1)	24.101(a)(1).
24.101(b)(1)(i)	24.101(a)(1)(i).
24.101(b)(1)(ii)	24.101(a)(1)(ii).
24.101(b)(1)(iii)	24.101(a)(1)(iii).
24.101(b)(1)(iv)	24.101(a)(1)(iv).
24.101(b)(2)	24.101(a)(2).
24.101(b)(2)(i)	24.101(a)(2)(i).
24.101(b)(2)(ii)	24.101(a)(2)(ii).
24.101(b)(3)	24.101(a)(3).
24.101(b)(4)	24.101(a)(4).

DERIVATION TABLE—Continued

New section	Old section
24.101(b)(5)	24.101(a)(5).
24.101(c)	24.101(b).
24.101(d)	24.101(c).
24.102(c)(1)	24.102(c).
24.102(n)	24.103(e).
24.103(a)(1)	24.103(a)(2).
24.103(a)(2)	24.103(a)(3).
24.103(a)(3)	24.103(a)(4).
24.103(a)(4)	24.103(a)(5).
24.103(a)(5)	24.103(a)(6).
24.203(a)(2) through (5).	24.203(a)(4).
24.203(d)	24.2 Notice of intent to acquire.
24.205(a)(4)	None.
24.205(a)(5)	24.205(a)(4).
24.205(c)(2)(i)(A) through (F).	None.
24.205(c)(2)(ii)(A)	24.205(c)(2)(ii).
24.205(c)(2)(ii)(B)	24.205(c)(2)(ii)(A).
24.205(c)(2)(ii)(C)	24.205(c)(2)(ii)(B).
24.205(c)(2)(ii)(D)	24.205(c)(2)(ii)(C).
24.205(c)(2)(ii)(E)	24.205(c)(2)(ii)(D).
24.205(c)(2)(ii)(F)	None.
None	24.205(c)(2)(vi).
24.205(e)	24.205(c)(2)(iv).
24.207(e)	24.207(g).
24.207(f) and (g)	None.
24.301(a)	24.303(a) and 24.502(b).
24.301(a)(1) and (2)	24.502(a).
24.301(b)(1) and (2)	24.301 Intro. para.
24.301(b)(1)	24.303(a).
24.301(b)(2)(i)	24.302 First sentence.
24.301(b)(3)	None.
24.301(c)	None.
24.301(d)	24.303(a).
24.301(d)(1) and (2)	24.303 (c).
24.301(f)	24.303(e).
24.301(g)(1)	24.303(a)(1) and 24.301(a).
24.301(g)(2)	24.301(b) and 24.303(a)(2).
24.301(g)(3)	24.303(a)(3).
24.301(g)(4)	24.303(a)(4) and 24.301(d).
24.301(g)(5)	24.303(a)(5) and 24.301(e).
24.301(g)(6)	24.303(a)(7) and 24.301(f).
24.301(g)(7)	24.303(a)(14) and 24.301(g).
24.301(g)(8)	24.502(b)(1).
24.301(g)(9)	24.502(b)(2).
24.301(g)(10)	24.502(b)(3).
24.301(g)(11)	24.303(a)(6).
24.301(g)(12)	24.303(a)(8).
24.301(g)(12)(i) through (iii).	24.303(a)(8)(i) through (iii).
24.301(g)(13) through (17).	24.303(a)(9) through (13)(iv).
24.301(g)(17)(v) and (vi).	None.
24.301(g)(18)	None.
24.301(h)(1) through (11).	24.305(a) through (k).
24.301(i)	24.303(b).
24.301(j)	24.303(d).
24.303 Intro. para.	23.303 Intro. para.
24.303(a)	24.304(a)(4).

DERIVATION TABLE—Continued

New section	Old section
24.303(b)	24.304(a)(7) and (a)(9).
24.303(c)	24.304(a)(11).
24.304(a)(4)	24.304(a)(5).
24.304(a)(5)	24.304(a)(8).
24.304(a)(6)	24.304(a)(10).
24.304(a)(7)	24.304(a)(12).
24.305	24.306.
24.305(b)(1) through (4).	24.306 (b)(1) through (4).
24.305(c) through (e)	24.306 (c) through (e).
24.306	24.307.
24.401(c)(2)	24.401(c)(4).
24.403(a)(5)	24.207(e).
24.403(a)(6)	24.207(f).
24.403(a)(7)	24.401(c)(2).
24.403(g)	24.401(c)(3).
None	24.404(c)(1)(viii).
24.501(a)	24.501 Intro. para.
24.501(b)	24.505(e).
24.502 Heading	24.503.
24.502(a)	24.503(a)(1) and 505(c).
24.502(a)(1)	24.503(a)(1) and 505(c).
24.502(a)(2) and (3)	24.503(a)(2) and (3).
24.502(b)	24.503(b).
24.502(b)(1)	None.
24.502(b)(2)	24.503(a)(3) and 503(b).
24.502(c)	24.505(a).
24.502(d)	24.503(a)(3)(iii) and 24.505(b)(1).
24.502(e)	24.505(b)(2).
24.503	24.504.

DISTRIBUTION TABLE

Old section	New section
Subpart A	Subpart A
24.1	24.1 Text unchanged.
24.2 Heading	24.2 Heading revised.
None	24.2(a) Introductory para. added.
Agency	24.2(a)(1) Revised.
(1) Acquiring agency	24.2(a)(1)(i) Redesignated and revised.
(2) Displacing agency	24.2(a)(1)(ii) Redesignated and text unchanged.
(3) Federal agency	24.2(a)(1)(iii) Redesignated and text unchanged.
(4) State agency	24.2(a)(1)(iv) Redesignated and text unchanged.
Alien not lawfully present in the US.	24.2(a)(2) Redesignated.
Appraisal	24.2(a)(2)(i) Redesignated and revised.
	24.2(a)(2)(ii) Redesignated and text unchanged.
	24.2(a)(3) Redesignated and text unchanged.
Business	24.2(a)(4) Redesignated.

DISTRIBUTION TABLE—Continued

Old section	New section
(1) and (2)	24.2(a)(4)(i) and (ii) Redesignated and revised.
(2) and (3)	24.2(a)(4)(iii) and (iv) Redesignated and text unchanged.
Citizen	24.2(a)(5) Redesignated and text unchanged.
Comparable replacement dwelling.	24.2(a)(6) Redesignated and text unchanged.
(1) and (2)	24.2(a)(6)(i) and (ii) Redesignated and revised.
(3) through (6)	24.2(a)(6)(iii) through (vi) Redesignated and text unchanged.
(7) and (8)	24.2(a)(6)(vii) and (viii) Redesignated and revised.
(8)(i) through (iii)	24.2(a)(6)(viii) (A) through (C) Redesignated and text unchanged.
None	24.2(a)(6)(ix) Added.
Contribute materially	24.2(a)(7) Redesignated and text unchanged.
Decent, safe, and sanitary dwelling.	24.2(a)(8) Redesignated and revised.
(1) through (3)	24.2(a)(8)(i) through (iii) Redesignated and text unchanged.
(4) Sentence one	24.2(a)(8)(iv) Redesignated and revised.
(4) Remaining sentences.	24.2(a)(8)(iv) Redesignated and text unchanged.
(5)	24.2(a)(8)(vi) Redesignated and revised.
(6)	24.2(a)(8)(vii) Redesignated and revised.
Displaced Person	24.2(a)(9) Redesignated.
Displaced person (1)	24.2(a)(9)(i) Redesignated and revised.
Displaced person (1)(i).	24.2 (a)(9)(i)(A) Redesignated and revised.
Displaced person (1)(ii).	4.2 (a)(9)(i)(B) Redesignated and text unchanged.
Displaced person (1)(iii).	24.2 (a)(9)(i)(C) Redesignated and text unchanged.
Persons not displaced (2).	24.2 (a)(9)(ii) Redesignated and text unchanged.
Persons not displaced (2)(i) through (iii).	24.2 (a)(9)(ii) (A) through (C) Redesignated and text unchanged.

DISTRIBUTION TABLE—Continued

Old section	New section
Persons not displaced (2)(iv) through (viii).	24.2 (a)(9)(ii)(D) through (H) Redesignated and revised.
Displaced person (2)(ix).	24.2(a)(9)(ii)(I) Redesignated and text unchanged.
Displaced person (2)(x) and (xi).	24.2(a)(9)(ii)(J) and (K) Redesignated and revised.
Displaced person (2)(xii).	24.2(a)(9)(ii)(L) Redesignated and revised.
None	24.2(a)(9)(ii)(M) Added.
Dwelling	24.2(a)(10) Redesignated and text unchanged.
None	24.2(a)(11) Added.
Farm operation	24.2(a)(12) Redesignated and text unchanged.
Federal financial assistance.	24.2(a)(13) Redesignated and text unchanged.
None	24.2(a)(14) Added.
Initiation of negotiations Intro. para..	24.2(a)(15) Intro. para. Redesignated and text unchanged.
(1) and (2)	24.2(a)(15)(i) and (ii) Redesignated and text unchanged.
(3)	24.2(a)(15)(iii) Redesignated and revised.
None	24.2(a)(15)(iv) Added.
Lead agency	24.2(a)(16) Redesignated and text unchanged.
None	24.2(a)(17) Added.
Mortgage	24.2(a)(18) Redesignated and text unchanged.
Nonprofit organization	24.2(a)(19) Redesignated and text unchanged.
Notice of intent to acquire or notice. of eligibility for relocation assistance.	24.203(d) Revised.
Owner of a dwelling	24.2(a)(20) Redesignated and revised.
(1), (2) and (4)	24.2(a)(20)(i), (ii) and (iv) Redesignated and text unchanged.
(3)	24.2(a)(20)(iii) Redesignated and revised.
Person	24.2(a)(21) Redesignated.
Program or project	24.2(a)(22) Redesignated.
Salvage value	24.2(a)(23) Revised.
Small business	24.2(a)(24) Redesignated.
State	24.2(a)(25) Redesignated.
Tenant	24.2(a)(26) Redesignated.

DISTRIBUTION TABLE—Continued

Old section	New section
Uneconomic remnant	24.2(a)(27) Redesignated.
Uniform Act	24.2(a)(28) Revised.
Unlawful occupancy	24.2(a)(29) Revised.
Utility costs	24.2(a)(30) Redesignated and revised.
Utility facility	24.2(a)(31) Redesignated.
Utility relocation	24.2(a)(32) Redesignated.
None	24.2(a)(33) Added.
None	24.2(b) Added.
24.3	24.3 Text unchanged.
24.4(a)(1) through (3)	24.4(a)(1) through (3) Text unchanged.
24.4(b) and (c)	24.4(b) and (c) Text unchanged.
24.5 through 24.7	24.5 through 24.7 Text unchanged.
24.8(a) through (g)	24.8(a) through (g) Text unchanged.
24.8(h)	24.8(h) Revised.
24.8(i)	24.8(i) Revised.
24.8(j) through (l)	24.8(j) through (l) Text unchanged.
24.8(m)	24.8(m) Removed.
24.8(n)	24.8(m) Redesignated.
None	24.8(n) Added.
None	24.8(o) Added
24.9(a) and (b)	24.9(a) and (b) Text unchanged.
24.9(c)	24.9(c) Revised.
24.10(a) through (f)	24.10(a) through (f) Text unchanged.
24.10(g)	24.10(g) Revised.
24.10(h)	24.10(h) Text unchanged.
Subpart B	**Subpart B**
24.101 Heading.	24.101 Heading Text unchanged.
24.101(a)	24.101(a) Revised.
24.101(a) Second phrase..	24.101(b) Redesignated and revised.
24.101(a)(1)	24.101(b)(1) Redesignated and revised.
24.101(a)(1)(i)	24.101(b)(1)(i) Redesignated and revised.
24.101(a)(1)(ii) and (iii).	24.101(b)(1)(ii) and (iii) Redesignated and revised.
24.101(a)(1)(iv)	24.101(b)(1)(iv) Redesignated and revised.
24.101(a)(2)	24.101(b)(2) Redesignated and text unchanged.
24.101(a)(2)(i)	24.101(b)(2)(i) Redesignated and revised.
24.101(a)(2)(ii)	24.101(b)(2)(ii) Redesignated and revised.
24.101(a)(3) and (4)	24.101(b)(3) and (4) Redesignated and text unchanged.
24.101(a)(5)	24.101(b)(5) Redesignated and revised.

DISTRIBUTION TABLE—Continued

Old section	New section
24.101(b)	24.101(c) Redesignated and revised.
24.101(c)	24.101(d) Redesignated and text unchanged.
24.102(a)	24.102(a) Text unchanged.
24.102(b)	24.102(b) Revised.
24.102(c) Intro. para.	24.102(c) Intro. para. Text unchanged.
24.102(c)(1)	24.102(c)(1) Revised.
24.102(c)(2)	24.102(c)(2)(i) and (ii) redesignated and revised.
None	24.102(c)(2)(ii)(A)
24.102(d)	24.102(d) Revised.
24.102(e)	24.102(e) Text unchanged.
24.102(f)	24.102(f) Revised.
24.102(g) and (h)	24.102(g) and (h) Text unchanged.
24.102(i) through (k)	24.102(i) through (k) Revised.
24.102 (l)	24.102 (l) Text unchanged.
24.102(m)	24.102(m) Revised.
None	4.102(n) Added.
24.103 Heading	24.103 Heading. Text unchanged.
24.103(a)	24.103(a) Revised.
24.103(a)(1)	Appendix 24.103(a).
24.103(a)(2)	24.103(a)(1) Redesignated and revised.
24.103(a)(3)	24.103(a)(2) Redesignated and revised.
24.103(a)(4) through (6).	24.103(a)(3) through (5) Redesignated. and text unchanged.
24.103(b) and (c)	24.103(b) and (c) Revised.
24.103(d) Heading and (d)(1).	24.103(d) Heading and (d)(1)Revised.
24.103(d)(2)	24.103(d)(2) Revised.
24.103(e)	24.102(n) Redesignated and revised.
24.104 Introductory para..	24.104 Introductory para. Text unchanged.
24.104(a), (b) and (c)	24.104(a), (b) and (c) Revised.
24.105(a) and (b)	24.105(a) and (b) Text unchanged.
24.105(c)	24.105(c) Revised.
24.105(d) Introductory para..	24.105(d) Introductory para. Revised.
24.105(d)(1) through D24.105(e).	24.105(d)(1) through 24.105(e) Text unchanged.
24.106(a) and (b)	24.106(a) and (b) Text unchanged.
24.107 through 24.108.	24.107 through 24.108 Text unchanged.
Subpart C	**Subpart C**
24.201	24.201 Text unchanged.
24.202	24.202 Revised.
24.203 (a) and (a)(1) and (2).	24.203(a)(1) and (2) Text unchanged.

DISTRIBUTION TABLE—Continued

Old section	New section
24.203(a)(3)	24.203(a)(3) Text unchanged.
24.203(a)(4)	24.203(a)(5) Redesignated and revised
24.203(b)	24.203(b) Revised.
24.203(c) and (c)(1)	24.203(c) and (c)(1) Text unchanged.
24.203(c)(2)	24.203(c)(2) Revised.
24.203(c)(3)	24.203(c)(3) Text unchanged.
24.203(c)(4)	Removed.
24.203(c)(5)	24.203(c)(4) Redesignated and text unchanged.
None	24.203(d) Added.
24.204(a)	24.204(a) Revised.
24.204(a)(1) through (b) Intro. para..	24.204(a)(1) through (b) Intro. para. Text unchanged.
24.204(b)(1)	24.204(b)(1) Revised.
24.204(b)(2) and (3)	24.204(b)(2) and (3) Text unchanged.
24.204(c) Intro. para.	24.204(c) Intro. para. Revised.
24.204(c)(1) through (3).	24.204(c)(1) through (3) Text unchanged.
24.205(a)	24.205(a) Revised.
24.205(a)(1) and (2)	24.205(a)(1) and (2) Revised.
24.205(a)(3)	24.205(a)(3) Text unchanged.
None	24.205(a)(4) Added.
24.205(a)(4)	24.205(a)(5) Redesignated and text unchanged.
24.205(b) through 24.205(c)(2).	24.205(b) through 24.205(c)(2) Text unchanged.
24.205(c)(2)(i)	24.205(c)(2)(i) Revised.
None	24.205(c)(2)(i)(A) through (F) Added.
	24.205(c)(2)(ii) Added
24.205(c)(2)(ii)	24.205(c)(2)(ii)(A) Redesignated and text unchanged.
24.205(c)(2)(ii)(A) and (B).	24.205(c)(2)(ii)(B) and (C) Redesignated and text unchanged.
24.205(c)(2)(ii)(C) and (D).	24.205(c)(2)(ii)(D) and (E) Redesignated and revised.
None	24.205(c)(2)(ii)(F) Added.
24.205(c)(2)(iii)	24.205(c)(2)(iii) Revised.
24.205(c)(2)(iv) and (v).	24.205(c)(2)(iv) and (v) Text unchanged.
24.205(c)(2)(vi)	24.205(e) Redesignated and text unchanged.
24.205(d)	24.205(d) Text unchanged.
24.206	24.206 Text unchanged.
24.207(a) through (d)(1).	24.207(a) through (d)(1) Text unchanged.
24.207(d)(2)	24.207(d)(2) Revised.

DISTRIBUTION TABLE—Continued

Old section	New section
24.207(e)	24.403(a)(5) Redesignated.
24.207(f)	24.403(a)(6) Redesignated
24.207(g)	24.207(e) Redesignated and text unchanged.
None	24.207(f) and (g) Added.
24.208 Heading.	24.208 Heading Text unchanged.
24.208(a) through (f) Intro. para..	24.208(a) through (f) Intro. para. Text unchanged.
24.208(f)(1)	24.208(f)(1) Revised.
24.208(f)(2) through 24.209.	24.208(f)(2) through 24.209 Text unchanged.
Subpart D	**Subpart D**
24.301 Heading	24.301 Heading Revised.
24.301 Introductory paragraph.	24.301(a) Redesignated and revised.
None	24.301(a) Added.
24.301(a) and (b)	24.301(g)(1) and (g)(2) Redesignated and text unchanged.
None	24.301(b) Added.
24.301(c)	24.301(g)(3) Redesignated.
None	24.301(c) Added.
24.301(d) through (f)	24.301(g)(4) through (g)(6) Redesignated.
None	24.301(d) through (f) Added.
24.301(g)	24.301(g)(7) Revised.
None	24.301(g)(18) Added.
None	24.301(h) through (j) Added.
24.302	24.302 Revised.
24.303	24.303 Revised.
24.303(a) through (a)(14).	24.301(g)(1) through (g)(17) Redesignated and revised.
24.303(b) through (b)(3).	24.301(i)(1) and (2) Redesignated and revised.
24.303(c)	24.301(d) Redesignated and revised.
24.303(d)	24.301(j) Redesignated and text unchanged.
24.303(e) through (e)(2).	24.301(f) through (f)(2) Redesignated and text unchanged.
24.304 Heading	24.304 Heading Text unchanged.
24.304 Introductory para..	24.304 Introductory para. Revised.
24.304(a) through (a)(3).	24.304(a) through (a)(3) Text unchanged.
24.304(a)(4)	24.303(a) Redesignated.
24.304(a)(5)	24.304(a)(4) Redesignated.

DISTRIBUTION TABLE—Continued

Old section	New section
24.304(a)(6)	24.301(g)(11) Redesignated.
24.304(a)(7)	24.303(b) Redesignated and revised.
24.304(a)(8)	24.304(a)(5) Redesignated.
24.304(a)(9)	24.303(b) Redesignated and revised.
24.304(a)(10)	24.304(a)(6) Redesignated.
24.304(a)(11)	24.303(c) Redesignated and revised.
24.304(a)(12)	24.304(a)(7) Redesignated.
24.304(b)(1) through (3).	24.304(b)(1) through (3) Text unchanged.
24.304(b)(4)	24.304(b)(4) Revised.
24.305 section heading.	24.305 Removed.
24.305(a) through (k)	24.301(h)(1) through (h)(11) Redesignated and revised.
None	24.305(h)(12) Added.
24.306 section heading.	24.305 Redesignated.
24.306(a)	24.305(a) Redesignated and revised.
24.306(a)(1) through (a)(5).	24.305(a)(1) through (a)(5) Redesignated and text unchanged.
24.306(a)(6)	24.305(a)(6) Revised.
24.306(b)	24.305(b) Revised.
24.306(c)	24.305(c) Revised.
24.306(c)(1) through (d).	24.305(c)(1) through (d) Redesignated.
24.306(e)	24.305(e) Revised.
24.307 section heading.	24.306 Redesignated.
24.307(a) through (b)	24.306(a) through (b) Redesignated.
24.307(c)	24.306(c) Revised.
Subpart E	**Subpart E**
24.401 through 24.40l(b).	24.401 through 24.401(b) Text unchanged.
24.401(c)	24.401(c) Text unchanged.
24.401(c)(1)	24.401(c)(1) Revised.
24.401(c)(1)(i) and (ii)	24.401(c)(1)(i) and (ii) Text unchanged.
24.401(c)(2)	24.403(a)(7) Redesignated and revised.
24.401(c)(3)	24.403(g) Redesignated and text unchanged.
24.401(c)(4)	24.401(c)(2) Redesignated and text unchanged.
24.401(c)(4)(i)	24.401(c)(2)(i) Redesignated and text unchanged.
24.401(c)(4)(ii) and (iii).	24.401(c)(2)(ii) and (iii) Redesignated and revised.
24.401(c)(4)(iv)	24.401(c)(2)(iv) Redesignated and text unchanged.

DISTRIBUTION TABLE—Continued

Old section	New section
24.401(d)	24.401(d) Text unchanged.
24.401(d)(1)	24.401(d) Revised.
24.401(d)(2) through 24.401(e)(3).	24.401(d)(2) through 24.401(e)(3) Text unchanged.
24.401(e)(4)	24.401(e)(4) Revised.
24.401(e)(5) through (e)(9).	24.401(e)(5) through (e)(9) Text unchanged.
24.401(f)	24.401(f) Revised.
24.402(a) through (b)(2)(i).	24.402(a) through (b)(2)(i) Text unchanged.
24.402(b)(2)(ii)	24.402(b)(2)(ii) Revised.
24.402(b)(2)(iii) and (b)(3).	24.402(b)(2)(iii) and (b)(3) Text unchanged.
24.402(c)(1)	24.402(c)(1) Revised.
24.402(c)(2)	24.402(c)(2) Text unchanged.
24.403 Heading	24.403 Text unchanged.
24.403(a) and (a)(1)	24.403(a) and (a)(1) Revised.
24.403(a)(2) through (4).	24.403(a)(2) through (4) Text unchanged.
None	24.403(a)(5) through (7) Added.
24.403(b)	24.403(b) Revised.
24.403(c) through (f(1).	24.403(c) through (f)(1) Text unchanged.
24.403(f)(2)	24.403(f)(2) Revised.
24.403(f)(3)	24.403(f)(3) Text unchanged.
None	24.403(g) Added.
24.404(a) through 404(a)(2)(ii).	24.404(a) through 404(a)(2)(ii) Text unchanged.
24.404(a)(2)(iii)	24.404(a)(2)(iii) Revised.
24.404(b) through 404(c)(1)(vi).	24.404(b) through 404(c)(1)(vi) Text unchanged.
24.404(b) through 404(c)(1)(i).	24.404(b) through 404(c)(1)(i) Revised.
24.404(c)(1)(ii) through (vi).	24.404(c)(1)(ii) through (vi) text unchanged.
24.404(c)(1)(vii)	24.404(c)(1)(vii) Revised.
24.404(c)(1)(viii).	Removed.
24.404(c)(2) and (3)	24.404(c)(2) and (3) Revised.
Subpart F	**Subpart F**
24.501 Heading	24.501 Heading Text unchanged.
24.501 Intro. para.	24.501(a) Redesignated and revised.
None	24.501(b) Added.
24.502(a)	24.301 (a)(1) and (2)
24.502(b) through (b)(3).	24.301(g)(8) through (g)(10) Redesignated and revised.
24.503 section heading.	24.502 Redesignated and revised.

DISTRIBUTION TABLE—Continued

Old section	New section
24.503(a)	24.502(a) Redesignated and revised.
24.503(a)(1)	24.502(a)(1) Redesignated and revised.
None	24.502(a)(1)(i) through (iii) Added.
24.503(a)(2)	24.502(a)(2) Redesignated and text unchanged.
24.503(a)(3)	24.502(a)(3) Redesignated and revised.
24.503(a)(3)(i) through (iv).	24.502(a)(3)(i) through (iv) Redesignated and text unchanged.
None	24.502(b)(1) Added.
24.503(b)	24.502(b)(2) Redesignated and revised.
None	24.502(b)(3) Added.
None	24.502 (c) through (e) Added.
24.504 Heading	24.503 Heading Redesignated and text unchanged.
24.504 Intro. para.	24.503 Intro. para. Redesignated.
24.504(a) and (b)	24.503(a) and (b) Redesignated and text unchanged.
24.504(c)	24.503(c) Redesignated and revised.
24.505(a) through (e)	24.505(a) through (e) Removed.
24.505(e)	24.501(b) Redesignated.
24.601	24.601 Text unchanged.
24.602	24.602 Revised.
24.603	24.603 Text unchanged.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866, nor is it significant within the meaning of Department of Transportation regulatory policies and procedures.

This action updates and streamlines the Uniform Act regulation and does not include any new initiatives. We have made only nominal adjustments to enhance services and payments to persons displaced by Federal and federally-assisted programs and projects. The costs of the increased benefits will continue to be funded through Federal and federally-assisted project funds. These changes will assist the 18 Federal Agencies that acquire real property or displace persons, and several of these Agencies provided input in developing this final rule.

This final rule will not adversely affect, in a material way, any sector of the economy. This action will assist Agencies in developing their programs that acquire real property or displace persons by providing increased assistance, especially for businesses, farms and nonprofit organizations. None of the changes will materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 60l-612) the FHWA has evaluated the effects of this action on small entities and has determined that the final rule will not have a significant economic impact on a substantial number of small entities.

This action updates the government-wide regulation that provides assistance for persons, including small businesses, displaced by Federal and federally-assisted programs or projects. One of the reasons for the update is to increase assistance for displaced small businesses. We anticipate this final rule will have a positive impact on those relatively few small businesses that are affected by such programs or projects. Financial impacts on local governments are mitigated by the fact that any increased costs will accrue only on federally-assisted programs, which will include participation of Federal funds. For these reasons, the FHWA certifies that this action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This final rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). The updates are applicable only on Federal and federally-assisted programs. This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $120.7 million or more in any one year (2 U.S.C. 1532).

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA has determined that this action will not have a substantial direct effect or sufficient federalism implications on States that will limit the policymaking discretion of the States. The FHWA has also determined that this action will not preempt any State law, or State regulation, or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

This action does not contain a collection of information requirement under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

National Environmental Policy Act

The FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321) and has determined that this final rule will not have any effect on the quality of the environment.

Executive Order 12630 (Taking of Private Property)

This action will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Government Actions and Interface with Constitutionally Protected Property Rights.

Executive Order 12988 (Civil Justice Reform)

This final rule meets applicable standards in §§ 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

We have analyzed this final rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This action does not involve an economically significant rule and does not concern an environmental risk to health or safety that may disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this final rule under Executive Order 13175, dated November 6, 2000, and believes that this action will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

We have analyzed this final rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a significant energy action under that order because it is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 24

Real property acquisition, Relocation assistance, Reporting and recordkeeping requirements and Transportation.

Issued on: December 27, 2004.

Mary E. Peters,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA amends title 49, Code of Federal Regulations, Part 24, as set forth below:

PART 24—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY-ASSISTED PROGRAMS

Subpart A—General

Sec.
24.1 Purpose.
24.2 Definitions and acronyms.
24.3 No duplication of payments.
24.4 Assurances, monitoring and corrective action.
24.5 Manner of notices.
24.6 Administration of jointly-funded projects.
24.7 Federal Agency waiver of regulations.
24.8 Compliance with other laws and regulations.
24.9 Recordkeeping and reports.
24.10 Appeals.

Subpart B—Real Property Acquisition

24.101 Applicability of acquisition requirements.
24.102 Basic acquisition policies.
24.103 Criteria for appraisals.
24.104 Review of appraisals.
24.105 Acquisition of tenant-owned improvements.

24.106 Expenses incidental to transfer of title to the Agency.
24.107 Certain litigation expenses.
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Subpart D—Payments for Moving and Related Expenses

24.301 Payment for actual reasonable moving and related expenses.
24.302 Fixed payment for moving expenses'residential moves.
24.303 Related nonresidential eligible expenses.
24.304 Reestablishment expenses'nonresidential moves.
24.305 Fixed payment for moving expenses'nonresidential moves.
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Subpart E—Replacement Housing Payments

24.401 Replacement housing payment for 180-day homeowner-occupants.
24.402 Replacement housing payment for 90-day occupants.
24.403 Additional rules governing replacement housing payments.
24.404 Replacement housing of last resort.

Subpart F—Mobile Homes

24.501 Applicability.
24.502 Replacement housing payment for 180-day mobile homeowner displaced from a mobile home, and/or from the acquired mobile home site.
24.503 Replacement housing payment for 90-day mobile home occupants.

Subpart G—Certification

24.601 Purpose.
24.602 Certification application.
24.603 Monitoring and corrective action.

Appendix A to Part 24—Additional Information
Appendix B to Part 24—Statistical Report Form

Authority: 42 U.S.C. 4601 *et seq.*; 49 CFR 1.48(cc).

Subpart A—General

§ 24.1 Purpose.

The purpose of this part is to promulgate rules to implement the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 *et seq.*) (Uniform Act), in accordance with the following objectives:

(a) To ensure that owners of real property to be acquired for Federal and federally-assisted projects are treated fairly and consistently, to encourage and expedite acquisition by agreements with such owners, to minimize litigation and relieve congestion in the courts, and to promote public confidence in Federal and federally-assisted land acquisition programs;

(b) To ensure that persons displaced as a direct result of Federal or federally-assisted projects are treated fairly, consistently, and equitably so that such displaced persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole; and

(c) To ensure that Agencies implement these regulations in a manner that is efficient and cost effective.

§ 24.2 Definitions and acronyms.

(a) *Definitions.* Unless otherwise noted, the following terms used in this part shall be understood as defined in this section:

(1) *Agency.* The term *Agency* means the Federal Agency, State, State Agency, or person that acquires real property or displaces a person.

(i) *Acquiring Agency.* The term *acquiring Agency* means a State Agency, as defined in paragraph (a)(1)(iv) of this section, which has the authority to acquire property by eminent domain under State law, and a State Agency or person which does not have such authority.

(ii) *Displacing Agency.* The term *displacing Agency* means any Federal Agency carrying out a program or project, and any State, State Agency, or person carrying out a program or project with Federal financial assistance, which causes a person to be a displaced person.

(iii) *Federal Agency.* The term *Federal Agency* means any department, Agency, or instrumentality in the executive branch of the government, any wholly owned government corporation, the Architect of the Capitol, the Federal Reserve Banks and branches thereof, and any person who has the authority to acquire property by eminent domain under Federal law.

(iv) *State Agency.* The term *State Agency* means any department, Agency or instrumentality of a State or of a political subdivision of a State, any department, Agency, or instrumentality of two or more States or of two or more political subdivisions of a State or States, and any person who has the authority to acquire property by eminent domain under State law.

(2) *Alien not lawfully present in the United States.* The phrase ''alien not lawfully present in the United States'' means an alien who is not ''lawfully present'' in the United States as defined in 8 CFR 103.12 and includes:

(i) An alien present in the United States who has not been admitted or paroled into the United States pursuant to the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) and whose stay in the United States has not been authorized by the United States Attorney General; and,

(ii) An alien who is present in the United States after the expiration of the period of stay authorized by the United States Attorney General or who otherwise violates the terms and conditions of admission, parole or authorization to stay in the United States.

(3) *Appraisal.* The term *appraisal* means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.

(4) *Business.* The term *business* means any lawful activity, except a farm operation, that is conducted:

(i) Primarily for the purchase, sale, lease and/or rental of personal and/or real property, and/or for the manufacture, processing, and/or marketing of products, commodities, and/or any other personal property;

(ii) Primarily for the sale of services to the public;

(iii) Primarily for outdoor advertising display purposes, when the display must be moved as a result of the project; or

(iv) By a nonprofit organization that has established its nonprofit status under applicable Federal or State law.

(5) *Citizen.* The term *citizen* for purposes of this part includes both citizens of the United States and noncitizen nationals.

(6) *Comparable replacement dwelling.* The term *comparable replacement dwelling* means a dwelling which is:

(i) Decent, safe and sanitary as described in paragraph 24.2(a)(8) of this section;

(ii) Functionally equivalent to the displacement dwelling. The term *functionally equivalent* means that it performs the same function, and provides the same utility. While a comparable replacement dwelling need not possess every feature of the displacement dwelling, the principal

features must be present. Generally, functional equivalency is an objective standard, reflecting the range of purposes for which the various physical features of a dwelling may be used. However, in determining whether a replacement dwelling is functionally equivalent to the displacement dwelling, the Agency may consider reasonable trade-offs for specific features when the replacement unit is equal to or better than the displacement dwelling (*See* appendix A, § 24.2(a)(6));

(iii) Adequate in size to accommodate the occupants;

(iv) In an area not subject to unreasonable adverse environmental conditions;

(v) In a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities and commercial and public facilities, and reasonably accessible to the person's place of employment;

(vi) On a site that is typical in size for residential development with normal site improvements, including customary landscaping. The site need not include special improvements such as outbuildings, swimming pools, or greenhouses. (See also § 24.403(a)(2));

(vii) Currently available to the displaced person on the private market except as provided in paragraph (a)(6)(ix) of this section (See appendix A, § 24.2(a)(6)(vii)); and

(viii) Within the financial means of the displaced person:

(A) A replacement dwelling purchased by a homeowner in occupancy at the displacement dwelling for at least 180 days prior to initiation of negotiations (180-day homeowner) is considered to be within the homeowner's financial means if the homeowner will receive the full price differential as described in § 24.401(c), all increased mortgage interest costs as described at § 24.401(d) and all incidental expenses as described at § 24.401(e), plus any additional amount required to be paid under § 24.404, Replacement housing of last resort.

(B) A replacement dwelling rented by an eligible displaced person is considered to be within his or her financial means if, after receiving rental assistance under this part, the person's monthly rent and estimated average monthly utility costs for the replacement dwelling do not exceed the person's base monthly rental for the displacement dwelling as described at § 24.402(b)(2).

(C) For a displaced person who is not eligible to receive a replacement housing payment because of the person's failure to meet length-of-occupancy requirements, comparable replacement rental housing is considered to be within the person's financial means if an Agency pays that portion of the monthly housing costs of a replacement dwelling which exceeds the person's base monthly rent for the displacement dwelling as described in § 24.402(b)(2). Such rental assistance must be paid under § 24.404, Replacement housing of last resort.

(ix) For a person receiving government housing assistance before displacement, a dwelling that may reflect similar government housing assistance. In such cases any requirements of the government housing assistance program relating to the size of the replacement dwelling shall apply. (*See* appendix A, § 24.2(a)(6)(ix).)

(7) *Contribute materially.* The term *contribute materially* means that during the 2 taxable years prior to the taxable year in which displacement occurs, or during such other period as the Agency determines to be more equitable, a business or farm operation:

(i) Had average annual gross receipts of at least $5,000; or

(ii) Had average annual net earnings of at least $1,000; or

(iii) Contributed at least 33⅓ percent of the owner's or operator's average annual gross income from all sources.

(iv) If the application of the above criteria creates an inequity or hardship in any given case, the Agency may approve the use of other criteria as determined appropriate.

(8) *Decent, safe, and sanitary dwelling.* The term *decent, safe, and sanitary dwelling* means a dwelling which meets local housing and occupancy codes. However, any of the following standards which are not met by the local code shall apply unless waived for good cause by the Federal Agency funding the project. The dwelling shall:

(i) Be structurally sound, weather tight, and in good repair;

(ii) Contain a safe electrical wiring system adequate for lighting and other devices;

(iii) Contain a heating system capable of sustaining a healthful temperature (of approximately 70 degrees) for a displaced person, except in those areas where local climatic conditions do not require such a system;

(iv) Be adequate in size with respect to the number of rooms and area of living space needed to accommodate the displaced person. The number of persons occupying each habitable room used for sleeping purposes shall not exceed that permitted by local housing codes or, in the absence of local codes, the policies of the displacing Agency. In addition, the displacing Agency shall follow the requirements for separate bedrooms for children of the opposite gender included in local housing codes or in the absence of local codes, the policies of such Agencies;

(v) There shall be a separate, well lighted and ventilated bathroom that provides privacy to the user and contains a sink, bathtub or shower stall, and a toilet, all in good working order and properly connected to appropriate sources of water and to a sewage drainage system. In the case of a housekeeping dwelling, there shall be a kitchen area that contains a fully usable sink, properly connected to potable hot and cold water and to a sewage drainage system, and adequate space and utility service connections for a stove and refrigerator;

(vi) Contains unobstructed egress to safe, open space at ground level; and

(vii) For a displaced person with a disability, be free of any barriers which would preclude reasonable ingress, egress, or use of the dwelling by such displaced person. (See appendix A, § 24.2(a)(8)(vii).)

(9) *Displaced person.* (i) *General.* The term *displaced person* means, except as provided in paragraph (a)(9)(ii) of this section, any person who moves from the real property or moves his or her personal property from the real property. (This includes a person who occupies the real property prior to its acquisition, but who does not meet the length of occupancy requirements of the Uniform Act as described at § 24.401(a) and § 24.402(a)):

(A) As a direct result of a written notice of intent to acquire (see § 24.203(d)), the initiation of negotiations for, or the acquisition of, such real property in whole or in part for a project;

(B) As a direct result of rehabilitation or demolition for a project; or

(C) As a direct result of a written notice of intent to acquire, or the acquisition, rehabilitation or demolition of, in whole or in part, other real property on which the person conducts a business or farm operation, for a project. However, eligibility for such person under this paragraph applies only for purposes of obtaining relocation assistance advisory services under § 24.205(c), and moving expenses under § 24.301, § 24.302 or § 24.303.

(ii) *Persons not displaced.* The following is a nonexclusive listing of persons who do not qualify as displaced persons under this part:

(A) A person who moves before the initiation of negotiations (see § 24.403(d)), unless the Agency determines that the person was

displaced as a direct result of the program or project;

(B) A person who initially enters into occupancy of the property after the date of its acquisition for the project;

(C) A person who has occupied the property for the purpose of obtaining assistance under the Uniform Act;

(D) A person who is not required to relocate permanently as a direct result of a project. Such determination shall be made by the Agency in accordance with any guidelines established by the Federal Agency funding the project (See appendix A, § 24.2(a)(9)(ii)(D));

(E) An owner-occupant who moves as a result of an acquisition of real property as described in §§ 24.101(a)(2) or 24.101(b)(1) or (2), or as a result of the rehabilitation or demolition of the real property. (However, the displacement of a tenant as a direct result of any acquisition, rehabilitation or demolition for a Federal or federally-assisted project is subject to this part.);

(F) A person whom the Agency determines is not displaced as a direct result of a partial acquisition;

(G) A person who, after receiving a notice of relocation eligibility (described at § 24.203(b)), is notified in writing that he or she will not be displaced for a project. Such written notification shall not be issued unless the person has not moved and the Agency agrees to reimburse the person for any expenses incurred to satisfy any binding contractual relocation obligations entered into after the effective date of the notice of relocation eligibility;

(H) An owner-occupant who conveys his or her property, as described in §§ 24.101(a)(2) or 24.101(b)(1) or (2), after being informed in writing that if a mutually satisfactory agreement on terms of the conveyance cannot be reached, the Agency will not acquire the property. In such cases, however, any resulting displacement of a tenant is subject to the regulations in this part;

(I) A person who retains the right of use and occupancy of the real property for life following its acquisition by the Agency;

(J) An owner who retains the right of use and occupancy of the real property for a fixed term after its acquisition by the Department of the Interior under Pub. L. 93–477, Appropriations for National Park System, or Pub. L. 93–303, Land and Water Conservation Fund, except that such owner remains a displaced person for purposes of subpart D of this part;

(K) A person who is determined to be in unlawful occupancy prior to or after the initiation of negotiations, or a person who has been evicted for cause, under applicable law, as provided for in § 24.206. However, advisory assistance may be provided to unlawful occupants at the option of the Agency in order to facilitate the project;

(L) A person who is not lawfully present in the United States and who has been determined to be ineligible for relocation assistance in accordance with § 24.208; or

(M) Tenants required to move as a result of the sale of their dwelling to a person using downpayment assistance provided under the American Dream Downpayment Initiative (ADDI) authorized by section 102 of the American Dream Downpayment Act (Pub. L. 108–186; codified at 42 U.S.C. 12821).

(10) *Dwelling.* The term *dwelling* means the place of permanent or customary and usual residence of a person, according to local custom or law, including a single family house; a single family unit in a two-family, multi-family, or multi-purpose property; a unit of a condominium or cooperative housing project; a non-housekeeping unit; a mobile home; or any other residential unit.

(11) *Dwelling site.* The term *dwelling site* means a land area that is typical in size for similar dwellings located in the same neighborhood or rural area. (See appendix A, § 24.2(a)(11).)

(12) *Farm operation.* The term *farm operation* means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(13) *Federal financial assistance.* The term *Federal financial assistance* means a grant, loan, or contribution provided by the United States, except any Federal guarantee or insurance and any interest reduction payment to an individual in connection with the purchase and occupancy of a residence by that individual.

(14) *Household income.* The term *household income* means total gross income received for a 12 month period from all sources (earned and unearned) including, but not limited to wages, salary, child support, alimony, unemployment benefits, workers compensation, social security, or the net income from a business. It does not include income received or earned by dependent children and full time students under 18 years of age. (*See* appendix A, § 24.2(a)(14) for examples of exclusions to income.)

(15) *Initiation of negotiations.* Unless a different action is specified in applicable Federal program regulations, the term *initiation of negotiations* means the following:

(i) Whenever the displacement results from the acquisition of the real property by a Federal Agency or State Agency, the *initiation of negotiations* means the delivery of the initial written offer of just compensation by the Agency to the owner or the owner's representative to purchase the real property for the project. However, if the Federal Agency or State Agency issues a notice of its intent to acquire the real property, and a person moves after that notice, but before delivery of the initial written purchase offer, the *initiation of negotiations* means the actual move of the person from the property.

(ii) Whenever the displacement is caused by rehabilitation, demolition or privately undertaken acquisition of the real property (and there is no related acquisition by a Federal Agency or a State Agency), the *initiation of negotiations* means the notice to the person that he or she will be displaced by the project or, if there is no notice, the actual move of the person from the property.

(iii) In the case of a permanent relocation to protect the public health and welfare, under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (Pub. L. 96–510, or Superfund) (CERCLA) the *initiation of negotiations* means the formal announcement of such relocation or the Federal or federally-coordinated health advisory where the Federal Government later decides to conduct a permanent relocation.

(iv) In the case of permanent relocation of a tenant as a result of an acquisition of real property described in § 24.101(b)(1) through (5), the initiation of negotiations means the actions described in § 24.2(a)(15)(i) and (ii), except that such initiation of negotiations does not become effective, for purposes of establishing eligibility for relocation assistance for such tenants under this part, until there is a written agreement between the Agency and the owner to purchase the real property. (See appendix A, § 24.2(a)(15)(iv)).

(16) *Lead Agency.* The term *Lead Agency* means the Department of Transportation acting through the Federal Highway Administration.

(17) *Mobile home.* The term *mobile home* includes manufactured homes and recreational vehicles used as residences. (*See* appendix A, § 24.2(a)(17)).

(18) *Mortgage.* The term *mortgage* means such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real

property, under the laws of the State in which the real property is located, together with the credit instruments, if any, secured thereby.

(19) *Nonprofit organization.* The term *nonprofit organization* means an organization that is incorporated under the applicable laws of a State as a nonprofit organization, and exempt from paying Federal income taxes under section 501 of the Internal Revenue Code (26 U.S.C. 501).

(20) *Owner of a dwelling.* The term *owner of a dwelling* means a person who is considered to have met the requirement to own a dwelling if the person purchases or holds any of the following interests in real property:

(i) Fee title, a life estate, a land contract, a 99 year lease, or a lease including any options for extension with at least 50 years to run from the date of acquisition; or

(ii) An interest in a cooperative housing project which includes the right to occupy a dwelling; or

(iii) A contract to purchase any of the interests or estates described in § 24.2(a)(1)(i) or (ii) of this section; or

(iv) Any other interest, including a partial interest, which in the judgment of the Agency warrants consideration as ownership.

(21) *Person.* The term *person* means any individual, family, partnership, corporation, or association.

(22) *Program or project.* The phrase *program or project* means any activity or series of activities undertaken by a Federal Agency or with Federal financial assistance received or anticipated in any phase of an undertaking in accordance with the Federal funding Agency guidelines.

(23) *Salvage value.* The term *salvage value* means the probable sale price of an item offered for sale to knowledgeable buyers with the requirement that it be removed from the property at a buyer's expense (i.e., not eligible for relocation assistance). This includes items for re-use as well as items with components that can be re-used or recycled when there is no reasonable prospect for sale except on this basis.

(24) *Small business.* A *small business* is a business having not more than 500 employees working at the site being acquired or displaced by a program or project, which site is the location of economic activity. Sites occupied solely by outdoor advertising signs, displays, or devices do not qualify as a business for purposes of § 24.304.

(25) *State.* Any of the several States of the United States or the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or a political subdivision of any of these jurisdictions.

(26) *Tenant.* The term *tenant* means a person who has the temporary use and occupancy of real property owned by another.

(27) *Uneconomic remnant.* The term *uneconomic remnant* means a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property, and which the Agency has determined has little or no value or utility to the owner.

(28) *Uniform Act.* The term *Uniform Act* means the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646, 84 Stat. 1894; 42 U.S.C. 4601 *et seq.*), and amendments thereto.

(29) *Unlawful occupant.* A person who occupies without property right, title or payment of rent or a person legally evicted, with no legal rights to occupy a property under State law. An Agency, at its discretion, may consider such person to be in lawful occupancy.

(30) *Utility costs.* The term *utility costs* means expenses for electricity, gas, other heating and cooking fuels, water and sewer.

(31) *Utility facility.* The term *utility facility* means any electric, gas, water, steam power, or materials transmission or distribution system; any transportation system; any communications system, including cable television; and any fixtures, equipment, or other property associated with the operation, maintenance, or repair of any such system. A utility facility may be publicly, privately, or cooperatively owned.

(32) *Utility relocation.* The term *utility relocation* means the adjustment of a utility facility required by the program or project undertaken by the displacing Agency. It includes removing and reinstalling the facility, including necessary temporary facilities; acquiring necessary right-of-way on a new location; moving, rearranging or changing the type of existing facilities; and taking any necessary safety and protective measures. It shall also mean constructing a replacement facility that has the functional equivalency of the existing facility and is necessary for the continued operation of the utility service, the project economy, or sequence of project construction.

(33) *Waiver valuation.* The term *waiver valuation* means the valuation process used and the product produced when the Agency determines that an appraisal is not required, pursuant to § 24.102(c)(2) appraisal waiver provisions.

(b) *Acronyms.* The following acronyms are commonly used in the implementation of programs subject to this regulation:

(1) BCIS. Bureau of Citizenship and Immigration Service.

(2) FEMA. Federal Emergency Management Agency.

(3) FHA. Federal Housing Administration.

(4) FHWA. Federal Highway Administration.

(5) FIRREA. Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

(6) HLR. Housing of last resort.

(7) HUD. U.S. Department of Housing and Urban Development.

(8) MIDP. Mortgage interest differential payment.

(9) RHP. Replacement housing payment.

(10) STURAA. Surface Transportation and Uniform Relocation Act Amendments of 1987.

(11) URA. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

(12) USDOT. U.S. Department of Transportation.

(13) USPAP. Uniform Standards of Professional Appraisal Practice.

§ 24.3 No duplication of payments.

No person shall receive any payment under this part if that person receives a payment under Federal, State, local law, or insurance proceeds which is determined by the Agency to have the same purpose and effect as such payment under this part. (See appendix A, § 24.3).

§ 24.4 Assurances, monitoring and corrective action.

(a) *Assurances.* (1) Before a Federal Agency may approve any grant to, or contract, or agreement with, a State Agency under which Federal financial assistance will be made available for a project which results in real property acquisition or displacement that is subject to the Uniform Act, the State Agency must provide appropriate assurances that it will comply with the Uniform Act and this part. A displacing Agency's assurances shall be in accordance with section 210 of the Uniform Act. An acquiring Agency's assurances shall be in accordance with section 305 of the Uniform Act and must contain specific reference to any State law which the Agency believes provides an exception to §§ 301 or 302 of the Uniform Act. If, in the judgment of the Federal Agency, Uniform Act compliance will be served, a State Agency may provide these assurances at one time to cover all subsequent federally-assisted programs or projects. An Agency, which both acquires real

property and displaces persons, may combine its section 210 and section 305 assurances in one document.

(2) If a Federal Agency or State Agency provides Federal financial assistance to a ''person'' causing displacement, such Federal or State Agency is responsible for ensuring compliance with the requirements of this part, notwithstanding the person's contractual obligation to the grantee to comply.

(3) As an alternative to the assurance requirement described in paragraph (a)(1) of this section, a Federal Agency may provide Federal financial assistance to a State Agency after it has accepted a certification by such State Agency in accordance with the requirements in subpart G of this part.

(b) *Monitoring and corrective action.* The Federal Agency will monitor compliance with this part, and the State Agency shall take whatever corrective action is necessary to comply with the Uniform Act and this part. The Federal Agency may also apply sanctions in accordance with applicable program regulations. (Also see § 24.603, of this part).

(c) *Prevention of fraud, waste, and mismanagement.* The Agency shall take appropriate measures to carry out this part in a manner that minimizes fraud, waste, and mismanagement.

§ 24.5 Manner of notices.

Each notice which the Agency is required to provide to a property owner or occupant under this part, except the notice described at § 24.102(b), shall be personally served or sent by certified or registered first-class mail, return receipt requested, and documented in Agency files. Each notice shall be written in plain, understandable language. Persons who are unable to read and understand the notice must be provided with appropriate translation and counseling. Each notice shall indicate the name and telephone number of a person who may be contacted for answers to questions or other needed help.

§ 24.6 Administration of jointly-funded projects.

Whenever two or more Federal Agencies provide financial assistance to an Agency or Agencies, other than a Federal Agency, to carry out functionally or geographically related activities, which will result in the acquisition of property or the displacement of a person, the Federal Agencies may by agreement designate one such Agency as the cognizant Federal Agency. In the unlikely event that agreement among the Agencies cannot be reached as to which Agency shall be the cognizant Federal Agency, then the Lead Agency shall designate one of such Agencies to assume the cognizant role. At a minimum, the agreement shall set forth the federally-assisted activities which are subject to its terms and cite any policies and procedures, in addition to this part, that are applicable to the activities under the agreement. Under the agreement, the cognizant Federal Agency shall assure that the project is in compliance with the provisions of the Uniform Act and this part. All federally-assisted activities under the agreement shall be deemed a project for the purposes of this part.

§ 24.7 Federal Agency waiver of regulations.

The Federal Agency funding the project may waive any requirement in this part not required by law if it determines that the waiver does not reduce any assistance or protection provided to an owner or displaced person under this part. Any request for a waiver shall be justified on a case-by-case basis.

§ 24.8 Compliance with other laws and regulations.

The implementation of this part must be in compliance with other applicable Federal laws and implementing regulations, including, but not limited to, the following:

(a) Section I of the Civil Rights Act of 1866 (42 U.S.C. 1982 *et seq.*).

(b) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*).

(c) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*), as amended.

(d) The National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

(e) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 790 *et seq.*).

(f) The Flood Disaster Protection Act of 1973 (Pub. L. 93–234).

(g) The Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*).

(h) Executive Order 11063—Equal Opportunity and Housing, as amended by Executive Order 12892.

(i) Executive Order 11246—Equal Employment Opportunity, as amended.

(j) Executive Order 11625—Minority Business Enterprise.

(k) Executive Orders 11988—Floodplain Management, and 11990—Protection of Wetlands.

(l) Executive Order 12250—Leadership and Coordination of Non-Discrimination Laws.

(m) Executive Order 12630—Governmental Actions and Interference with Constitutionally Protected Property Rights.

(n) Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5121 *et seq.*).

(o) Executive Order 12892—Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing (January 17, 1994).

§ 24.9 Recordkeeping and reports.

(a) *Records.* The Agency shall maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance with this part. These records shall be retained for at least 3 years after each owner of a property and each person displaced from the property receives the final payment to which he or she is entitled under this part, or in accordance with the applicable regulations of the Federal funding Agency, whichever is later.

(b) *Confidentiality of records.* Records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise.

(c) *Reports.* The Agency shall submit a report of its real property acquisition and displacement activities under this part if required by the Federal Agency funding the project. A report will not be required more frequently than every 3 years, or as the Uniform Act provides, unless the Federal funding Agency shows good cause. The report shall be prepared and submitted using the format contained in appendix B of this part.

§ 24.10 Appeals.

(a) *General.* The Agency shall promptly review appeals in accordance with the requirements of applicable law and this part.

(b) *Actions which may be appealed.* Any aggrieved person may file a written appeal with the Agency in any case in which the person believes that the Agency has failed to properly consider the person's application for assistance under this part. Such assistance may include, but is not limited to, the person's eligibility for, or the amount of, a payment required under § 24.106 or § 24.107, or a relocation payment required under this part. The Agency shall consider a written appeal regardless of form.

(c) *Time limit for initiating appeal.* The Agency may set a reasonable time limit for a person to file an appeal. The time limit shall not be less than 60 days after the person receives written notification of the Agency's determination on the person's claim.

(d) *Right to representation.* A person has a right to be represented by legal

counsel or other representative in connection with his or her appeal, but solely at the person's own expense.

(e) *Review of files by person making appeal.* The Agency shall permit a person to inspect and copy all materials pertinent to his or her appeal, except materials which are classified as confidential by the Agency. The Agency may, however, impose reasonable conditions on the person's right to inspect, consistent with applicable laws.

(f) *Scope of review of appeal.* In deciding an appeal, the Agency shall consider all pertinent justification and other material submitted by the person, and all other available information that is needed to ensure a fair and full review of the appeal.

(g) *Determination and notification after appeal.* Promptly after receipt of all information submitted by a person in support of an appeal, the Agency shall make a written determination on the appeal, including an explanation of the basis on which the decision was made, and furnish the person a copy. If the full relief requested is not granted, the Agency shall advise the person of his or her right to seek judicial review of the Agency decision.

(h) *Agency official to review appeal.* The Agency official conducting the review of the appeal shall be either the head of the Agency or his or her authorized designee. However, the official shall not have been directly involved in the action appealed.

Subpart B—Real Property Acquisition

§ 24.101 Applicability of acquisition requirements.

(a) *Direct Federal program or project.*

(1) The requirements of this subpart apply to any acquisition of real property for a direct Federal program or project, except acquisition for a program or project that is undertaken by the Tennessee Valley Authority or the Rural Utilities Service. (*See* appendix A, § 24.101(a).)

(2) If a Federal Agency (except for the Tennessee Valley Authority or the Rural Utilities Service) will not acquire a property because negotiations fail to result in an agreement, the owner of the property shall be so informed in writing. Owners of such properties are not displaced persons, (*see* §§ 24.2(a)(9)(ii)(E) or (H)), and as such, are not entitled to relocation assistance benefits. However, tenants on such properties may be eligible for relocation assistance benefits. (*See* § 24.2(a)(9)).

(b) *Programs and projects receiving Federal financial assistance.* The requirements of this subpart apply to any acquisition of real property for programs and projects where there is Federal financial assistance in any part of project costs except for the acquisitions described in paragraphs (b)(1) through (5) of this section. The relocation assistance provisions in this part are applicable to any tenants that must move as a result of an acquisition described in paragraphs (b)(1) through (5) of this section. Such tenants are considered displaced persons. (*See* § 24.2(a)(9).)

(1) The requirements of Subpart B do not apply to acquisitions that meet all of the following conditions in paragraphs (b)(1)(i) through (iv):

(i) No specific site or property needs to be acquired, although the Agency may limit its search for alternative sites to a general geographic area. Where an Agency wishes to purchase more than one site within a general geographic area on this basis, all owners are to be treated similarly. (*See* appendix A, § 24.101(b)(1)(i).)

(ii) The property to be acquired is not part of an intended, planned, or designated project area where all or substantially all of the property within the area is to be acquired within specific time limits.

(iii) The Agency will not acquire the property if negotiations fail to result in an amicable agreement, and the owner is so informed in writing.

(iv) The Agency will inform the owner in writing of what it believes to be the market value of the property. (*See* appendix A, § 24.101(b)(1)(iv) and (2)(ii).)

(2) Acquisitions for programs or projects undertaken by an Agency or person that receives Federal financial assistance but does not have authority to acquire property by eminent domain, provided that such Agency or person shall:

(i) Prior to making an offer for the property, clearly advise the owner that it is unable to acquire the property if negotiations fail to result in an agreement; and

(ii) Inform the owner in writing of what it believes to be the market value of the property. (*See* appendix A, § 24.101(b)(1)(iv) and (2)(ii).)

(3) The acquisition of real property from a Federal Agency, State, or State Agency, if the Agency desiring to make the purchase does not have authority to acquire the property through condemnation.

(4) The acquisition of real property by a cooperative from a person who, as a condition of membership in the cooperative, has agreed to provide without charge any real property that is needed by the cooperative.

(5) Acquisition for a program or project that receives Federal financial assistance from the Tennessee Valley Authority or the Rural Utilities Service.

(c) *Less-than-full-fee interest in real property.*

(1) The provisions of this subpart apply when acquiring fee title subject to retention of a life estate or a life use; to acquisition by leasing where the lease term, including option(s) for extension, is 50 years or more; and to the acquisition of permanent and/or temporary easements necessary for the project. However, the Agency may apply these regulations to any less-than-full-fee acquisition that, in its judgment, should be covered.

(2) The provisions of this subpart do not apply to temporary easements or permits needed solely to perform work intended exclusively for the benefit of the property owner, which work may not be done if agreement cannot be reached.

(d) *Federally-assisted projects.* For projects receiving Federal financial assistance, the provisions of §§ 24.102, 24.103, 24.104, and 24.105 apply to the greatest extent practicable under State law. (*See* § 24.4(a).)

§ 24.102 Basic acquisition policies.

(a) *Expeditious acquisition.* The Agency shall make every reasonable effort to acquire the real property expeditiously by negotiation.

(b) *Notice to owner.* As soon as feasible, the Agency shall notify the owner in writing of the Agency's interest in acquiring the real property and the basic protections provided to the owner by law and this part. (*See* § 24.203.)

(c) *Appraisal, waiver thereof, and invitation to owner.*

(1) Before the initiation of negotiations the real property to be acquired shall be appraised, except as provided in § 24.102 (c)(2), and the owner, or the owner's designated representative, shall be given an opportunity to accompany the appraiser during the appraiser's inspection of the property.

(2) An appraisal is not required if:

(i) The owner is donating the property and releases the Agency from its obligation to appraise the property; or

(ii) The Agency determines that an appraisal is unnecessary because the valuation problem is uncomplicated and the anticipated value of the proposed acquisition is estimated at $10,000 or less, based on a review of available data.

(A) When an appraisal is determined to be unnecessary, the Agency shall prepare a waiver valuation.

(B) The person performing the waiver valuation must have sufficient

understanding of the local real estate market to be qualified to make the waiver valuation.

(C) The Federal Agency funding the project may approve exceeding the $10,000 threshold, up to a maximum of $25,000, if the Agency acquiring the real property offers the property owner the option of having the Agency appraise the property. If the property owner elects to have the Agency appraise the property, the Agency shall obtain an appraisal and not use procedures described in this paragraph. (See appendix A, § 24.102(c)(2).)

(d) *Establishment and offer of just compensation.* Before the initiation of negotiations, the Agency shall establish an amount which it believes is just compensation for the real property. The amount shall not be less than the approved appraisal of the market value of the property, taking into account the value of allowable damages or benefits to any remaining property. An Agency official must establish the amount believed to be just compensation. (*See* § 24.104.) Promptly thereafter, the Agency shall make a written offer to the owner to acquire the property for the full amount believed to be just compensation. (*See* appendix A, § 24.102(d).)

(e) *Summary statement.* Along with the initial written purchase offer, the owner shall be given a written statement of the basis for the offer of just compensation, which shall include:

(1) A statement of the amount offered as just compensation. In the case of a partial acquisition, the compensation for the real property to be acquired and the compensation for damages, if any, to the remaining real property shall be separately stated.

(2) A description and location identification of the real property and the interest in the real property to be acquired.

(3) An identification of the buildings, structures, and other improvements (including removable building equipment and trade fixtures) which are included as part of the offer of just compensation. Where appropriate, the statement shall identify any other separately held ownership interest in the property, *e.g.*, a tenant-owned improvement, and indicate that such interest is not covered by this offer.

(f) *Basic negotiation procedures.* The Agency shall make all reasonable efforts to contact the owner or the owner's representative and discuss its offer to purchase the property, including the basis for the offer of just compensation and explain its acquisition policies and procedures, including its payment of incidental expenses in accordance with § 24.106. The owner shall be given reasonable opportunity to consider the offer and present material which the owner believes is relevant to determining the value of the property and to suggest modification in the proposed terms and conditions of the purchase. The Agency shall consider the owner's presentation. (*See* appendix A, § 24.102(f).)

(g) *Updating offer of just compensation.* If the information presented by the owner, or a material change in the character or condition of the property, indicates the need for new appraisal information, or if a significant delay has occurred since the time of the appraisal(s) of the property, the Agency shall have the appraisal(s) updated or obtain a new appraisal(s). If the latest appraisal information indicates that a change in the purchase offer is warranted, the Agency shall promptly reestablish just compensation and offer that amount to the owner in writing.

(h) *Coercive action.* The Agency shall not advance the time of condemnation, or defer negotiations or condemnation or the deposit of funds with the court, or take any other coercive action in order to induce an agreement on the price to be paid for the property.

(i) *Administrative settlement.* The purchase price for the property may exceed the amount offered as just compensation when reasonable efforts to negotiate an agreement at that amount have failed and an authorized Agency official approves such administrative settlement as being reasonable, prudent, and in the public interest. When Federal funds pay for or participate in acquisition costs, a written justification shall be prepared, which states what available information, including trial risks, supports such a settlement. (*See* appendix A, § 24.102(i).)

(j) *Payment before taking possession.* Before requiring the owner to surrender possession of the real property, the Agency shall pay the agreed purchase price to the owner, or in the case of a condemnation, deposit with the court, for the benefit of the owner, an amount not less than the Agency's approved appraisal of the market value of such property, or the court award of compensation in the condemnation proceeding for the property. In exceptional circumstances, with the prior approval of the owner, the Agency may obtain a right-of-entry for construction purposes before making payment available to an owner. (*See* appendix A, § 24.102(j).)

(k) *Uneconomic remnant.* If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the Agency shall offer to acquire the uneconomic remnant along with the portion of the property needed for the project. (*See* § 24.2(a)(27).)

(l) *Inverse condemnation.* If the Agency intends to acquire any interest in real property by exercise of the power of eminent domain, it shall institute formal condemnation proceedings and not intentionally make it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property.

(m) *Fair rental.* If the Agency permits a former owner or tenant to occupy the real property after acquisition for a short term, or a period subject to termination by the Agency on short notice, the rent shall not exceed the fair market rent for such occupancy. (*See* appendix A, § 24.102(m).)

(n) *Conflict of interest.*

(1) The appraiser, review appraiser or person performing the waiver valuation shall not have any interest, direct or indirect, in the real property being valued for the Agency.

Compensation for making an appraisal or waiver valuation shall not be based on the amount of the valuation estimate.

(2) No person shall attempt to unduly influence or coerce an appraiser, review appraiser, or waiver valuation preparer regarding any valuation or other aspect of an appraisal, review or waiver valuation. Persons functioning as negotiators may not supervise or formally evaluate the performance of any appraiser or review appraiser performing appraisal or appraisal review work, except that, for a program or project receiving Federal financial assistance, the Federal funding Agency may waive this requirement if it determines it would create a hardship for the Agency.

(3) An appraiser, review appraiser, or waiver valuation preparer making an appraisal, appraisal review or waiver valuation may be authorized by the Agency to act as a negotiator for real property for which that person has made an appraisal, appraisal review or waiver valuation only if the offer to acquire the property is $10,000, or less. (*See* appendix A, § 24.102(n).)

§ 24.103 Criteria for appraisals.

(a) *Appraisal requirements.* This section sets forth the requirements for real property acquisition appraisals for Federal and federally-assisted programs. Appraisals are to be prepared according to these requirements, which are intended to be consistent with the Uniform Standards of Professional

Appraisal Practice (USPAP).[1] (*See* appendix A, § 24.103(a).) The Agency may have appraisal requirements that supplement these requirements, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA).[2]

(1) The Agency acquiring real property has a legitimate role in contributing to the appraisal process, especially in developing the scope of work and defining the appraisal problem. The scope of work and development of an appraisal under these requirements depends on the complexity of the appraisal problem.

(2) The Agency has the responsibility to assure that the appraisals it obtains are relevant to its program needs, reflect established and commonly accepted Federal and federally-assisted program appraisal practice, and as a minimum, complies with the definition of appraisal in § 24.2(a)(3) and the five following requirements: (*See* appendix A, §§ 24.103 and 24.103(a).)

(i) An adequate description of the physical characteristics of the property being appraised (and, in the case of a partial acquisition, an adequate description of the remaining property), including items identified as personal property, a statement of the known and observed encumbrances, if any, title information, location, zoning, present use, an analysis of highest and best use, and at least a 5-year sales history of the property. (*See* appendix A, § 24.103(a)(1).)

(ii) All relevant and reliable approaches to value consistent with established Federal and federally-assisted program appraisal practices. If the appraiser uses more than one approach, there shall be an analysis and reconciliation of approaches to value used that is sufficient to support the appraiser's opinion of value. (*See* appendix A, § 24.103(a).)

(iii) A description of comparable sales, including a description of all relevant physical, legal, and economic factors such as parties to the transaction, source and method of financing, and verification by a party involved in the transaction.

(iv) A statement of the value of the real property to be acquired and, for a partial acquisition, a statement of the value of the damages and benefits, if any, to the remaining real property, where appropriate.

(v) The effective date of valuation, date of appraisal, signature, and certification of the appraiser.

(b) *Influence of the project on just compensation.* The appraiser shall disregard any decrease or increase in the market value of the real property caused by the project for which the property is to be acquired, or by the likelihood that the property would be acquired for the project, other than that due to physical deterioration within the reasonable control of the owner. (*See* appendix A, § 24.103(b).)

(c) *Owner retention of improvements.* If the owner of a real property improvement is permitted to retain it for removal from the project site, the amount to be offered for the interest in the real property to be acquired shall be not less than the difference between the amount determined to be just compensation for the owner's entire interest in the real property and the salvage value (defined at § 24.2(a)(24)) of the retained improvement.

(d) *Qualifications of appraisers and review appraisers.*

(1) The Agency shall establish criteria for determining the minimum qualifications and competency of appraisers and review appraisers. Qualifications shall be consistent with the scope of work for the assignment. The Agency shall review the experience, education, training, certification/licensing, designation(s) and other qualifications of appraisers, and review appraisers, and use only those determined by the Agency to be qualified. (*See* appendix A, § 24.103(d)(1).)

(2) If the Agency uses a contract (fee) appraiser to perform the appraisal, such appraiser shall be State licensed or certified in accordance with title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (12 U.S.C. 3331 *et seq.*).

§ 24.104 Review of appraisals.

The Agency shall have an appraisal review process and, at a minimum:

(a) A qualified review appraiser (*see* § 24.103(d)(1) and appendix A, § 24.104) shall examine the presentation and analysis of market information in all appraisals to assure that they meet the definition of appraisal found in 49 CFR 24.2(a)(3), appraisal requirements found in 49 CFR 24.103 and other applicable requirements, including, to the extent appropriate, the UASFLA, and support the appraiser's opinion of value. The level of review analysis depends on the complexity of the appraisal problem. As needed, the review appraiser shall, prior to acceptance, seek necessary corrections or revisions. The review appraiser shall identify each appraisal report as recommended (as the basis for the establishment of the amount believed to be just compensation), accepted (meets all requirements, but not selected as recommended or approved), or not accepted. If authorized by the Agency to do so, the staff review appraiser shall also approve the appraisal (as the basis for the establishment of the amount believed to be just compensation), and, if also authorized to do so, develop and report the amount believed to be just compensation. (*See* appendix A, § 24.104(a).)

(b) If the review appraiser is unable to recommend (or approve) an appraisal as an adequate basis for the establishment of the offer of just compensation, and it is determined by the acquiring Agency that it is not practical to obtain an additional appraisal, the review appraiser may, as part of the review, present and analyze market information in conformance with § 24.103 to support a recommended (or approved) value. (*See* appendix A, § 24.104(b).)

(c) The review appraiser shall prepare a written report that identifies the appraisal reports reviewed and documents the findings and conclusions arrived at during the review of the appraisal(s). Any damages or benefits to any remaining property shall be identified in the review appraiser's report. The review appraiser shall also prepare a signed certification that states the parameters of the review. The certification shall state the approved value, and, if the review appraiser is authorized to do so, the amount believed to be just compensation for the acquisition. (*See* appendix A, § 24.104(c).)

§ 24.105 Acquisition of tenant-owned improvements.

(a) *Acquisition of improvements.* When acquiring any interest in real property, the Agency shall offer to acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property to be acquired, which it requires to be removed or which it determines will be adversely affected by the use to which such real property will be put. This shall include any improvement of a tenant-owner who has the right or obligation to remove the

[1] Uniform Standards of Professional Appraisal Practice (USPAP). Published by The Appraisal Foundation, a nonprofit educational organization. Copies may be ordered from The Appraisal Foundation at the following URL: *http://www.appraisalfoundation.org/htm/USPAP2004/toc.htm.*

[2] The ''Uniform Appraisal Standards for Federal Land Acquisitions'' is published by the Interagency Land Acquisition Conference. It is a compendium of Federal eminent domain appraisal law, both case and statute, regulations and practices. It is available at *http://www.usdoj.gov/enrd/land-ack/toc.htm* or in soft cover format from the Appraisal Institute at *http://www.appraisalinstitute.org/econom/publications/Default.asp* and select ''Legal/Regulatory'' or call 888–570–4545.

improvement at the expiration of the lease term.

(b) *Improvements considered to be real property.* Any building, structure, or other improvement, which would be considered to be real property if owned by the owner of the real property on which it is located, shall be considered to be real property for purposes of this subpart.

(c) *Appraisal and Establishment of Just Compensation for a Tenant-Owned Improvement.* Just compensation for a tenant-owned improvement is the amount which the improvement contributes to the market value of the whole property, or its salvage value, whichever is greater. (Salvage value is defined at § 24.2(a)(23).)

(d) *Special conditions for tenant-owned improvements.* No payment shall be made to a tenant-owner for any real property improvement unless:

(1) The tenant-owner, in consideration for the payment, assigns, transfers, and releases to the Agency all of the tenant-owner's right, title, and interest in the improvement;

(2) The owner of the real property on which the improvement is located disclaims all interest in the improvement; and

(3) The payment does not result in the duplication of any compensation otherwise authorized by law.

(e) *Alternative compensation.* Nothing in this subpart shall be construed to deprive the tenant-owner of any right to reject payment under this subpart and to obtain payment for such property interests in accordance with other applicable law.

§ 24.106 Expenses incidental to transfer of title to the Agency.

(a) The owner of the real property shall be reimbursed for all reasonable expenses the owner necessarily incurred for:

(1) Recording fees, transfer taxes, documentary stamps, evidence of title, boundary surveys, legal descriptions of the real property, and similar expenses incidental to conveying the real property to the Agency. However, the Agency is not required to pay costs solely required to perfect the owner's title to the real property;

(2) Penalty costs and other charges for prepayment of any preexisting recorded mortgage entered into in good faith encumbering the real property; and

(3) The pro rata portion of any prepaid real property taxes which are allocable to the period after the Agency obtains title to the property or effective possession of it, whichever is earlier.

(b) Whenever feasible, the Agency shall pay these costs directly to the billing agent so that the owner will not have to pay such costs and then seek reimbursement from the Agency.

§ 24.107 Certain litigation expenses.

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:

(a) The final judgment of the court is that the Agency cannot acquire the real property by condemnation;

(b) The condemnation proceeding is abandoned by the Agency other than under an agreed-upon settlement; or

(c) The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding.

§ 24.108 Donations.

An owner whose real property is being acquired may, after being fully informed by the Agency of the right to receive just compensation for such property, donate such property or any part thereof, any interest therein, or any compensation paid therefore, to the Agency as such owner shall determine. The Agency is responsible for ensuring that an appraisal of the real property is obtained unless the owner releases the Agency from such obligation, except as provided in § 24.102(c)(2).

Subpart C—General Relocation Requirements

§ 24.201 Purpose.

This subpart prescribes general requirements governing the provision of relocation payments and other relocation assistance in this part.

§ 24.202 Applicability.

These requirements apply to the relocation of any displaced person as defined at § 24.2(a)(9). Any person who qualifies as a displaced person must be fully informed of his or her rights and entitlements to relocation assistance and payments provided by the Uniform Act and this regulation. (*See* appendix A, § 24.202.)

§ 24.203 Relocation notices.

(a) *General information notice.* As soon as feasible, a person scheduled to be displaced shall be furnished with a general written description of the displacing Agency's relocation program which does at least the following:

(1) Informs the person that he or she may be displaced for the project and generally describes the relocation payment(s) for which the person may be eligible, the basic conditions of eligibility, and the procedures for obtaining the payment(s);

(2) Informs the displaced person that he or she will be given reasonable relocation advisory services, including referrals to replacement properties, help in filing payment claims, and other necessary assistance to help the displaced person successfully relocate;

(3) Informs the displaced person that he or she will not be required to move without at least 90 days advance written notice (see paragraph (c) of this section), and informs any person to be displaced from a dwelling that he or she cannot be required to move permanently unless at least one comparable replacement dwelling has been made available;

(4) Informs the displaced person that any person who is an alien not lawfully present in the United States is ineligible for relocation advisory services and relocation payments, unless such ineligibility would result in exceptional and extremely unusual hardship to a qualifying spouse, parent, or child, as defined in § 24.208(h); and

(5) Describes the displaced person's right to appeal the Agency's determination as to a person's application for assistance for which a person may be eligible under this part.

(b) *Notice of relocation eligibility.* Eligibility for relocation assistance shall begin on the date of a notice of intent to acquire (described in § 24.203(d)), the initiation of negotiations (defined in § 24.2(a)(15)), or actual acquisition, whichever occurs first. When this occurs, the Agency shall promptly notify all occupants in writing of their eligibility for applicable relocation assistance.

(c) *Ninety-day notice.* (1) *General.* No lawful occupant shall be required to move unless he or she has received at least 90 days advance written notice of the earliest date by which he or she may be required to move.

(2) *Timing of notice.* The displacing Agency may issue the notice 90 days or earlier before it expects the person to be displaced.

(3) *Content of notice.* The 90-day notice shall either state a specific date as the earliest date by which the occupant may be required to move, or state that the occupant will receive a further notice indicating, at least 30 days in advance, the specific date by which he or she must move. If the 90-day notice is issued before a comparable replacement dwelling is made available, the notice must state clearly that the occupant will not have to move earlier than 90 days after such a dwelling is made available. (*See* § 24.204(a).)

(4) *Urgent need.* In unusual circumstances, an occupant may be

required to vacate the property on less than 90 days advance written notice if the displacing Agency determines that a 90-day notice is impracticable, such as when the person's continued occupancy of the property would constitute a substantial danger to health or safety. A copy of the Agency's determination shall be included in the applicable case file.

(d) *Notice of intent to acquire.* A notice of intent to acquire is a displacing Agency's written communication that is provided to a person to be displaced, including those to be displaced by rehabilitation or demolition activities from property acquired prior to the commitment of Federal financial assistance to the activity, which clearly sets forth that the Agency intends to acquire the property. A notice of intent to acquire establishes eligibility for relocation assistance prior to the initiation of negotiations and/or prior to the commitment of Federal financial assistance. (*See* § 24.2(a)(9)(i)(A).)

§ 24.204 Availability of comparable replacement dwelling before displacement.

(a) *General.* No person to be displaced shall be required to move from his or her dwelling unless at least one comparable replacement dwelling (defined at § 24.2 (a)(6)) has been made available to the person. When possible, three or more comparable replacement dwellings shall be made available. A comparable replacement dwelling will be considered to have been made available to a person, if:

(1) The person is informed of its location;

(2) The person has sufficient time to negotiate and enter into a purchase agreement or lease for the property; and

(3) Subject to reasonable safeguards, the person is assured of receiving the relocation assistance and acquisition payment to which the person is entitled in sufficient time to complete the purchase or lease of the property.

(b) *Circumstances permitting waiver.* The Federal Agency funding the project may grant a waiver of the policy in paragraph (a) of this section in any case where it is demonstrated that a person must move because of:

(1) A major disaster as defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5122);

(2) A presidentially declared national emergency; or

(3) Another emergency which requires immediate vacation of the real property, such as when continued occupancy of the displacement dwelling constitutes a substantial danger to the health or safety of the occupants or the public.

(c) *Basic conditions of emergency move.* Whenever a person to be displaced is required to relocate from the displacement dwelling for a temporary period because of an emergency as described in paragraph (b) of this section, the Agency shall:

(1) Take whatever steps are necessary to assure that the person is temporarily relocated to a decent, safe, and sanitary dwelling;

(2) Pay the actual reasonable out-of-pocket moving expenses and any reasonable increase in rent and utility costs incurred in connection with the temporary relocation; and

(3) Make available to the displaced person as soon as feasible, at least one comparable replacement dwelling. (For purposes of filing a claim and meeting the eligibility requirements for a relocation payment, the date of displacement is the date the person moves from the temporarily occupied dwelling.)

§ 24.205 Relocation planning, advisory services, and coordination.

(a) *Relocation planning.* During the early stages of development, an Agency shall plan Federal and federally-assisted programs or projects in such a manner that recognizes the problems associated with the displacement of individuals, families, businesses, farms, and nonprofit organizations and develop solutions to minimize the adverse impacts of displacement. Such planning, where appropriate, shall precede any action by an Agency which will cause displacement, and should be scoped to the complexity and nature of the anticipated displacing activity including an evaluation of program resources available to carry out timely and orderly relocations. Planning may involve a relocation survey or study, which may include the following:

(1) An estimate of the number of households to be displaced including information such as owner/tenant status, estimated value and rental rates of properties to be acquired, family characteristics, and special consideration of the impacts on minorities, the elderly, large families, and persons with disabilities when applicable.

(2) An estimate of the number of comparable replacement dwellings in the area (including price ranges and rental rates) that are expected to be available to fulfill the needs of those households displaced. When an adequate supply of comparable housing is not expected to be available, the Agency should consider housing of last resort actions.

(3) An estimate of the number, type and size of the businesses, farms, and nonprofit organizations to be displaced and the approximate number of employees that may be affected.

(4) An estimate of the availability of replacement business sites. When an adequate supply of replacement business sites is not expected to be available, the impacts of displacing the businesses should be considered and addressed. Planning for displaced businesses which are reasonably expected to involve complex or lengthy moving processes or small businesses with limited financial resources and/or few alternative relocation sites should include an analysis of business moving problems.

(5) Consideration of any special relocation advisory services that may be necessary from the displacing Agency and other cooperating Agencies.

(b) *Loans for planning and preliminary expenses.* In the event that an Agency elects to consider using the duplicative provision in section 215 of the Uniform Act which permits the use of project funds for loans to cover planning and other preliminary expenses for the development of additional housing, the Lead Agency will establish criteria and procedures for such use upon the request of the Federal Agency funding the program or project.

(c) *Relocation assistance advisory services.* (1) *General.* The Agency shall carry out a relocation assistance advisory program which satisfies the requirements of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*), and Executive Order 11063 (27 FR 11527, November 24, 1962), and offer the services described in paragraph (c)(2) of this section. If the Agency determines that a person occupying property adjacent to the real property acquired for the project is caused substantial economic injury because of such acquisition, it may offer advisory services to such person.

(2) *Services to be provided.* The advisory program shall include such measures, facilities, and services as may be necessary or appropriate in order to:

(i) Determine, for nonresidential (businesses, farm and nonprofit organizations) displacements, the relocation needs and preferences of each business (farm and nonprofit organization) to be displaced and explain the relocation payments and other assistance for which the business may be eligible, the related eligibility requirements, and the procedures for

obtaining such assistance. This shall include a personal interview with each business. At a minimum, interviews with displaced business owners and operators should include the following items:

(A) The business's replacement site requirements, current lease terms and other contractual obligations and the financial capacity of the business to accomplish the move.

(B) Determination of the need for outside specialists in accordance with § 24.301(g)(12) that will be required to assist in planning the move, assistance in the actual move, and in the reinstallation of machinery and/or other personal property.

(C) For businesses, an identification and resolution of personalty/realty issues. Every effort must be made to identify and resolve realty/personalty issues prior to, or at the time of, the appraisal of the property.

(D) An estimate of the time required for the business to vacate the site.

(E) An estimate of the anticipated difficulty in locating a replacement property.

(F) An identification of any advance relocation payments required for the move, and the Agency's legal capacity to provide them.

(ii) Determine, for residential displacements, the relocation needs and preferences of each person to be displaced and explain the relocation payments and other assistance for which the person may be eligible, the related eligibility requirements, and the procedures for obtaining such assistance. This shall include a personal interview with each residential displaced person.

(A) Provide current and continuing information on the availability, purchase prices, and rental costs of comparable replacement dwellings, and explain that the person cannot be required to move unless at least one comparable replacement dwelling is made available as set forth in § 24.204(a).

(B) As soon as feasible, the Agency shall inform the person in writing of the specific comparable replacement dwelling and the price or rent used for establishing the upper limit of the replacement housing payment (*see* § 24.403 (a) and (b)) and the basis for the determination, so that the person is aware of the maximum replacement housing payment for which he or she may qualify.

(C) Where feasible, housing shall be inspected prior to being made available to assure that it meets applicable standards. (*See* § 24.2(a)(8).) If such an inspection is not made, the Agency shall notify the person to be displaced that a replacement housing payment may not be made unless the replacement dwelling is subsequently inspected and determined to be decent, safe, and sanitary.

(D) Whenever possible, minority persons shall be given reasonable opportunities to relocate to decent, safe, and sanitary replacement dwellings, not located in an area of minority concentration, that are within their financial means. This policy, however, does not require an Agency to provide a person a larger payment than is necessary to enable a person to relocate to a comparable replacement dwelling. (*See* appendix A, § 24.205(c)(2)(ii)(D).)

(E) The Agency shall offer all persons transportation to inspect housing to which they are referred.

(F) Any displaced person that may be eligible for government housing assistance at the replacement dwelling shall be advised of any requirements of such government housing assistance program that would limit the size of the replacement dwelling (*see* § 24.2(a)(6)(ix)), as well as of the long term nature of such rent subsidy, and the limited (42 month) duration of the relocation rental assistance payment.

(iii) Provide, for nonresidential moves, current and continuing information on the availability, purchase prices, and rental costs of suitable commercial and farm properties and locations. Assist any person displaced from a business or farm operation to obtain and become established in a suitable replacement location.

(iv) Minimize hardships to persons in adjusting to relocation by providing counseling, advice as to other sources of assistance that may be available, and such other help as may be appropriate.

(v) Supply persons to be displaced with appropriate information concerning Federal and State housing programs, disaster loan and other programs administered by the Small Business Administration, and other Federal and State programs offering assistance to displaced persons, and technical help to persons applying for such assistance.

(d) *Coordination of relocation activities.* Relocation activities shall be coordinated with project work and other displacement-causing activities to ensure that, to the extent feasible, persons displaced receive consistent treatment and the duplication of functions is minimized. (*See* § 24.6.)

(e) Any person who occupies property acquired by an Agency, when such occupancy began subsequent to the acquisition of the property, and the occupancy is permitted by a short term rental agreement or an agreement subject to termination when the property is needed for a program or project, shall be eligible for advisory services, as determined by the Agency.

§ 24.206 Eviction for cause.

(a) Eviction for cause must conform to applicable State and local law. Any person who occupies the real property and is not in unlawful occupancy on the date of the initiation of negotiations, is presumed to be entitled to relocation payments and other assistance set forth in this part unless the Agency determines that:

(1) The person received an eviction notice prior to the initiation of negotiations and, as a result of that notice is later evicted; or

(2) The person is evicted after the initiation of negotiations for serious or repeated violation of material terms of the lease or occupancy agreement; and

(3) In either case the eviction was not undertaken for the purpose of evading the obligation to make available the payments and other assistance set forth in this part.

(b) For purposes of determining eligibility for relocation payments, the date of displacement is the date the person moves, or if later, the date a comparable replacement dwelling is made available. This section applies only to persons who would otherwise have been displaced by the project. (*See* appendix A, § 24.206.)

§ 24.207 General requirements—claims for relocation payments.

(a) *Documentation.* Any claim for a relocation payment shall be supported by such documentation as may be reasonably required to support expenses incurred, such as bills, certified prices, appraisals, or other evidence of such expenses. A displaced person must be provided reasonable assistance necessary to complete and file any required claim for payment.

(b) *Expeditious payments.* The Agency shall review claims in an expeditious manner. The claimant shall be promptly notified as to any additional documentation that is required to support the claim. Payment for a claim shall be made as soon as feasible following receipt of sufficient documentation to support the claim.

(c) *Advanced payments.* If a person demonstrates the need for an advanced relocation payment in order to avoid or reduce a hardship, the Agency shall issue the payment, subject to such safeguards as are appropriate to ensure that the objective of the payment is accomplished.

(d) *Time for filing.* (1) All claims for a relocation payment shall be filed with the Agency no later than 18 months after:

(i) For tenants, the date of displacement.

(ii) For owners, the date of displacement or the date of the final payment for the acquisition of the real property, whichever is later.

(2) The Agency shall waive this time period for good cause.

(e) *Notice of denial of claim.* If the Agency disapproves all or part of a payment claimed or refuses to consider the claim on its merits because of untimely filing or other grounds, it shall promptly notify the claimant in writing of its determination, the basis for its determination, and the procedures for appealing that determination.

(f) *No waiver of relocation assistance.* A displacing Agency shall not propose or request that a displaced person waive his or her rights or entitlements to relocation assistance and benefits provided by the Uniform Act and this regulation.

(g) *Expenditure of payments.* Payments, provided pursuant to this part, shall not be considered to constitute Federal financial assistance. Accordingly, this part does not apply to the expenditure of such payments by, or for, a displaced person.

§ 24.208 Aliens not lawfully present in the United States.

(a) Each person seeking relocation payments or relocation advisory assistance shall, as a condition of eligibility, certify:

(1) In the case of an individual, that he or she is either a citizen or national of the United States, or an alien who is lawfully present in the United States.

(2) In the case of a family, that each family member is either a citizen or national of the United States, or an alien who is lawfully present in the United States. The certification may be made by the head of the household on behalf of other family members.

(3) In the case of an unincorporated business, farm, or nonprofit organization, that each owner is either a citizen or national of the United States, or an alien who is lawfully present in the United States. The certification may be made by the principal owner, manager, or operating officer on behalf of other persons with an ownership interest.

(4) In the case of an incorporated business, farm, or nonprofit organization, that the corporation is authorized to conduct business within the United States.

(b) The certification provided pursuant to paragraphs (a)(1), (a)(2), and (a)(3) of this section shall indicate whether such person is either a citizen or national of the United States, or an alien who is lawfully present in the United States. Requirements concerning the certification in addition to those contained in this rule shall be within the discretion of the Federal funding Agency and, within those parameters, that of the displacing Agency.

(c) In computing relocation payments under the Uniform Act, if any member(s) of a household or owner(s) of an unincorporated business, farm, or nonprofit organization is (are) determined to be ineligible because of a failure to be legally present in the United States, no relocation payments may be made to him or her. Any payment(s) for which such household, unincorporated business, farm, or nonprofit organization would otherwise be eligible shall be computed for the household, based on the number of eligible household members and for the unincorporated business, farm, or nonprofit organization, based on the ratio of ownership between eligible and ineligible owners.

(d) The displacing Agency shall consider the certification provided pursuant to paragraph (a) of this section to be valid, unless the displacing Agency determines in accordance with paragraph (f) of this section that it is invalid based on a review of an alien's documentation or other information that the Agency considers reliable and appropriate.

(e) Any review by the displacing Agency of the certifications provided pursuant to paragraph (a) of this section shall be conducted in a nondiscriminatory fashion. Each displacing Agency will apply the same standard of review to all such certifications it receives, except that such standard may be revised periodically.

(f) If, based on a review of an alien's documentation or other credible evidence, a displacing Agency has reason to believe that a person's certification is invalid (for example a document reviewed does not on its face reasonably appear to be genuine), and that, as a result, such person may be an alien not lawfully present in the United States, it shall obtain the following information before making a final determination:

(1) If the Agency has reason to believe that the certification of a person who has certified that he or she is an alien lawfully present in the United States is invalid, the displacing Agency shall obtain verification of the alien's status from the local Bureau of Citizenship and Immigration Service (BCIS) Office. A list of local BCIS offices is available at *http://www.uscis.gov/graphics/fieldoffices/alphaa.htm.* Any request for BCIS verification shall include the alien's full name, date of birth and alien number, and a copy of the alien's documentation. (If an Agency is unable to contact the BCIS, it may contact the FHWA in Washington, DC, Office of Real Estate Services or Office of Chief Counsel for a referral to the BCIS.)

(2) If the Agency has reason to believe that the certification of a person who has certified that he or she is a citizen or national is invalid, the displacing Agency shall request evidence of United States citizenship or nationality from such person and, if considered necessary, verify the accuracy of such evidence with the issuer.

(g) No relocation payments or relocation advisory assistance shall be provided to a person who has not provided the certification described in this section or who has been determined to be not lawfully present in the United States, unless such person can demonstrate to the displacing Agency's satisfaction that the denial of relocation assistance will result in an exceptional and extremely unusual hardship to such person's spouse, parent, or child who is a citizen of the United States, or is an alien lawfully admitted for permanent residence in the United States.

(h) For purposes of paragraph (g) of this section, ''exceptional and extremely unusual hardship'' to such spouse, parent, or child of the person not lawfully present in the United States means that the denial of relocation payments and advisory assistance to such person will directly result in:

(1) A significant and demonstrable adverse impact on the health or safety of such spouse, parent, or child;

(2) A significant and demonstrable adverse impact on the continued existence of the family unit of which such spouse, parent, or child is a member; or

(3) Any other impact that the displacing Agency determines will have a significant and demonstrable adverse impact on such spouse, parent, or child.

(i) The certification referred to in paragraph (a) of this section may be included as part of the claim for relocation payments described in § 24.207 of this part.

(Approved by the Office of Management and Budget under control number 2105–0508.)

§ 24.209 Relocation payments not considered as income.

No relocation payment received by a displaced person under this part shall be considered as income for the purpose

of the Internal Revenue Code of 1954, which has been redesignated as the Internal Revenue Code of 1986 (Title 26, U.S. Code), or for the purpose of determining the eligibility or the extent of eligibility of any person for assistance under the Social Security Act (42 U.S. Code 301 *et seq.*) or any other Federal law, except for any Federal law providing low-income housing assistance.

Subpart D—Payments for Moving and Related Expenses

§ 24.301 Payment for actual reasonable moving and related expenses.

(a) *General.* (1) Any owner-occupant or tenant who qualifies as a displaced person (defined at § 24.2(a)(9)) and who moves from a dwelling (including a mobile home) or who moves from a business, farm or nonprofit organization is entitled to payment of his or her actual moving and related expenses, as the Agency determines to be reasonable and necessary.

(2) A non-occupant owner of a rented mobile home is eligible for actual cost reimbursement under § 24.301 to relocate the mobile home. If the mobile home is not acquired as real estate, but the homeowner-occupant obtains a replacement housing payment under one of the circumstances described at § 24.502(a)(3), the home-owner occupant is not eligible for payment for moving the mobile home, but may be eligible for a payment for moving personal property from the mobile home.

(b) *Moves from a dwelling.* A displaced person's actual, reasonable and necessary moving expenses for moving personal property from a dwelling may be determined based on the cost of one, or a combination of the following methods: (Eligible expenses for moves from a dwelling include the expenses described in paragraphs (g)(1) through (g)(7) of this section. Self-moves based on the lower of two bids or estimates are not eligible for reimbursement under this section.)

(1) *Commercial move*—moves performed by a professional mover.

(2) *Self-move*—moves that may be performed by the displaced person in one or a combination of the following methods:

(i) *Fixed Residential Moving Cost Schedule.* (Described in § 24.302.)

(ii) *Actual cost move.* Supported by receipted bills for labor and equipment. Hourly labor rates should not exceed the cost paid by a commercial mover. Equipment rental fees should be based on the actual cost of renting the equipment but not exceed the cost paid by a commercial mover.

(c) *Moves from a mobile home.* A displaced person's actual, reasonable and necessary moving expenses for moving personal property from a mobile home may be determined based on the cost of one, or a combination of the following methods: (self-moves based on the lower of two bids or estimates are not eligible for reimbursement under this section. Eligible expenses for moves from a mobile home include those expenses described in paragraphs (g)(1) through (g)(7) of this section. In addition to the items in paragraph (a) of this section, the owner-occupant of a mobile home that is moved as personal property and used as the person's replacement dwelling, is also eligible for the moving expenses described in paragraphs (g)(8) through (g)(10) of this section.)

(1) *Commercial move*—moves performed by a professional mover.

(2) *Self-move*—moves that may be performed by the displaced person in one or a combination of the following methods:

(i) *Fixed Residential Moving Cost Schedule.* (Described in § 24.302.)

(ii) *Actual cost move.* Supported by receipted bills for labor and equipment. Hourly labor rates should not exceed the cost paid by a commercial mover. Equipment rental fees should be based on the actual cost of renting the equipment but not exceed the cost paid by a commercial mover.

(d) *Moves from a business, farm or nonprofit organization.* Personal property as determined by an inventory from a business, farm or nonprofit organization may be moved by one or a combination of the following methods: (Eligible expenses for moves from a business, farm or nonprofit organization include those expenses described in paragraphs (g)(1) through (g)(7) of this section and paragraphs (g)(11) through (g)(18) of this section and § 24.303.)

(1) *Commercial move.* Based on the lower of two bids or estimates prepared by a commercial mover. At the Agency's discretion, payment for a low cost or uncomplicated move may be based on a single bid or estimate.

(2) *Self-move.* A self-move payment may be based on one or a combination of the following:

(i) The lower of two bids or estimates prepared by a commercial mover or qualified Agency staff person. At the Agency's discretion, payment for a low cost or uncomplicated move may be based on a single bid or estimate; or

(ii) Supported by receipted bills for labor and equipment. Hourly labor rates should not exceed the rates paid by a commercial mover to employees performing the same activity and, equipment rental fees should be based on the actual rental cost of the equipment but not to exceed the cost paid by a commercial mover.

(e) *Personal property only.* Eligible expenses for a person who is required to move personal property from real property but is not required to move from a dwelling (including a mobile home), business, farm or nonprofit organization include those expenses described in paragraphs (g)(1) through (g)(7) and (g)(18) of this section. (See appendix A, § 24.301(e).)

(f) *Advertising signs.* The amount of a payment for direct loss of an advertising sign, which is personal property shall be the lesser of:

(1) The depreciated reproduction cost of the sign, as determined by the Agency, less the proceeds from its sale; or

(2) The estimated cost of moving the sign, but with no allowance for storage.

(g) *Eligible actual moving expenses.*

(1) Transportation of the displaced person and personal property. Transportation costs for a distance beyond 50 miles are not eligible, unless the Agency determines that relocation beyond 50 miles is justified.

(2) Packing, crating, unpacking, and uncrating of the personal property.

(3) Disconnecting, dismantling, removing, reassembling, and reinstalling relocated household appliances and other personal property. For businesses, farms or nonprofit organizations this includes machinery, equipment, substitute personal property, and connections to utilities available within the building; it also includes modifications to the personal property, including those mandated by Federal, State or local law, code or ordinance, necessary to adapt it to the replacement structure, the replacement site, or the utilities at the replacement site, and modifications necessary to adapt the utilities at the replacement site to the personal property.

(4) Storage of the personal property for a period not to exceed 12 months, unless the Agency determines that a longer period is necessary.

(5) Insurance for the replacement value of the property in connection with the move and necessary storage.

(6) The replacement value of property lost, stolen, or damaged in the process of moving (not through the fault or negligence of the displaced person, his or her agent, or employee) where insurance covering such loss, theft, or damage is not reasonably available.

(7) Other moving-related expenses that are not listed as ineligible under

§ 24.301(h), as the Agency determines to be reasonable and necessary.

(8) The reasonable cost of disassembling, moving, and reassembling any appurtenances attached to a mobile home, such as porches, decks, skirting, and awnings, which were not acquired, anchoring of the unit, and utility ''hookup'' charges.

(9) The reasonable cost of repairs and/or modifications so that a mobile home can be moved and/or made decent, safe, and sanitary.

(10) The cost of a nonrefundable mobile home park entrance fee, to the extent it does not exceed the fee at a comparable mobile home park, if the person is displaced from a mobile home park or the Agency determines that payment of the fee is necessary to effect relocation.

(11) Any license, permit, fees or certification required of the displaced person at the replacement location. However, the payment may be based on the remaining useful life of the existing license, permit, fees or certification.

(12) Professional services as the Agency determines to be actual, reasonable and necessary for:

(i) Planning the move of the personal property;

(ii) Moving the personal property; and

(iii) Installing the relocated personal property at the replacement location.

(13) Relettering signs and replacing stationery on hand at the time of displacement that are made obsolete as a result of the move.

(14) Actual direct loss of tangible personal property incurred as a result of moving or discontinuing the business or farm operation. The payment shall consist of the lesser of:

(i) The fair market value in place of the item, as is for continued use, less the proceeds from its sale. (To be eligible for payment, the claimant must make a good faith effort to sell the personal property, unless the Agency determines that such effort is not necessary. When payment for property loss is claimed for goods held for sale, the market value shall be based on the cost of the goods to the business, not the potential selling prices.); or

(ii) The estimated cost of moving the item as is, but not including any allowance for storage; or for reconnecting a piece of equipment if the equipment is in storage or not being used at the acquired site. (See appendix A, § 24.301(g)(14)(i) and (ii).) If the business or farm operation is discontinued, the estimated cost of moving the item shall be based on a moving distance of 50 miles.

(15) The reasonable cost incurred in attempting to sell an item that is not to be relocated.

(16) *Purchase of substitute personal property.* If an item of personal property, which is used as part of a business or farm operation is not moved but is promptly replaced with a substitute item that performs a comparable function at the replacement site, the displaced person is entitled to payment of the lesser of:

(i) The cost of the substitute item, including installation costs of the replacement site, minus any proceeds from the sale or trade-in of the replaced item; or

(ii) The estimated cost of moving and reinstalling the replaced item but with no allowance for storage. At the Agency's discretion, the estimated cost for a low cost or uncomplicated move may be based on a single bid or estimate.

(17) Searching for a replacement location. A business or farm operation is entitled to reimbursement for actual expenses, not to exceed $2,500, as the Agency determines to be reasonable, which are incurred in searching for a replacement location, including:

(i) Transportation;

(ii) Meals and lodging away from home;

(iii) Time spent searching, based on reasonable salary or earnings;

(iv) Fees paid to a real estate agent or broker to locate a replacement site, exclusive of any fees or commissions related to the purchase of such sites;

(v) Time spent in obtaining permits and attending zoning hearings; and

(vi) Time spent negotiating the purchase of a replacement site based on a reasonable salary or earnings.

(18) *Low value/high bulk.* When the personal property to be moved is of low value and high bulk, and the cost of moving the property would be disproportionate to its value in the judgment of the displacing Agency, the allowable moving cost payment shall not exceed the lesser of: The amount which would be received if the property were sold at the site or the replacement cost of a comparable quantity delivered to the new business location. Examples of personal property covered by this provision include, but are not limited to, stockpiled sand, gravel, minerals, metals and other similar items of personal property as determined by the Agency.

(h) *Ineligible moving and related expenses.* A displaced person is not entitled to payment for:

(1) The cost of moving any structure or other real property improvement in which the displaced person reserved ownership. (However, this part does not preclude the computation under § 24.401(c)(2)(iii));

(2) Interest on a loan to cover moving expenses;

(3) Loss of goodwill;

(4) Loss of profits;

(5) Loss of trained employees;

(6) Any additional operating expenses of a business or farm operation incurred because of operating in a new location except as provided in § 24.304(a)(6);

(7) Personal injury;

(8) Any legal fee or other cost for preparing a claim for a relocation payment or for representing the claimant before the Agency;

(9) Expenses for searching for a replacement dwelling;

(10) Physical changes to the real property at the replacement location of a business or farm operation except as provided in §§ 24.301(g)(3) and 24.304(a);

(11) Costs for storage of personal property on real property already owned or leased by the displaced person, and

(12) Refundable security and utility deposits.

(i) *Notification and inspection (nonresidential).* The Agency shall inform the displaced person, in writing, of the requirements of this section as soon as possible after the initiation of negotiations. This information may be included in the relocation information provided the displaced person as set forth in § 24.203. To be eligible for payments under this section the displaced person must:

(1) Provide the Agency reasonable advance notice of the approximate date of the start of the move or disposition of the personal property and an inventory of the items to be moved. However, the Agency may waive this notice requirement after documenting its file accordingly.

(2) Permit the Agency to make reasonable and timely inspections of the personal property at both the displacement and replacement sites and to monitor the move.

(j) *Transfer of ownership (nonresidential).* Upon request and in accordance with applicable law, the claimant shall transfer to the Agency ownership of any personal property that has not been moved, sold, or traded in.

§ 24.302 Fixed payment for moving expenses—residential moves.

Any person displaced from a dwelling or a seasonal residence or a dormitory style room is entitled to receive a fixed moving cost payment as an alternative to a payment for actual moving and related expenses under § 24.301. This payment shall be determined according

to the Fixed Residential Moving Cost Schedule [3] approved by the Federal Highway Administration and published in the **Federal Register** on a periodic basis. The payment to a person with minimal personal possessions who is in occupancy of a dormitory style room or a person whose residential move is performed by an Agency at no cost to the person shall be limited to the amount stated in the most recent edition of the Fixed Residential Moving Cost Schedule.

§ 24.303 Related nonresidential eligible expenses.

The following expenses, in addition to those provided by § 24.301 for moving personal property, shall be provided if the Agency determines that they are actual, reasonable and necessary:

(a) Connection to available nearby utilities from the right-of-way to improvements at the replacement site.

(b) Professional services performed prior to the purchase or lease of a replacement site to determine its suitability for the displaced person's business operation including but not limited to, soil testing, feasibility and marketing studies (excluding any fees or commissions directly related to the purchase or lease of such site). At the discretion of the Agency a reasonable pre-approved hourly rate may be established. (See appendix A, § 24.303(b).)

(c) Impact fees or one time assessments for anticipated heavy utility usage, as determined necessary by the Agency.

§ 24.304 Reestablishment expenses—nonresidential moves.

In addition to the payments available under §§ 24.301 and 24.303 of this subpart, a small business, as defined in § 24.2(a)(24), farm or nonprofit organization is entitled to receive a payment, not to exceed $10,000, for expenses actually incurred in relocating and reestablishing such small business, farm or nonprofit organization at a replacement site.

(a) *Eligible expenses.* Reestablishment expenses must be reasonable and necessary, as determined by the Agency. They include, but are not limited to, the following:

(1) Repairs or improvements to the replacement real property as required by Federal, State or local law, code or ordinance.

(2) Modifications to the replacement property to accommodate the business operation or make replacement structures suitable for conducting the business.

(3) Construction and installation costs for exterior signing to advertise the business.

(4) Redecoration or replacement of soiled or worn surfaces at the replacement site, such as paint, paneling, or carpeting.

(5) Advertisement of replacement location.

(6) Estimated increased costs of operation during the first 2 years at the replacement site for such items as:

(i) Lease or rental charges;

(ii) Personal or real property taxes;

(iii) Insurance premiums; and

(iv) Utility charges, excluding impact fees.

(7) Other items that the Agency considers essential to the reestablishment of the business.

(b) *Ineligible expenses.* The following is a nonexclusive listing of reestablishment expenditures not considered to be reasonable, necessary, or otherwise eligible:

(1) Purchase of capital assets, such as, office furniture, filing cabinets, machinery, or trade fixtures.

(2) Purchase of manufacturing materials, production supplies, product inventory, or other items used in the normal course of the business operation.

(3) Interest on money borrowed to make the move or purchase the replacement property.

(4) Payment to a part-time business in the home which does not contribute materially (defined at § 24.2(a)(7)) to the household income.

§ 24.305 Fixed payment for moving expenses—nonresidential moves.

(a) *Business.* A displaced business may be eligible to choose a fixed payment in lieu of the payments for actual moving and related expenses, and actual reasonable reestablishment expenses provided by §§ 24.301, 24.303 and 24.304. Such fixed payment, except for payment to a nonprofit organization, shall equal the average annual net earnings of the business, as computed in accordance with paragraph (e) of this section, but not less than $1,000 nor more than $20,000. The displaced business is eligible for the payment if the Agency determines that:

(1) The business owns or rents personal property which must be moved in connection with such displacement and for which an expense would be incurred in such move and, the business vacates or relocates from its displacement site;

(2) The business cannot be relocated without a substantial loss of its existing patronage (clientele or net earnings). A business is assumed to meet this test unless the Agency determines that it will not suffer a substantial loss of its existing patronage;

(3) The business is not part of a commercial enterprise having more than three other entities which are not being acquired by the Agency, and which are under the same ownership and engaged in the same or similar business activities.

(4) The business is not operated at a displacement dwelling solely for the purpose of renting such dwelling to others;

(5) The business is not operated at the displacement site solely for the purpose of renting the site to others; and

(6) The business contributed materially to the income of the displaced person during the 2 taxable years prior to displacement. (See § 24.2(a)(7).)

(b) *Determining the number of businesses.* In determining whether two or more displaced legal entities constitute a single business, which is entitled to only one fixed payment, all pertinent factors shall be considered, including the extent to which:

(1) The same premises and equipment are shared;

(2) Substantially identical or interrelated business functions are carried out and business and financial affairs are commingled;

(3) The entities are held out to the public, and to those customarily dealing with them, as one business; and

(4) The same person or closely related persons own, control, or manage the affairs of the entities.

(c) *Farm operation.* A displaced farm operation (defined at § 24.2(a)(12)) may choose a fixed payment, in lieu of the payments for actual moving and related expenses and actual reasonable reestablishment expenses, in an amount equal to its average annual net earnings as computed in accordance with paragraph (e) of this section, but not less than $1,000 nor more than $20,000. In the case of a partial acquisition of land, which was a farm operation before the acquisition, the fixed payment shall be made only if the Agency determines that:

(1) The acquisition of part of the land caused the operator to be displaced from the farm operation on the remaining land; or

(2) The partial acquisition caused a substantial change in the nature of the farm operation.

(d) *Nonprofit organization.* A displaced nonprofit organization may

[3] The Fixed Residential Moving Cost Schedule is available at the following URL: *http://www.fhwa.dot.gov//////realestate/fixsch96.htm.* Agencies are cautioned to ensure they are using the most recent edition.

choose a fixed payment of $1,000 to $20,000, in lieu of the payments for actual moving and related expenses and actual reasonable reestablishment expenses, if the Agency determines that it cannot be relocated without a substantial loss of existing patronage (membership or clientele). A nonprofit organization is assumed to meet this test, unless the Agency demonstrates otherwise. Any payment in excess of $1,000 must be supported with financial statements for the two 12-month periods prior to the acquisition. The amount to be used for the payment is the average of 2 years annual gross revenues less administrative expenses. (See appendix A, § 24.305(d).)

(e) *Average annual net earnings of a business or farm operation.* The average annual net earnings of a business or farm operation are one-half of its net earnings before Federal, State, and local income taxes during the 2 taxable years immediately prior to the taxable year in which it was displaced. If the business or farm was not in operation for the full 2 taxable years prior to displacement, net earnings shall be based on the actual period of operation at the displacement site during the 2 taxable years prior to displacement, projected to an annual rate. Average annual net earnings may be based upon a different period of time when the Agency determines it to be more equitable. Net earnings include any compensation obtained from the business or farm operation by its owner, the owner's spouse, and dependents. The displaced person shall furnish the Agency proof of net earnings through income tax returns, certified financial statements, or other reasonable evidence, which the Agency determines is satisfactory. (See appendix A, § 24.305(e).)

§ 24.306 Discretionary utility relocation payments.

(a) Whenever a program or project undertaken by a displacing Agency causes the relocation of a utility facility (see § 24.2(a)(31)) and the relocation of the facility creates extraordinary expenses for its owner, the displacing Agency may, at its option, make a relocation payment to the owner for all or part of such expenses, if the following criteria are met:

(1) The utility facility legally occupies State or local government property, or property over which the State or local government has an easement or right-of-way;

(2) The utility facility's right of occupancy thereon is pursuant to State law or local ordinance specifically authorizing such use, or where such use and occupancy has been granted through a franchise, use and occupancy permit, or other similar agreement;

(3) Relocation of the utility facility is required by and is incidental to the primary purpose of the project or program undertaken by the displacing Agency;

(4) There is no Federal law, other than the Uniform Act, which clearly establishes a policy for the payment of utility moving costs that is applicable to the displacing Agency's program or project; and

(5) State or local government reimbursement for utility moving costs or payment of such costs by the displacing Agency is in accordance with State law.

(b) For the purposes of this section, the term extraordinary expenses means those expenses which, in the opinion of the displacing Agency, are not routine or predictable expenses relating to the utility's occupancy of rights-of-way, and are not ordinarily budgeted as operating expenses, unless the owner of the utility facility has explicitly and knowingly agreed to bear such expenses as a condition for use of the property, or has voluntarily agreed to be responsible for such expenses.

(c) A relocation payment to a utility facility owner for moving costs under this section may not exceed the cost to functionally restore the service disrupted by the federally-assisted program or project, less any increase in value of the new facility and salvage value of the old facility. The displacing Agency and the utility facility owner shall reach prior agreement on the nature of the utility relocation work to be accomplished, the eligibility of the work for reimbursement, the responsibilities for financing and accomplishing the work, and the method of accumulating costs and making payment. (*See* appendix A, § 24.306.)

Subpart E—Replacement Housing Payments

§ 24.401 Replacement housing payment for 180-day homeowner-occupants.

(a) *Eligibility.* A displaced person is eligible for the replacement housing payment for a 180-day homeowner-occupant if the person:

(1) Has actually owned and occupied the displacement dwelling for not less than 180 days immediately prior to the initiation of negotiations; and

(2) Purchases and occupies a decent, safe, and sanitary replacement dwelling within one year after the later of the following dates (except that the Agency may extend such one year period for good cause):

(i) The date the displaced person receives final payment for the displacement dwelling or, in the case of condemnation, the date the full amount of the estimate of just compensation is deposited in the court; or

(ii) The date the displacing Agency's obligation under § 24.204 is met.

(b) *Amount of payment.* The replacement housing payment for an eligible 180-day homeowner-occupant may not exceed $22,500. (See also § 24.404.) The payment under this subpart is limited to the amount necessary to relocate to a comparable replacement dwelling within one year from the date the displaced homeowner-occupant is paid for the displacement dwelling, or the date a comparable replacement dwelling is made available to such person, whichever is later. The payment shall be the sum of:

(1) The amount by which the cost of a replacement dwelling exceeds the acquisition cost of the displacement dwelling, as determined in accordance with paragraph (c) of this section;

(2) The increased interest costs and other debt service costs which are incurred in connection with the mortgage(s) on the replacement dwelling, as determined in accordance with paragraph (d) of this section; and

(3) The reasonable expenses incidental to the purchase of the replacement dwelling, as determined in accordance with paragraph (e) of this section.

(c) *Price differential.* (1) *Basic computation.* The price differential to be paid under paragraph (b)(1) of this section is the amount which must be added to the acquisition cost of the displacement dwelling and site (*see* § 24.2(a)(11)) to provide a total amount equal to the lesser of:

(i) The reasonable cost of a comparable replacement dwelling as determined in accordance with § 24.403(a); or

(ii) The purchase price of the decent, safe, and sanitary replacement dwelling actually purchased and occupied by the displaced person.

(2) *Owner retention of displacement dwelling.* If the owner retains ownership of his or her dwelling, moves it from the displacement site, and reoccupies it on a replacement site, the purchase price of the replacement dwelling shall be the sum of:

(i) The cost of moving and restoring the dwelling to a condition comparable to that prior to the move;

(ii) The cost of making the unit a decent, safe, and sanitary replacement dwelling (defined at § 24.2(a)(8)); and

(iii) The current market value for residential use of the replacement

dwelling site (*see* appendix A, § 24.401(c)(2)(iii)), unless the claimant rented the displacement site and there is a reasonable opportunity for the claimant to rent a suitable replacement site; and

(iv) The retention value of the dwelling, if such retention value is reflected in the ''acquisition cost'' used when computing the replacement housing payment.

(d) *Increased mortgage interest costs.* The displacing Agency shall determine the factors to be used in computing the amount to be paid to a displaced person under paragraph (b)(2) of this section. The payment for increased mortgage interest cost shall be the amount which will reduce the mortgage balance on a new mortgage to an amount which could be amortized with the same monthly payment for principal and interest as that for the mortgage(s) on the displacement dwelling. In addition, payments shall include other debt service costs, if not paid as incidental costs, and shall be based only on bona fide mortgages that were valid liens on the displacement dwelling for at least 180 days prior to the initiation of negotiations. Paragraphs (d)(1) through (d)(5) of this section shall apply to the computation of the increased mortgage interest costs payment, which payment shall be contingent upon a mortgage being placed on the replacement dwelling.

(1) The payment shall be based on the unpaid mortgage balance(s) on the displacement dwelling; however, in the event the displaced person obtains a smaller mortgage than the mortgage balance(s) computed in the buydown determination, the payment will be prorated and reduced accordingly. (See appendix A, § 24.401(d).) In the case of a home equity loan the unpaid balance shall be that balance which existed 180 days prior to the initiation of negotiations or the balance on the date of acquisition, whichever is less.

(2) The payment shall be based on the remaining term of the mortgage(s) on the displacement dwelling or the term of the new mortgage, whichever is shorter.

(3) The interest rate on the new mortgage used in determining the amount of the payment shall not exceed the prevailing fixed interest rate for conventional mortgages currently charged by mortgage lending institutions in the area in which the replacement dwelling is located.

(4) Purchaser's points and loan origination or assumption fees, but not seller's points, shall be paid to the extent:

(i) They are not paid as incidental expenses;

(ii) They do not exceed rates normal to similar real estate transactions in the area;

(iii) The Agency determines them to be necessary; and

(iv) The computation of such points and fees shall be based on the unpaid mortgage balance on the displacement dwelling, less the amount determined for the reduction of the mortgage balance under this section.

(5) The displaced person shall be advised of the approximate amount of this payment and the conditions that must be met to receive the payment as soon as the facts relative to the person's current mortgage(s) are known and the payment shall be made available at or near the time of closing on the replacement dwelling in order to reduce the new mortgage as intended.

(e) *Incidental expenses.* The incidental expenses to be paid under paragraph (b)(3) of this section or § 24.402(c)(1) are those necessary and reasonable costs actually incurred by the displaced person incident to the purchase of a replacement dwelling, and customarily paid by the buyer, including:

(1) Legal, closing, and related costs, including those for title search, preparing conveyance instruments, notary fees, preparing surveys and plats, and recording fees.

(2) Lender, FHA, or VA application and appraisal fees.

(3) Loan origination or assumption fees that do not represent prepaid interest.

(4) Professional home inspection, certification of structural soundness, and termite inspection.

(5) Credit report.

(6) Owner's and mortgagee's evidence of title, *e.g.*, title insurance, not to exceed the costs for a comparable replacement dwelling.

(7) Escrow agent's fee.

(8) State revenue or documentary stamps, sales or transfer taxes (not to exceed the costs for a comparable replacement dwelling).

(9) Such other costs as the Agency determine to be incidental to the purchase.

(f) Rental assistance payment for 180-day homeowner. A 180-day homeowner-occupant, who could be eligible for a replacement housing payment under paragraph (a) of this section but elects to rent a replacement dwelling, is eligible for a rental assistance payment. The amount of the rental assistance payment is based on a determination of market rent for the acquired dwelling compared to a comparable rental dwelling available on the market. The difference, if any, is computed in accordance with § 24.402(b)(1), except that the limit of $5,250 does not apply, and disbursed in accordance with § 24.402(b)(3). Under no circumstances would the rental assistance payment exceed the amount that could have been received under § 24.401(b)(1) had the 180-day homeowner elected to purchase and occupy a comparable replacement dwelling.

§ 24.402 Replacement housing payment for 90-day occupants.

(a) *Eligibility.* A tenant or owner-occupant displaced from a dwelling is entitled to a payment not to exceed $5,250 for rental assistance, as computed in accordance with paragraph (b) of this section, or downpayment assistance, as computed in accordance with paragraph (c) of this section, if such displaced person:

(1) Has actually and lawfully occupied the displacement dwelling for at least 90 days immediately prior to the initiation of negotiations; and

(2) Has rented, or purchased, and occupied a decent, safe, and sanitary replacement dwelling within 1 year (unless the Agency extends this period for good cause) after:

(i) For a tenant, the date he or she moves from the displacement dwelling; or

(ii) For an owner-occupant, the later of:

(A) The date he or she receives final payment for the displacement dwelling, or in the case of condemnation, the date the full amount of the estimate of just compensation is deposited with the court; or

(B) The date he or she moves from the displacement dwelling.

(b) *Rental assistance payment.* (1) *Amount of payment.* An eligible displaced person who rents a replacement dwelling is entitled to a payment not to exceed $5,250 for rental assistance. (See § 24.404.) Such payment shall be 42 times the amount obtained by subtracting the base monthly rental for the displacement dwelling from the lesser of:

(i) The monthly rent and estimated average monthly cost of utilities for a comparable replacement dwelling; or

(ii) The monthly rent and estimated average monthly cost of utilities for the decent, safe, and sanitary replacement dwelling actually occupied by the displaced person.

(2) *Base monthly rental for displacement dwelling.* The base monthly rental for the displacement dwelling is the lesser of:

(i) The average monthly cost for rent and utilities at the displacement

dwelling for a reasonable period prior to displacement, as determined by the Agency (for an owner-occupant, use the fair market rent for the displacement dwelling. For a tenant who paid little or no rent for the displacement dwelling, use the fair market rent, unless its use would result in a hardship because of the person's income or other circumstances);

(ii) Thirty (30) percent of the displaced person's average monthly gross household income if the amount is classified as ''low income'' by the U.S. Department of Housing and Urban Development's Annual Survey of Income Limits for the Public Housing and Section 8 Programs [4]. The base monthly rental shall be established solely on the criteria in paragraph (b)(2)(i) of this section for persons with income exceeding the survey's ''low income'' limits, for persons refusing to provide appropriate evidence of income, and for persons who are dependents. A full time student or resident of an institution may be assumed to be a dependent, unless the person demonstrates otherwise; or,

(iii) The total of the amounts designated for shelter and utilities if the displaced person is receiving a welfare assistance payment from a program that designates the amounts for shelter and utilities.

(3) *Manner of disbursement.* A rental assistance payment may, at the Agency's discretion, be disbursed in either a lump sum or in installments. However, except as limited by § 24.403(f), the full amount vests immediately, whether or not there is any later change in the person's income or rent, or in the condition or location of the person's housing.

(c) *Downpayment assistance payment*—(1) *Amount of payment.* An eligible displaced person who purchases a replacement dwelling is entitled to a downpayment assistance payment in the amount the person would receive under paragraph (b) of this section if the person rented a comparable replacement dwelling. At the Agency's discretion, a downpayment assistance payment that is less than $5,250 may be increased to any amount not to exceed $5,250. However, the payment to a displaced homeowner shall not exceed the amount the owner would receive under § 24.401(b) if he or she met the 180-day occupancy requirement. If the Agency elects to provide the maximum payment of $5,250 as a downpayment, the Agency shall apply this discretion in a uniform and consistent manner, so that eligible displaced persons in like circumstances are treated equally. A displaced person eligible to receive a payment as a 180-day owner-occupant under § 24.401(a) is not eligible for this payment. (See appendix A, § 24.402(c).)

(2) *Application of payment.* The full amount of the replacement housing payment for downpayment assistance must be applied to the purchase price of the replacement dwelling and related incidental expenses.

§ 24.403 Additional rules governing replacement housing payments.

(a) *Determining cost of comparable replacement dwelling.* The upper limit of a replacement housing payment shall be based on the cost of a comparable replacement dwelling (defined at § 24.2(a)(6)).

(1) If available, at least three comparable replacement dwellings shall be examined and the payment computed on the basis of the dwelling most nearly representative of, and equal to, or better than, the displacement dwelling.

(2) If the site of the comparable replacement dwelling lacks a major exterior attribute of the displacement dwelling site, (*e.g.*, the site is significantly smaller or does not contain a swimming pool), the value of such attribute shall be subtracted from the acquisition cost of the displacement dwelling for purposes of computing the payment.

(3) If the acquisition of a portion of a typical residential property causes the displacement of the owner from the dwelling and the remainder is a buildable residential lot, the Agency may offer to purchase the entire property. If the owner refuses to sell the remainder to the Agency, the market value of the remainder may be added to the acquisition cost of the displacement dwelling for purposes of computing the replacement housing payment.

(4) To the extent feasible, comparable replacement dwellings shall be selected from the neighborhood in which the displacement dwelling was located or, if that is not possible, in nearby or similar neighborhoods where housing costs are generally the same or higher.

(5) Multiple occupants of one displacement dwelling. If two or more occupants of the displacement dwelling move to separate replacement dwellings, each occupant is entitled to a reasonable prorated share, as determined by the Agency, of any relocation payments that would have been made if the occupants moved together to a comparable replacement dwelling. However, if the Agency determines that two or more occupants maintained separate households within the same dwelling, such occupants have separate entitlements to relocation payments.

(6) Deductions from relocation payments. An Agency shall deduct the amount of any advance relocation payment from the relocation payment(s) to which a displaced person is otherwise entitled. The Agency shall not withhold any part of a relocation payment to a displaced person to satisfy an obligation to any other creditor.

(7) Mixed-use and multifamily properties. If the displacement dwelling was part of a property that contained another dwelling unit and/or space used for nonresidential purposes, and/or is located on a lot larger than typical for residential purposes, only that portion of the acquisition payment which is actually attributable to the displacement dwelling shall be considered the acquisition cost when computing the replacement housing payment.

(b) *Inspection of replacement dwelling.* Before making a replacement housing payment or releasing the initial payment from escrow, the Agency or its designated representative shall inspect the replacement dwelling and determine whether it is a decent, safe, and sanitary dwelling as defined at § 24.2(a)(8).

(c) *Purchase of replacement dwelling.* A displaced person is considered to have met the requirement to purchase a replacement dwelling, if the person:

(1) Purchases a dwelling;

(2) Purchases and rehabilitates a substandard dwelling;

(3) Relocates a dwelling which he or she owns or purchases;

(4) Constructs a dwelling on a site he or she owns or purchases;

(5) Contracts for the purchase or construction of a dwelling on a site provided by a builder or on a site the person owns or purchases; or

(6) Currently owns a previously purchased dwelling and site, valuation of which shall be on the basis of current market value.

(d) *Occupancy requirements for displacement or replacement dwelling.* No person shall be denied eligibility for a replacement housing payment solely because the person is unable to meet the occupancy requirements set forth in these regulations for a reason beyond his or her control, including:

(1) A disaster, an emergency, or an imminent threat to the public health or welfare, as determined by the President, the Federal Agency funding the project, or the displacing Agency; or

(2) Another reason, such as a delay in the construction of the replacement dwelling, military duty, or hospital stay, as determined by the Agency.

(e) *Conversion of payment.* A displaced person who initially rents a replacement dwelling and receives a rental assistance payment under

[4] The U.S. Department of Housing and Urban Development's Public Housing and Section 8 Program Income Limits are updated annually and are available on FHWA's Web site at *http://www.fhwa.dot.gov/realestate/ua/ualic.htm.*

§ 24.402(b) is eligible to receive a payment under § 24.401 or § 24.402(c) if he or she meets the eligibility criteria for such payments, including purchase and occupancy within the prescribed 1-year period. Any portion of the rental assistance payment that has been disbursed shall be deducted from the payment computed under § 24.401 or § 24.402(c).

(f) *Payment after death.* A replacement housing payment is personal to the displaced person and upon his or her death the undisbursed portion of any such payment shall not be paid to the heirs or assigns, except that:

(1) The amount attributable to the displaced person's period of actual occupancy of the replacement housing shall be paid.

(2) Any remaining payment shall be disbursed to the remaining family members of the displaced household in any case in which a member of a displaced family dies.

(3) Any portion of a replacement housing payment necessary to satisfy the legal obligation of an estate in connection with the selection of a replacement dwelling by or on behalf of a deceased person shall be disbursed to the estate.

(g) *Insurance proceeds.* To the extent necessary to avoid duplicate compensation, the amount of any insurance proceeds received by a person in connection with a loss to the displacement dwelling due to a catastrophic occurrence (fire, flood, etc.) shall be included in the acquisition cost of the displacement dwelling when computing the price differential. (*See* § 24.3.)

§ 24.404 Replacement housing of last resort.

(a) *Determination to provide replacement housing of last resort.* Whenever a program or project cannot proceed on a timely basis because comparable replacement dwellings are not available within the monetary limits for owners or tenants, as specified in § 24.401 or § 24.402, as appropriate, the Agency shall provide additional or alternative assistance under the provisions of this subpart. Any decision to provide last resort housing assistance must be adequately justified either:

(1) On a case-by-case basis, for good cause, which means that appropriate consideration has been given to:

(i) The availability of comparable replacement housing in the program or project area;

(ii) The resources available to provide comparable replacement housing; and

(iii) The individual circumstances of the displaced person, or

(2) By a determination that:

(i) There is little, if any, comparable replacement housing available to displaced persons within an entire program or project area; and, therefore, last resort housing assistance is necessary for the area as a whole;

(ii) A program or project cannot be advanced to completion in a timely manner without last resort housing assistance; and

(iii) The method selected for providing last resort housing assistance is cost effective, considering all elements, which contribute to total program or project costs.

(b) *Basic rights of persons to be displaced.* Notwithstanding any provision of this subpart, no person shall be required to move from a displacement dwelling unless comparable replacement housing is available to such person. No person may be deprived of any rights the person may have under the Uniform Act or this part. The Agency shall not require any displaced person to accept a dwelling provided by the Agency under these procedures (unless the Agency and the displaced person have entered into a contract to do so) in lieu of any acquisition payment or any relocation payment for which the person may otherwise be eligible.

(c) *Methods of providing comparable replacement housing.* Agencies shall have broad latitude in implementing this subpart, but implementation shall be for reasonable cost, on a case-by-case basis unless an exception to case-by-case analysis is justified for an entire project.

(1) The methods of providing replacement housing of last resort include, but are not limited to:

(i) A replacement housing payment in excess of the limits set forth in § 24.401 or § 24.402. A replacement housing payment under this section may be provided in installments or in a lump sum at the Agency's discretion.

(ii) Rehabilitation of and/or additions to an existing replacement dwelling.

(iii) The construction of a new replacement dwelling.

(iv) The provision of a direct loan, which requires regular amortization or deferred repayment. The loan may be unsecured or secured by the real property. The loan may bear interest or be interest-free.

(v) The relocation and, if necessary, rehabilitation of a dwelling.

(vi) The purchase of land and/or a replacement dwelling by the displacing Agency and subsequent sale or lease to, or exchange with a displaced person.

(vii) The removal of barriers for persons with disabilities.

(2) Under special circumstances, consistent with the definition of a comparable replacement dwelling, modified methods of providing replacement housing of last resort permit consideration of replacement housing based on space and physical characteristics different from those in the displacement dwelling (*see* appendix A, § 24.404(c)), including upgraded, but smaller replacement housing that is decent, safe, and sanitary and adequate to accommodate individuals or families displaced from marginal or substandard housing with probable functional obsolescence. In no event, however, shall a displaced person be required to move into a dwelling that is not functionally equivalent in accordance with § 24.2(a)(6)(ii) of this part.

(3) The Agency shall provide assistance under this subpart to a displaced person who is not eligible to receive a replacement housing payment under §§ 24.401 and 24.402 because of failure to meet the length of occupancy requirement when comparable replacement rental housing is not available at rental rates within the displaced person's financial means. (*See* § 24.2(a)(6)(viii)(C).) Such assistance shall cover a period of 42 months.

Subpart F—Mobile Homes

§ 24.501 Applicability.

(a) *General.* This subpart describes the requirements governing the provision of replacement housing payments to a person displaced from a mobile home and/or mobile home site who meets the basic eligibility requirements of this part. Except as modified by this subpart, such a displaced person is entitled to a moving expense payment in accordance with subpart D of this part and a replacement housing payment in accordance with subpart E of this part to the same extent and subject to the same requirements as persons displaced from conventional dwellings. Moving cost payments to persons occupying mobile homes are covered in § 24.301(g)(1) through (g)(10).

(b) *Partial acquisition of mobile home park.* The acquisition of a portion of a mobile home park property may leave a remaining part of the property that is not adequate to continue the operation of the park. If the Agency determines that a mobile home located in the remaining part of the property must be moved as a direct result of the project, the occupant of the mobile home shall be considered to be a displaced person

who is entitled to relocation payments and other assistance under this part.

§ 24.502 Replacement housing payment for 180-day mobile homeowner displaced from a mobile home, and/or from the acquired mobile home site.

(a) *Eligibility.* An owner-occupant displaced from a mobile home or site is entitled to a replacement housing payment, not to exceed $22,500, under § 24.401 if:

(1) The person occupied the mobile home on the displacement site for at least 180 days immediately before:

(i) The initiation of negotiations to acquire the mobile home, if the person owned the mobile home and the mobile home is real property;

(ii) The initiation of negotiations to acquire the mobile home site if the mobile home is personal property, but the person owns the mobile home site; or

(iii) The date of the Agency's written notification to the owner-occupant that the owner is determined to be displaced from the mobile home as described in paragraphs (a)(3)(i) through (iv) of this section.

(2) The person meets the other basic eligibility requirements at § 24.401(a)(2); and

(3) The Agency acquires the mobile home as real estate, or acquires the mobile home site from the displaced owner, or the mobile home is personal property but the owner is displaced from the mobile home because the Agency determines that the mobile home:

(i) Is not, and cannot economically be made decent, safe, and sanitary;

(ii) Cannot be relocated without substantial damage or unreasonable cost;

(iii) Cannot be relocated because there is no available comparable replacement site; or

(iv) Cannot be relocated because it does not meet mobile home park entrance requirements.

(b) *Replacement housing payment computation for a 180-day owner that is displaced from a mobile home.* The replacement housing payment for an eligible displaced 180-day owner is computed as described at § 24.401(b) incorporating the following, as applicable:

(1) If the Agency acquires the mobile home as real estate and/or acquires the owned site, the acquisition cost used to compute the price differential payment is the actual amount paid to the owner as just compensation for the acquisition of the mobile home, and/or site, if owned by the displaced mobile homeowner.

(2) If the Agency does not purchase the mobile home as real estate but the owner is determined to be displaced from the mobile home and eligible for a replacement housing payment based on paragraph (a)(1)(iii) of this section, the eligible price differential payment for the purchase of a comparable replacement mobile home, is the lesser of the displaced mobile homeowner's net cost to purchase a replacement mobile home (*i.e.*, purchase price of the replacement mobile home less trade-in or sale proceeds of the displacement mobile home); or, the cost of the Agency's selected comparable mobile home less the Agency's estimate of the salvage or trade-in value for the mobile home from which the person is displaced.

(3) If a comparable replacement mobile home site is not available, the price differential payment shall be computed on the basis of the reasonable cost of a conventional comparable replacement dwelling.

(c) *Rental assistance payment for a 180-day owner-occupant that is displaced from a leased or rented mobile home site.* If the displacement mobile home site is leased or rented, a displaced 180-day owner-occupant is entitled to a rental assistance payment computed as described in § 24.402(b). This rental assistance payment may be used to lease a replacement site; may be applied to the purchase price of a replacement site; or may be applied, with any replacement housing payment attributable to the mobile home, to the purchase of a replacement mobile home or conventional decent, safe and sanitary dwelling.

(d) *Owner-occupant not displaced from the mobile home.* If the Agency determines that a mobile home is personal property and may be relocated to a comparable replacement site, but the owner-occupant elects not to do so, the owner is not entitled to a replacement housing payment for the purchase of a replacement mobile home. However, the owner is eligible for moving costs described at § 24.301 and any replacement housing payment for the purchase or rental of a comparable site as described in this section or § 24.503 as applicable.

§ 24.503 Replacement housing payment for 90-day mobile home occupants.

A displaced tenant or owner-occupant of a mobile home and/or site is eligible for a replacement housing payment, not to exceed $5,250, under § 24.402 if:

(a) The person actually occupied the displacement mobile home on the displacement site for at least 90 days immediately prior to the initiation of negotiations;

(b) The person meets the other basic eligibility requirements at § 24.402(a); and

(c) The Agency acquires the mobile home and/or mobile home site, or the mobile home is not acquired by the Agency but the Agency determines that the occupant is displaced from the mobile home because of one of the circumstances described at § 24.502(a)(3).

Subpart G—Certification

§ 24.601 Purpose.

This subpart permits a State Agency to fulfill its responsibilities under the Uniform Act by certifying that it shall operate in accordance with State laws and regulations which shall accomplish the purpose and effect of the Uniform Act, in lieu of providing the assurances required by § 24.4 of this part.

§ 24.602 Certification application.

An Agency wishing to proceed on the basis of a certification may request an application for certification from the Lead Agency Director, Office of Real Estate Services, HEPR–1, Federal Highway Administration, 400 Seventh St, SW., Washington, DC 20590. The completed application for certification must be approved by the governor of the State, or the governor's designee, and must be coordinated with the Federal funding Agency, in accordance with application procedures.

§ 24.603 Monitoring and corrective action.

(a) The Federal Lead Agency shall, in coordination with other Federal Agencies, monitor from time to time State Agency implementation of programs or projects conducted under the certification process and the State Agency shall make available any information required for this purpose.

(b) The Lead Agency may require periodic information or data from affected Federal or State Agencies.

(c) A Federal Agency may, after consultation with the Lead Agency, and notice to and consultation with the governor, or his or her designee, rescind any previous approval provided under this subpart if the certifying State Agency fails to comply with its certification or with applicable State law and regulations. The Federal Agency shall initiate consultation with the Lead Agency at least 30 days prior to any decision to rescind approval of a certification under this subpart. The Lead Agency will also inform other Federal Agencies, which have accepted a certification under this subpart from

the same State Agency, and will take whatever other action that may be appropriate.

(d) Section 103(b)(2) of the Uniform Act, as amended, requires that the head of the Lead Agency report biennially to the Congress on State Agency implementation of section 103. To enable adequate preparation of the prescribed biennial report, the Lead Agency may require periodic information or data from affected Federal or State Agencies.

Appendix A to Part 24—Additional Information

This appendix provides additional information to explain the intent of certain provisions of this part.

Subpart A—General

Section 24.2 Definitions and Acronyms

Section 24.2(a)(6) Definition of comparable replacement dwelling. The requirement in § 24.2(a)(6)(ii) that a comparable replacement dwelling be ''functionally equivalent'' to the displacement dwelling means that it must perform the same function, and provide the same utility. While it need not possess every feature of the displacement dwelling, the principal features must be present.

For example, if the displacement dwelling contains a pantry and a similar dwelling is not available, a replacement dwelling with ample kitchen cupboards may be acceptable. Insulated and heated space in a garage might prove an adequate substitute for basement workshop space. A dining area may substitute for a separate dining room. Under some circumstances, attic space could substitute for basement space for storage purposes, and vice versa.

Only in unusual circumstances may a comparable replacement dwelling contain fewer rooms or, consequentially, less living space than the displacement dwelling. Such may be the case when a decent, safe, and sanitary replacement dwelling (which by definition is ''adequate to accommodate'' the displaced person) may be found to be ''functionally equivalent'' to a larger but very run-down substandard displacement dwelling. Another example is when a displaced person accepts an offer of government housing assistance and the applicable requirements of such housing assistance program require that the displaced person occupy a dwelling that has fewer rooms or less living space than the displacement dwelling.

Section 24.2(a)(6)(vii). The definition of comparable replacement dwelling requires that a comparable replacement dwelling for a person who is not receiving assistance under any government housing program before displacement must be currently available on the private market without any subsidy under a government housing program.

Section 24.2(a)(6)(ix). A public housing unit may qualify as a comparable replacement dwelling only for a person displaced from a public housing unit. A privately owned dwelling with a housing program subsidy tied to the unit may qualify as a comparable replacement dwelling only for a person displaced from a similarly subsidized unit or public housing.

A housing program subsidy that is paid to a person (not tied to the building), such as a HUD Section 8 Housing Voucher Program, may be reflected in an offer of a comparable replacement dwelling to a person receiving a similar subsidy or occupying a privately owned subsidized unit or public housing unit before displacement.

However, nothing in this part prohibits an Agency from offering, or precludes a person from accepting, assistance under a government housing program, even if the person did not receive similar assistance before displacement. However, the Agency is obligated to inform the person of his or her options under this part. (If a person accepts assistance under a government housing assistance program, the rules of that program governing the size of the dwelling apply, and the rental assistance payment under § 24.402 would be computed on the basis of the person's actual out-of-pocket cost for the replacement housing.)

Section 24.2(a)(8)(ii) Decent, Safe and Sanitary. Many local housing and occupancy codes require the abatement of deteriorating paint, including lead-based paint and lead-based paint dust, in protecting the public health and safety. Where such standards exist, they must be honored. Even where local law does not mandate adherence to such standards, it is strongly recommended that they be considered as a matter of public policy.

Section 24.2(a)(8)(vii) Persons with a disability. Reasonable accommodation of a displaced person with a disability at the replacement dwelling means the Agency is required to address persons with a physical impairment that substantially limits one or more of the major life activities. In these situations, reasonable accommodation should include the following at a minimum: Doors of adequate width; ramps or other assistance devices to traverse stairs and access bathtubs, shower stalls, toilets and sinks; storage cabinets, vanities, sink and mirrors at appropriate heights. Kitchen accommodations will include sinks and storage cabinets built at appropriate heights for access. The Agency shall also consider other items that may be necessary, such as physical modification to a unit, based on the displaced person's needs.

Section 24.2(a)(9)(ii)(D) Persons not displaced. Paragraph (a)(9)(ii)(D) of this section recognizes that there are circumstances where the acquisition, rehabilitation or demolition of real property takes place without the intent or necessity that an occupant of the property be permanently displaced. Because such occupants are not considered ''displaced persons'' under this part, great care must be exercised to ensure that they are treated fairly and equitably. For example, if the tenant-occupant of a dwelling will not be displaced, but is required to relocate temporarily in connection with the project, the temporarily occupied housing must be decent, safe, and sanitary and the tenant must be reimbursed for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation. These expenses may include moving expenses and increased housing costs during the temporary relocation. Temporary relocation should not extend beyond one year before the person is returned to his or her previous unit or location. The Agency must contact any residential tenant who has been temporarily relocated for a period beyond one year and offer all permanent relocation assistance. This assistance would be in addition to any assistance the person has already received for temporary relocation, and may not be reduced by the amount of any temporary relocation assistance.

Similarly, if a business will be shut-down for any length of time due to rehabilitation of a site, it may be temporarily relocated and reimbursed for all reasonable out of pocket expenses or must be determined to be displaced at the Agency's option.

Any person who disagrees with the Agency's determination that he or she is not a displaced person under this part may file an appeal in accordance with 49 CFR part 24.10 of this regulation.

Section 24.2(a)(11) Dwelling Site. This definition ensures that the computation of replacement housing payments are accurate and realistic (a) when the dwelling is located on a larger than normal site, (b) when mixed-use properties are acquired, (c) when more than one dwelling is located on the acquired property, or (d) when the replacement dwelling is retained by an owner and moved to another site.

Section 24.2(a)(14) Household income (exclusions). Household income for purposes of this regulation does not include program benefits that are not considered income by Federal law such as food stamps and the Women Infants and Children (WIC) program. For a more detailed list of income exclusions see Federal Highway Administration, Office of Real Estate Services Web site: *http://www.fhwa.dot.gov/realestate/.* (FR 4644–N–16 page 20319 Updated.) If there is a question on whether or not to include income from a specific program contact the Federal Agency administering the program.

Section 24(a)(15) Initiation of negotiations. This section provides a special definition for acquisition and displacements under Pub. L. 96–510 or Superfund. The order of activities under Superfund may differ slightly in that temporary relocation may precede acquisition. Superfund is a program designed to clean up hazardous waste sites. When such a site is discovered, it may be necessary, in certain limited circumstances, to alert individual owners and tenants to potential health or safety threats and to offer to temporarily relocate them while additional information is gathered. If a decision is later made to permanently relocate such persons, those who had been temporarily relocated under Superfund authority would no longer be on site when a formal, written offer to acquire the property was made, and thus would lose their eligibility for a replacement housing payment. In order to prevent this unfair outcome, we have provided a definition of initiation of negotiation, which is based on the date the Federal Government offers to temporarily relocate an owner or tenant from the subject property.

Section 24.2(a)(15)(iv) Initiation of negotiations (Tenants.) Tenants who occupy property that may be acquired amicably, without recourse to the use of the power of eminent domain, must be fully informed as to their eligibility for relocation assistance. This includes notifying such tenants of their potential eligibility when negotiations are initiated, notifying them if they become fully eligible, and, in the event the purchase of the property will not occur, notifying them that they are no longer eligible for relocation benefits. If a tenant is not readily accessible, as the result of a disaster or emergency, the Agency must make a good faith effort to provide these notifications and document its efforts in writing.

Section 24.2(a)(17) Mobile home. The following examples provide additional guidance on the types of mobile homes and manufactured housing that can be found acceptable as comparable replacement dwellings for persons displaced from mobile homes. A recreational vehicle that is capable of providing living accommodations may be considered a replacement dwelling if the following criteria are met: the recreational vehicle is purchased and occupied as the ''primary'' place of residence; it is located on a purchased or leased site and connected to or have available all necessary utilities for functioning as a housing unit on the date of the displacing Agency's inspection; and, the dwelling, as sited, meets all local, State, and Federal requirements for a decent, safe and sanitary dwelling. (The regulations of some local jurisdictions will not permit the consideration of these vehicles as decent, safe and sanitary dwellings. In those cases, the recreational vehicle will not qualify as a replacement dwelling.)

For HUD programs, mobile home is defined as ''a structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities and includes the plumbing, heating, air-conditioning, and electrical systems contained therein; except that such terms shall include any structure which meets all the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the Secretary of HUD and complies with the standards established under the National Manufactured Housing Construction and Safety Standards Act, provided by Congress in the original 1974 Manufactured Housing Act.'' In 1979 the term ''mobile home'' was changed to ''manufactured home.'' For purposes of this regulation, the terms mobile home and manufactured home are synonymous.

When assembled, manufactured homes built after 1976 contain no less than 320 square feet. They may be single or multi-sectioned units when installed. Their designation as personalty or realty will be determined by State law. When determined to be realty, most are eligible for conventional mortgage financing.

The 1976 HUD standards distinguish manufactured homes from factory-built ''modular homes'' as well as conventional or ''stick-built'' homes. Both of these types of housing are required to meet State and local construction codes.

Section 24.3 No Duplication of Payments. This section prohibits an Agency from making a payment to a person under these regulations that would duplicate another payment the person receives under Federal, State, or local law. The Agency is not required to conduct an exhaustive search for such other payments; it is only required to avoid creating a duplication based on the Agency's knowledge at the time a payment is computed.

Subpart B—Real Property Acquisition

Federal Agencies may find that, for Federal eminent domain purposes, the terms ''fair market value'' (as used throughout this subpart) and ''market value,'' which may be the more typical term in private transactions, may be synonymous.

Section 24.101(a) Direct Federal program or project. All 49 CFR Part 24 Subpart B (real property acquisition) requirements apply to all direct acquisitions for Federal programs and projects by Federal Agencies, except for acquisitions undertaken by the Tennessee Valley Authority or the Rural Utilities Service. There are no exceptions for ''voluntary transactions.''

Section 24.101(b)(1)(i). The term ''general geographic area'' is used to clarify that the ''geographic area'' is not to be construed to be a small, limited area.

Sections 24.101(b)(1)(iv) and (2)(ii). These sections provide that, for programs and projects receiving Federal financial assistance described in §§ 24.101(b)(1) and (2), Agencies are to inform the owner(s) in writing of the Agency's estimate of the market value for the property to be acquired.

While this part does not require an appraisal for these transactions, Agencies may still decide that an appraisal is necessary to support their determination of the market value of these properties, and, in any event, Agencies must have some reasonable basis for their determination of market value. In addition, some of the concepts inherent in Federal Program appraisal practice are appropriate for these estimates. It would be appropriate for Agencies to adhere to project influence restrictions, as well as guard against discredited ''public interest value'' valuation concepts.

After an Agency has established an amount it believes to be the market value of the property and has notified the owner of this amount in writing, an Agency may negotiate freely with the owner in order to reach agreement. Since these transactions are voluntary, accomplished by a willing buyer and a willing seller, negotiations may result in agreement for the amount of the original estimate, an amount exceeding it, or for a lesser amount. Although not required by the regulations, it would be entirely appropriate for Agencies to apply the administrative settlement concept and procedures in § 24.102(i) to negotiate amounts that exceed the original estimate of market value. Agencies shall not take any coercive action in order to reach agreement on the price to be paid for the property.

Section 24.101(c) Less-than-full-fee interest in real property. This provision provides a benchmark beyond which the requirements of the subpart clearly apply to leases.

Section 24.102(c)(2) Appraisal, waiver thereof, and invitation to owner. The purpose of the appraisal waiver provision is to provide Agencies a technique to avoid the costs and time delay associated with appraisal requirements for low-value, non-complex acquisitions. The intent is that non-appraisers make the waiver valuations, freeing appraisers to do more sophisticated work.

The Agency employee making the determination to use the appraisal waiver process must have enough understanding of appraisal principles to be able to determine whether or not the proposed acquisition is low value and uncomplicated.

Waiver valuations are not appraisals as defined by the Uniform Act and these regulations; therefore, appraisal performance requirements or standards, regardless of their source, are not required for waiver valuations by this rule. Since waiver valuations are not appraisals, neither is there a requirement for an appraisal review. However, the Agency must have a reasonable basis for the waiver valuation and an Agency official must still establish an amount believed to be just compensation to offer the property owner(s).

The definition of ''appraisal'' in the Uniform Act and appraisal waiver provisions of the Uniform Act and these regulations are Federal law and public policy and should be considered as such when determining the impact of appraisal requirements levied by others.

Section 24.102(d) Establishment of offer of just compensation. The initial offer to the property owner may not be less than the amount of the Agency's approved appraisal, but may exceed that amount if the Agency determines that a greater amount reflects just compensation for the property.

Section 24.102(f) Basic negotiation procedures. An offer should be adequately presented to an owner, and the owner should be properly informed. Personal, face-to-face contact should take place, if feasible, but this section does not require such contact in all cases.

This section also provides that the property owner be given a reasonable opportunity to consider the Agency's offer and to present relevant material to the Agency. In order to satisfy this requirement, Agencies must allow owners time for analysis, research and development, and compilation of a response, including perhaps getting an appraisal. The needed time can vary significantly, depending on the circumstances, but thirty (30) days would seem to be the minimum time these actions can be reasonably expected to require. Regardless of project time pressures, property owners must be afforded this opportunity.

In some jurisdictions, there is pressure to initiate formal eminent domain procedures at the earliest opportunity because completing the eminent domain process, including gaining possession of the needed real

property, is very time consuming. These provisions are not intended to restrict this practice, so long as it does not interfere with the reasonable time that must be provided for negotiations, described above, and the Agencies adhere to the Uniform Act ban on coercive action (section 301(7) of the Uniform Act).

If the owner expresses intent to provide an appraisal report, Agencies are encouraged to provide the owner and/or his/her appraiser a copy of Agency appraisal requirements and inform them that their appraisal should be based on those requirements.

Section 24.102(i) Administrative settlement. This section provides guidance on administrative settlement as an alternative to judicial resolution of a difference of opinion on the value of a property, in order to avoid unnecessary litigation and congestion in the courts.

All relevant facts and circumstances should be considered by an Agency official delegated this authority. Appraisers, including review appraisers, must not be pressured to adjust their estimate of value for the purpose of justifying such settlements. Such action would invalidate the appraisal process.

Section 24.102(j) Payment before taking possession. It is intended that a right-of-entry for construction purposes be obtained only in the exceptional case, such as an emergency project, when there is no time to make an appraisal and purchase offer and the property owner is agreeable to the process.

Section 24.102(m) Fair rental. Section 301(6) of the Uniform Act limits what an Agency may charge when a former owner or previous occupant of a property is permitted to rent the property for a short term or when occupancy is subject to termination by the Agency on short notice. Such rent may not exceed ''the fair rental value of the property to a short-term occupier.'' Generally, the Agency's right to terminate occupancy on short notice (whether or not the renter also has that right) supports the establishment of a lesser rental than might be found in a longer, fixed-term situation.

Section 24.102(n) Conflict of interest. The overall objective is to minimize the risk of fraud while allowing Agencies to operate as efficiently as possible. There are three parts to this provision.

The first provision is the prohibition against having any interest in the real property being valued by the appraiser (for an appraisal), the valuer (for a waiver estimate) or the review appraiser (for an appraisal review.)

The second provision is that no person functioning as a negotiator for a project or program can supervise or formally evaluate the performance of any appraiser or review appraiser performing appraisal or appraisal review work for that project or program. The intent of this provision is to ensure appraisal/valuation independence and to prevent inappropriate influence. It is not intended to prevent Agencies from providing appraisers/valuers with appropriate project information and participating in determining the scope of work for the appraisal or valuation. For a program or project receiving Federal financial assistance, the Federal funding Agency may waive this requirement if it would create a hardship for the Agency. The intent is to accommodate Federal-aid recipients that have a small staff where this provision would be unworkable.

The third provision is to minimize situations where administrative costs exceed acquisition costs. Section 24.102(n) also provides that the same person may prepare a valuation estimate (including an appraisal) and negotiate that acquisition, if the valuation estimate amount is $10,000 or less. However, it should be noted that this exception for properties valued at $10,000 or less is not mandatory, *e.g.*, Agencies are not required to use those who prepare a waiver valuation or appraisal of $10,000 or less to negotiate the acquisition, and, all appraisals must be reviewed in accordance with § 24.104. This includes appraisals of real property valued at $10,000 or less.

Section 24.103 Criteria for Appraisals. The term ''requirements'' is used throughout this section to avoid confusion with The Appraisal Foundation's Uniform Standards of Professional Appraisal Practice (USPAP) ''standards.'' Although this section discusses appraisal requirements, the definition of ''appraisal'' itself at § 24.2(a)(3) includes appraisal performance requirements that are an inherent part of this section.

The term ''Federal and federally-assisted program or project'' is used to better identify the type of appraisal practices that are to be referenced and to differentiate them from the private sector, especially mortgage lending, appraisal practice.

Section 24.103(a) Appraisal requirements. The first sentence instructs readers that requirements for appraisals for Federal and federally-assisted programs or projects are located in 49 CFR part 24. These are the basic appraisal requirements for Federal and federally-assisted programs or projects. However, Agencies may enhance and expand on them, and there may be specific project or program legislation that references other appraisal requirements.

These appraisal requirements are necessarily designed to comply with the Uniform Act and other Federal eminent domain based appraisal requirements. They are also considered to be consistent with Standards Rules 1, 2, and 3 of the 2004 edition of the USPAP. Consistency with USPAP has been a feature of these appraisal requirements since the beginning of USPAP. This ''consistent'' relationship was more formally recognized in OMB Bulletin 92–06. While these requirements are considered consistent with USPAP, neither can supplant the other; their provisions are neither identical, nor interchangeable. Appraisals performed for Federal and federally-assisted real property acquisition must follow the requirements in this regulation. Compliance with any other appraisal requirements is not the purview of this regulation. An appraiser who is committed to working within the bounds of USPAP should recognize that compliance with both USPAP and these requirements may be achieved by using the Supplemental Standards Rule and the Jurisdictional Exception Rule of USPAP, where applicable.

The term ''scope of work'' defines the general parameters of the appraisal. It reflects the needs of the Agency and the requirements of Federal and federally-assisted program appraisal practice. It should be developed cooperatively by the assigned appraiser and an Agency official who is competent to both represent the Agency's needs and respect valid appraisal practice. The scope of work statement should include the purpose and/or function of the appraisal, a definition of the estate being appraised, and if it is market value, its applicable definition, and the assumptions and limiting conditions affecting the appraisal. It may include parameters for the data search and identification of the technology, including approaches to value, to be used to analyze the data. The scope of work should consider the specific requirements in 49 CFR 24.103(a)(1) through (5) and address them as appropriate.

Section 24.103(a)(1). The appraisal report should identify the items considered in the appraisal to be real property, as well as those identified as personal property.

Section 24.103(a)(2). All relevant and reliable approaches to value are to be used. However, where an Agency determines that the sales comparison approach will be adequate by itself and yield credible appraisal results because of the type of property being appraised and the availability of sales data, it may limit the appraisal assignment to the sales comparison approach. This should be reflected in the scope of work.

Section 24.103(b) Influence of the project on just compensation. As used in this section, the term ''project'' means an undertaking which is planned, designed, and intended to operate as a unit.

When the public is aware of the proposed project, project area property values may be affected. Therefore, property owners should not be penalized because of a decrease in value caused by the proposed project nor reap a windfall at public expense because of increased value created by the proposed project.

Section 24.103(d)(1). The appraiser and review appraiser must each be qualified and competent to perform the appraisal and appraisal review assignments, respectively. Among other qualifications, State licensing or certification and professional society designations can help provide an indication of an appraiser's abilities.

Section 24.104 Review of appraisals. The term ''review appraiser'' is used rather than ''reviewing appraiser,'' to emphasize that ''review appraiser'' is a separate specialty and not just an appraiser who happens to be reviewing an appraisal. Federal Agencies have long held the perspective that appraisal review is a unique skill that, while it certainly builds on appraisal skills, requires more. The review appraiser should possess both appraisal technical abilities and the ability to be the two-way bridge between the Agency's real property valuation needs and the appraiser.

Agency review appraisers typically perform a role greater than technical appraisal review. They are often involved in early project development. Later they may be involved in devising the scope of work statements and participate in making

appraisal assignments to fee and/or staff appraisers. They are also mentors and technical advisors, especially on Agency policy and requirements, to appraisers, both staff and fee. Additionally, review appraisers are frequently technical advisors to other Agency officials.

Section 24.104(a). This paragraph states that the review appraiser is to review the appraiser's presentation and analysis of market information and that it is to be reviewed against § 24.103 and other applicable requirements, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisition. The appraisal review is to be a technical review by an appropriately qualified review appraiser. The qualifications of the review appraiser and the level of explanation of the basis for the review appraiser's recommended (or approved) value depend on the complexity of the appraisal problem. If the initial appraisal submitted for review is not acceptable, the review appraiser is to communicate and work with the appraiser to the greatest extent possible to facilitate the appraiser's development of an acceptable appraisal.

In doing this, the review appraiser is to remain in an advisory role, not directing the appraisal, and retaining objectivity and options for the appraisal review itself.

If the Agency intends that the staff review appraiser approve the appraisal (as the basis for the establishment of the amount believed to be just compensation), or establish the amount the Agency believes is just compensation, she/he must be specifically authorized by the Agency to do so. If the review appraiser is not specifically authorized to approve the appraisal (as the basis for the establishment of the amount believed to be just compensation), or establish the amount believed to be just compensation, that authority remains with another Agency official.

Section 24.104(b). In developing an independent approved or recommended value, the review appraiser may reference any acceptable resource, including acceptable parts of any appraisal, including an otherwise unacceptable appraisal. When a review appraiser develops an independent value, while retaining the appraisal review, that independent value also becomes the approved appraisal of the fair market value for Uniform Act Section 301(3) purposes. It is within Agency discretion to decide whether a second review is needed if the first review appraiser establishes a value different from that in the appraisal report or reports on the property.

Section 24.104(c). Before acceptance of an appraisal, the review appraiser must determine that the appraiser's documentation, including valuation data and analysis of that data, demonstrates the soundness of the appraiser's opinion of value. For the purposes of this part, an acceptable appraisal is any appraisal that, on its own, meets the requirements of § 24.103. An approved appraisal is the one acceptable appraisal that is determined to best fulfill the requirement to be the basis for the amount believed to be just compensation. Recognizing that appraisal is not an exact science, there may be more than one acceptable appraisal of a property, but for the purposes of this part, there can be only one approved appraisal.

At the Agency's discretion, for a low value property requiring only a simple appraisal process, the review appraiser's recommendation (or approval), endorsing the appraiser's report, may be determined to satisfy the requirement for the review appraiser's signed report and certification.

Section 24.106(b). Expenses incidental to transfer of title to the agency. Generally, the Agency is able to pay such incidental costs directly and, where feasible, is required to do so. In order to prevent the property owner from making unnecessary out-of-pocket expenditures and to avoid duplication of expenses, the property owner should be informed early in the acquisition process of the Agency's intent to make such arrangements. Such expenses must be reasonable and necessary.

Subpart C—General Relocation Requirements

Section 24.202 Applicability and Section 205(c) Services to be provided. In extraordinary circumstances, when a displaced person is not readily accessible, the Agency must make a good faith effort to comply with these sections and document its efforts in writing.

Section 24.204 Availability of comparable replacement dwelling before displacement.

Section 24.204(a) General. This provision requires that no one may be required to move from a dwelling without a comparable replacement dwelling having been made available. In addition, § 24.204(a) requires that, ''where possible, three or more comparable replacement dwellings shall be made available.'' Thus, the basic standard for the number of referrals required under this section is three. Only in situations where three comparable replacement dwellings are not available (*e.g.*, when the local housing market does not contain three comparable dwellings) may the Agency make fewer than three referrals.

Section 24.205 Relocation assistance advisory services. Section 24.205(c)(2)(ii)(D) emphasizes that if the comparable replacement dwellings are located in areas of minority concentration, minority persons should, if possible, also be given opportunities to relocate to replacement dwellings not located in such areas.

Section 24.206 Eviction for cause. An eviction related to non-compliance with a requirement related to carrying out a project (*e.g.*, failure to move or relocate when instructed, or to cooperate in the relocation process) shall not negate a person's entitlement to relocation payments and other assistance set forth in this part.

Section 24.207 General Requirements–Claims for relocation payments. Section 24.207(a) allows an Agency to make a payment for low cost or uncomplicated nonresidential moves without additional documentation, as long as the payment is limited to the amount of the lowest acceptable bid or estimate, as provided for in § 24.301(d)(1).

While § 24.207(f) prohibits an Agency from proposing or requesting that a displaced person waive his or her rights or entitlements to relocation assistance and payments, an Agency may accept a written statement from the displaced person that states that they have chosen not to accept some or all of the payments or assistance to which they are entitled. Any such written statement must clearly show that the individual knows what they are entitled to receive (a copy of the Notice of Eligibility which was provided may serve as documentation) and their statement must specifically identify which assistance or payments they have chosen not to accept. The statement must be signed and dated and may not be coerced by the Agency.

Subpart D—Payment for Moving and Related Expenses

Section 24.301. Payment for Actual Reasonable Moving and Related Expenses.

Section 24.301(e) Personal property only. Examples of personal property only moves might be: personal property that is located on a portion of property that is being acquired, but the business or residence will not be taken and can still operate after the acquisition; personal property that is located in a mini-storage facility that will be acquired or relocated; personal property that is stored on vacant land that is to be acquired.

For a nonresidential personal property only move, the owner of the personal property has the options of moving the personal property by using a commercial mover or a self-move.

If a question arises concerning the reasonableness of an actual cost move, the acquiring Agency may obtain estimates from qualified movers to use as the standard in determining the payment.

Section 24.301 (g)(14)(i) and (ii). If the piece of equipment is operational at the acquired site, the estimated cost to reconnect the equipment shall be based on the cost to install the equipment as it currently exists, and shall not include the cost of code-required betterments or upgrades that may apply at the replacement site. As prescribed in the regulation, the allowable in-place value estimate (§ 24.301(g)(14)(i)) and moving cost estimate (§ 24.301(g)(14)(ii)) must reflect only the ''as is'' condition and installation of the item at the displacement site. The in-place value estimate may not include costs that reflect code or other requirements that were not in effect at the displacement site; or include installation costs for machinery or equipment that is not operable or not installed at the displacement site.

Section 24.301(g)(17) Searching expenses. In special cases where the displacing Agency determines it to be reasonable and necessary, certain additional categories of searching costs may be considered for reimbursement. These include those costs involved in investigating potential replacement sites and the time of the business owner, based on salary or earnings, required to apply for licenses or permits, zoning changes, and attendance at zoning hearings. Necessary attorney fees required to obtain such licenses or permits are also reimbursable. Time spent in negotiating the purchase of a replacement business site is also reimbursable based on a reasonable salary or earnings rate. In those instances when such additional costs to

investigate and acquire the site exceed $2,500, the displacing Agency may consider waiver of the cost limitation under the § 24.7, waiver provision. Such a waiver should be subject to the approval of the Federal-funding Agency in accordance with existing delegation authority.

Section 24.303(b) Professional Services. If a question should arise as to what is a ''reasonable hourly rate,'' the Agency should compare the rates of other similar professional providers in that area.

Section 24.305 Fixed Payment for Moving Expenses—Nonresidential Moves.

Section 24.305(d) Nonprofit organization. Gross revenues may include membership fees, class fees, cash donations, tithes, receipts from sales or other forms of fund collection that enables the nonprofit organization to operate. Administrative expenses are those for administrative support such as rent, utilities, salaries, advertising, and other like items as well as fundraising expenses. Operating expenses for carrying out the purposes of the nonprofit organization are not included in administrative expenses. The monetary receipts and expense amounts may be verified with certified financial statements or financial documents required by public Agencies.

Section 24.305(e) Average annual net earnings of a business or farm operation. If the average annual net earnings of the displaced business, farm, or nonprofit organization are determined to be less than $1,000, even $0 or a negative amount, the minimum payment of $1,000 shall be provided.

Section 24.306 Discretionary Utility Relocation Payments. Section 24.306(c) describes the issues that the Agency and the utility facility owner must agree to in determining the amount of the relocation payment. To facilitate and aid in reaching such agreement, the practices in the Federal Highway Administration regulation, 23 CFR part 645, subpart A, Utility Relocations, Adjustments and Reimbursement, should be followed.

Subpart E—Replacement Housing Payments

Section 24.401 Replacement Housing Payment for 180-day Homeowner-Occupants.

Section 24.401(a)(2). An extension of eligibility may be granted if some event beyond the control of the displaced person such as acute or life threatening illness, bad weather preventing the completion of construction, or physical modifications required for reasonable accommodation of a replacement dwelling, or other like circumstances causes a delay in occupying a decent, safe, and sanitary replacement dwelling.

Section 24.401(c)(2)(iii) Price differential. The provision in § 24.401(c)(2)(iii) to use the current market value for residential use does not mean the Agency must have the property appraised. Any reasonable method for arriving at the market value may be used.

Section 24.401(d) Increased mortgage interest costs. The provision in § 24.401(d) sets forth the factors to be used in computing the payment that will be required to reduce a person's replacement mortgage (added to the downpayment) to an amount which can be amortized at the same monthly payment for principal and interest over the same period of time as the remaining term on the displacement mortgages. This payment is commonly known as the ''buydown.''

The Agency must know the remaining principal balance, the interest rate, and monthly principal and interest payments for the old mortgage as well as the interest rate, points and term for the new mortgage to compute the increased mortgage interest costs. If the combination of interest and points for the new mortgage exceeds the current prevailing fixed interest rate and points for conventional mortgages and there is no justification for the excessive rate, then the current prevailing fixed interest rate and points shall be used in the computations. Justification may be the unavailability of the current prevailing rate due to the amount of the new mortgage, credit difficulties, or other similar reasons.

SAMPLE COMPUTATION

Old Mortgage:	
Remaining Principal Balance	$50,000
Monthly Payment (principal and interest)	$458.22
Interest rate (percent)	7
New Mortgage:	
Interest rate (percent)	10
Points	3
Term (years)	15

Remaining term of the old mortgage is determined to be 174 months. Determining, or computing, the actual remaining term is more reliable than using the data supplied by the mortgagee. However, if it is shorter, use the term of the new mortgage and compute the needed monthly payment.

Amount to be financed to maintain monthly payments of $458.22 at 10% = $42,010.18.

Calculation:	
Remaining Principal Balance	$50,000.00
Minus Monthly Payment (principal and interest)	−42,010.18
Increased mortgage interest costs	7,989.82
3 points on $42,010.18	1,260.31
Total buydown necessary to maintain payments at $458.22/month	9,250.13

If the new mortgage actually obtained is less than the computed amount for a new mortgage ($42,010.18), the buydown shall be prorated accordingly. If the actual mortgage obtained in our example were $35,000, the buydown payment would be $7,706.57 ($35,000 divided by $42,010.18 = .8331; $9,250.13 multiplied by .83 = $7,706.57).

The Agency is obligated to inform the displaced person of the approximate amount of this payment and that the displaced person must obtain a mortgage of at least the same amount as the old mortgage and for at least the same term in order to receive the full amount of this payment. The Agency must advise the displaced person of the interest rate and points used to calculate the payment.

Section 24.402 Replacement Housing Payment for 90-day Occupants

Section 24.402(b)(2) Low income calculation example. The Uniform Act requires that an eligible displaced person who rents a replacement dwelling is entitled to a rental assistance payment calculated in accordance with § 24.402(b). One factor in this calculation is to determine if a displaced person is ''low income,'' as defined by the U.S. Department of Housing and Urban Development's annual survey of income limits for the Public Housing and Section 8 Programs. To make such a determination, the Agency must: (1) Determine the total number of members in the household (including all adults and children); (2) locate the appropriate table for income limits applicable to the Uniform Act for the state in which the displaced residence is located (found at: *http://www.fhwa.dot.gov/realestate/ua/ualic.htm*); (3) from the list of local jurisdictions shown, identify the appropriate county, Metropolitan Statistical Area (MSA)*, or Primary Metropolitan Statistical Area (PMSA)* in which the displacement property is located; and (4) locate the appropriate income limit in that jurisdiction for the size of this displaced person/family. The income limit must then be compared to the household income (§ 24.2(a)(15)) which is the gross annual income received by the displaced family, excluding income from any dependent children and full-time students under the age of 18. If the household income for the eligible displaced person/family is less than or equal to the income limit, the family is considered ''low income.'' For example:

Tom and Mary Smith and their three children are being displaced. The information obtained from the family and verified by the Agency is as follows:

Tom Smith, employed, earns $21,000/yr.

Mary Smith, receives disability payments of $6,000/yr.

Tom Smith Jr., 21, employed, earns $10,000/yr.

Mary Jane Smith, 17, student, has a paper route, earns $3,000/yr. (Income is not included because she is a dependent child and a full-time student under 18)

Sammie Smith, 10, full-time student, no income.

Total family income for 5 persons is: $21,000 + $6,000 + $10,000 = $37,000

The displacement residence is located in the State of Maryland, Caroline County. The low income limit for a 5 person household is: $47,450. (2004 Income Limits)

This household is considered ''low income.''

* A complete list of counties and towns included in the identified MSAs and PMSAs can be found under the bulleted item ''Income Limit Area Definition'' posted on the FHWA's Web site at: *http://www.fhwa.dot.gov/realestate/ua/ualic.htm.*

Section 24.402(c) Downpayment assistance. The downpayment assistance provisions in § 24.402(c) limit such assistance to the amount of the computed rental assistance payment for a tenant or an eligible homeowner. It does, however, provide the latitude for Agency discretion in offering downpayment assistance that exceeds the computed rental assistance payment, up to the $5,250 statutory maximum. This does not mean, however, that such Agency discretion may be exercised in a selective or discriminatory fashion. The displacing Agency should develop a policy that affords equal treatment for displaced persons in like circumstances and this policy should be applied uniformly throughout the Agency's programs or projects.

For the purpose of this section, should the amount of the rental assistance payment exceed the purchase price of the replacement dwelling, the payment would be limited to the cost of the dwelling.

Section 24.404 Replacement Housing of Last Resort.

Section 24.404(b) Basic rights of persons to be displaced. This paragraph affirms the right of a 180-day homeowner-occupant, who is eligible for a replacement housing payment under § 24.401, to a reasonable opportunity to purchase a comparable replacement dwelling. However, it should be read in conjunction with the definition of ''owner of a dwelling'' at § 24.2(a)(20). The Agency is not required to provide persons owning only a fractional interest in the displacement dwelling a greater level of assistance to purchase a replacement dwelling than the Agency would be required to provide such persons if they owned fee simple title to the displacement dwelling. If such assistance is not sufficient to buy a replacement dwelling, the Agency may provide additional purchase assistance or rental assistance.

Section 24.404(c) Methods of providing comparable replacement housing. This Section emphasizes the use of cost effective means of providing comparable replacement housing. The term ''reasonable cost'' is used to highlight the fact that while innovative means to provide housing are encouraged, they should be cost-effective. Section 24.404(c)(2) permits the use of last resort housing, in special cases, which may involve variations from the usual methods of obtaining comparability. However, such variation should never result in a lowering of housing standards nor should it ever result in a lower quality of living style for the displaced person. The physical characteristics of the comparable replacement dwelling may be dissimilar to those of the displacement dwelling but they may never be inferior.

One example might be the use of a new mobile home to replace a very substandard conventional dwelling in an area where comparable conventional dwellings are not available.

Another example could be the use of a superior, but smaller, decent, safe and sanitary dwelling to replace a large, old substandard dwelling, only a portion of which is being used as living quarters by the occupants and no other large comparable dwellings are available in the area.

Appendix B to Part 24—Statistical Report Form

This Appendix sets forth the statistical information collected from Agencies in accordance with § 24.9(c).

General

1. *Report coverage.* This report covers all relocation and real property acquisition activities under a Federal or a federally-assisted project or program subject to the provisions of the Uniform Act. If the exact numbers are not easily available, an Agency may provide what it believes to be a reasonable estimate.

2. *Report period.* Activities shall be reported on a Federal fiscal year basis, *i.e.*, October 1 through September 30.

3. *Where and when to submit report.* Submit a copy of this report to the lead Agency as soon as possible after September 30, but NOT LATER THAN NOVEMBER 15. Lead Agency address: Federal Highway Administration, Office of Real Estate Services (HEPR), Room 3221, 400 7th Street SW., Washington, DC 20590.

4. *How to report relocation payments.* The full amount of a relocation payment shall be reported as if disbursed in the year during which the claim was approved, regardless of whether the payment is to be paid in installments.

5. *How to report dollar amounts.* Round off all money entries in Parts of this section A, B and C to the nearest dollar.

6. *Regulatory references.* The references in Parts A, B, C and D of this section indicate the subpart of the regulations pertaining to the requested information.

Part A. Real property acquisition under The Uniform Act

Line 1. Report all parcels acquired during the report year where title or possession was vested in the Agency during the reporting period. The parcel count reported should relate to ownerships and not to the number of parcels of different property interests (such as fee, perpetual easement, temporary easement, etc.) that may have been part of an acquisition from one owner. For example, an acquisition from a property that includes a fee simple parcel, a perpetual easement parcel, and a temporary easement parcel should be reported as 1 parcel not 3 parcels. (Include parcels acquired without Federal financial assistance, if there was or will be Federal financial assistance in other phases of the project or program.)

Line 2. Report the number of parcels reported on Line 1 that were acquired by condemnation. Include those parcels where compensation for the property was paid, deposited in court, or otherwise made available to a property owner pursuant to applicable law in order to vest title or possession in the Agency through condemnation authority.

Line 3. Report the number of parcels in Line 1 acquired through administrative settlement where the purchase price for the property exceeded the amount offered as just compensation and efforts to negotiate an agreement at that amount have failed.

Line 4. Report the total of the amounts paid, deposited in court, or otherwise made available to a property owner pursuant to applicable law in order to vest title or possession in the Agency in Line 1.

Part B. Residential Relocation Under the Uniform Act

Line 5. Report the number of households who were permanently displaced during the fiscal year by project or program activities and moved to their replacement dwelling. The term ''households'' includes all families and individuals. A family shall be reported as ''one'' household, *not* by the number of people in the family unit.

Line 6. Report the total amount paid for residential moving expenses (actual expense and fixed payment).

Line 7. Report the total amount paid for residential replacement housing payments including payments for replacement housing of last resort provided pursuant to § 24.404 of this part.

Line 8. Report the number of households in Line 5 who were permanently displaced during the fiscal year by project or program activities and moved to their replacement dwelling as part of last resort housing assistance.

Line 9. Report the number of tenant households in Line 5 who were permanently displaced during the fiscal year by project or program activities, and who purchased and moved to their replacement dwelling using a downpayment assistance payment under this part.

Line 10. Report the total sum costs of residential relocation expenses and payments (excluding Agency administrative expenses) in Lines 6 and 7.

Part C. Nonresidential Relocation Under the Uniform Act

Line 11. Report the number of businesses, nonprofit organizations, and farms who were permanently displaced during the fiscal year by project or program activities and moved to their replacement location. This includes businesses, nonprofit organizations, and farms, that upon displacement, discontinued operations.

Line 12. Report the total amount paid for nonresidential moving expenses (actual expense and fixed payment.)

Line 13. Report the total amount paid for nonresidential reestablishment expenses.

Line 14. Report the total sum costs of nonresidential relocation expenses and payments (excluding Agency administrative expenses) in Lines 12 and 13.

Part D. Relocation Appeals

Line 15. Report the total number of relocation appeals filed during the fiscal year by aggrieved persons (residential and nonresidential).

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FEDERAL FISCAL YEAR ENDING SEPT. 30, 20____
REPORTING AGENCY: _____
STATE: _____
CITY/COUNTY (For Local Government Agencies): _____
FEDERAL FUNDING AGENCY: _____

PART A. REAL PROPERTY ACQUISITION UNDER THE UNIFORM ACT	
1) Total Number of Parcels Acquired (Ownerships)	
2) Number of Parcels in Line 1 Acquired by Condemnation	
3) Number of Parcels in Line 1 Acquired by Administrative Settlement (Above initial offer –see 24.102(i))	
4) Compensation – Total Costs (Including 24.106; Excluding appraisal costs, negotiator fees and other administrative expenses)	
PART B. RESIDENTIAL RELOCATION UNDER THE UNIFORM ACT	
5) Total Number of Residential Displacements (Households)	
6) Residential Moving Payments – Total Costs	
7) Replacement Housing Payments – Total Costs	
8) Number of Last Resort Housing Displacements in Line 5 (Households)	
9) Number of Tenants converted to Homeowners in Line 5 (Households using 24.402(c))	
10) Total Costs for Residential Relocation Expenses and Payments (Sum of lines 6 and 7; excluding Agency Administrative Costs)	
PART C. NONRESIDENTIAL RELOCATION UNDER THE UNIFORM ACT	
11) Total Number of NonResidential Displacements	
12) NonResidential Moving Payments – Total Costs (Including 24.305)	
13) NonResidential Reestablishment Payments – Total Costs	
14) Total Costs for Nonresidential Relocation Expenses and Payments (Sum of lines 12 and 13; excluding Agency Administrative Costs)	
PART D. RELOCATION APPEALS UNDER THE UNIFORM ACT	
15) Total Number of Relocation Appeals (Residential & NonResidential)	

[FR Doc. 05–6 Filed 1–3–05; 8:45 am]
BILLING CODE 4910–22–C

Federal Register

Tuesday,
January 4, 2005

Part VI

Environmental Protection Agency

40 CFR Part 80

Control of Emissions of Hazardous Air Pollutants From Mobile Sources: Default Baseline Revision; Proposed Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[OAR–2002–0042; FRL–7856–9]

RIN 2060–AJ97

Control of Emissions of Hazardous Air Pollutants From Mobile Sources: Default Baseline Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes revised default baseline values for reformulated gasoline and conventional gasoline under EPA's mobile source air toxics (MSAT) program. EPA's final rule, Control of Emissions of Hazardous Air Pollutants From Mobile Sources (66 FR 17230, March 29, 2001), requires that the annual average toxic performance of gasoline must be at least as clean as the average performance of the gasoline produced or imported during the period 1998–2000 (known as the ''baseline period''). The baseline performance is determined separately for each refinery and importer, and the rule established default toxics baseline values for refineries that could not develop individual toxics baselines. The default toxics baseline values are based on the national average performance of gasoline during the baseline period. However, at the time of the final rule, gasoline toxics performance data were not yet available for the year 2000. Therefore, the final rule included regulations directing the EPA to revise the default toxics baseline values in the rule to reflect the entire 1998–2000 baseline period once the appropriate data became available. With this action, EPA is proposing to revise the default toxics baseline values for refineries and importers to reflect the national average toxics performance of gasoline during 1998–2000.

DATES: *Comments:* Send written comments on this proposed rule by February 3, 2005.

Hearings: If anyone contacts the EPA requesting to speak at a public hearing by January 24, 2005, a public hearing will be held on February 3, 2005. If a public hearing is requested, it will be held at 10 a.m. at the EPA Office Building, 2000 Traverwood, Ann Arbor, MI 48105, or at an alternate site nearby. To request to speak at a public hearing, send a request to the contact in **FOR FURTHER INFORMATION CONTACT.**

See Section III for more information.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2002–0042, by one of the following methods:

1. Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
2. Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
3. E-mail: *brunner.christine@epa.gov.*
4. Fax: (734) 214–4816.
5. Mail: U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Ave., NW., Room B108, Mail Code 6102T, Washington, DC 20460, Attention Docket ID No. OAR–2002–0042. Please include a total of 2 copies.
6. Hand Delivery: EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. OAR–2002–0042. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Docket Center, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility and the Public Reading Room are open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Christine Brunner, OTAQ, ASD Environmental Protection Agency, 2000 Traverwood, Ann Arbor, MI 48105, telephone number: (734) 214–4287; fax number: (734) 214–4816; e-mail address: *brunner.christine@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Entities potentially affected by this proposed action include those involved with the production, distribution and sale of gasoline motor fuel. Regulated categories and entities include:

Category	NAICS [1] codes	SIC [2] codes	Examples of potentially regulated entities
Industry	324110	2911	Petroleum Refiners.
Industry	422710	5171	Gasoline or Diesel Marketers and Distributors.
	422720	5172	
Industry	484220	4212	Gasoline or Diesel Carriers.
	484230	4213	

[1] North American Industry Classification System (NAICS)
[2] Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this proposed action. Other types of entities not listed in the table could also be affected. To decide whether your organization might be affected by this proposed action, you should carefully examine today's notice and the existing regulations in 40 CFR part 80. If you have any questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

i. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. Docket Copying Costs. A reasonable fee may be charged by EPA for copying docket materials, as provided in 40 CFR part 2.

Outline of This Preamble

I. Background
II. Proposed Action
A. Summary
B. Methodology
C. Effective Date
D. Correction
E. Environmental and Economic Impact
III. Public Participation
IV. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
V. Statutory Provisions and Legal Authority

I. Background

The regulations promulgated in the final rule, Control of Emissions of Hazardous Air Pollutants From Mobile Sources,[1] also known as the Mobile Source Air Toxics (MSAT) rule, require that the annual average toxics performance of gasoline produced or imported beginning in 2002 must be at least as clean as the average performance of the gasoline produced or imported during the three-year period 1998–2000 (40 CFR part 80, subpart J). The period 1998–2000 is called the baseline period. The average 1998–2000 toxics performance level, or baseline, is determined separately for each refinery and importer, except for those who comply with the anti-dumping requirements for conventional gasoline [2] on an aggregate basis, in which case the MSAT requirements for conventional gasoline must be met on the same aggregate basis. Toxics performance is determined separately for reformulated gasoline (RFG) and conventional gasoline (CG), in the same manner as the toxics determinations required by the reformulated gasoline [3] and conventional gasoline rules. An MSAT baseline volume is associated with each unique individual MSAT baseline value of a refinery or importer. The MSAT baseline volume reflects the average annual volume of such gasoline produced or imported during the baseline period.

To establish a unique individual MSAT baseline, EPA requires each refiner and importer to submit documentation supporting the determination of the baseline. Most refiners and many importers in business during the baseline period had sufficient data to establish an individual baseline for their refineries. However, a few refiners and importers did not have sufficient refinery production or imports during that period, and thus, based on the criteria specified in §§ 80.855(a) and 80.915(a), cannot establish a unique individual MSAT baseline. Refiners and importers without a unique individual MSAT baseline have the default baseline provided in § 80.855(b)(1) as their individual MSAT baseline. As discussed in the rule, the default baseline is based on the average toxics performance of gasoline produced and imported for use in the United States during the baseline period. At the time

[1] 66 FR 17230, March 29, 2001.

[2] 40 CFR part 80, subpart E.

[3] 40 CFR part 80, subpart D.

of the rulemaking, year 2000 batch data from refiners and importers were not available, so EPA included in the regulations an estimate of the default baseline, as well as a requirement at § 80.855(b)(2) that EPA update this estimate to reflect the gasoline produced during the entire baseline period, including the year 2000. This proposed rule would complete that requirement.

II. Proposed Action

A. Summary

EPA is proposing to update the MSAT default compliance baseline values, or ''default baseline values,'' in § 80.855(b)(1). For RFG, the proposed revised value is 26.78 percent reduction. For CG, the proposed revised value is 97.38 mg/mile. These revised values include the appropriate compliance margins. These values reflect the average nationwide [4] toxics performance of gasoline produced and imported during the period 1998–2000. The revised default toxics values were calculated using 1998, 1999, and 2000 toxics performance data that refiners and importers submitted to EPA under the RFG and anti-dumping programs. This toxics performance data was submitted for each batch of gasoline produced or imported. Batch toxics performance data most closely represents actual gasoline produced during the baseline period because the toxics performance is calculated from the batch's own set of fuel parameter values. We are also proposing that the revised values would be effective beginning with the 2005 annual compliance period. We believe that this start date provides affected parties sufficient lead time to prepare for the changes proposed today, yet does not further delay any environmental benefits associated with the baseline value revisions.

B. Methodology

EPA considered two approaches for determining the revised MSAT default baseline values. Both used data submitted to EPA by refiners and importers under the RFG and anti-dumping programs. The first approach is the ''Fuel Parameter'' method. The volume-weighted average is calculated for fuel parameters values, each season, and the fuel parameter average is then used to determine the average toxics emissions. This is done separately for RFG and CG, for each baseline year for each refiner or importer. The Phase 2 version of the Complex Model [5] is used to calculate emissions. We then calculated the overall annual average toxics performance values for RFG and CG by volume-weighting the seasonal refiner and importer toxics performance values.

The second approach is the ''Batch Performance'' method. The toxics performance of each batch of CG and RFG is calculated based on each batch's fuel parameters. The batch by batch results are used to calculate the overall volume weighted average toxics performance for CG and RFG for the baseline period. The Batch Performance method is similar to the methodology used to develop the current default baseline values.

The national average 1998–2000 toxics performance determined by the two methods differs, as shown in Table 1. The RFG value determined by the Fuel Parameter method is slightly more stringent than that determined by the Batch Performance method. The RFG value by both methods is more stringent than the value currently in effect, as would be expected by the inclusion of year 2000 data. For the CG analysis, the results were mixed: compared to the value contained in the final rule, the Fuel Parameter method resulted in a more stringent value, and the Batch Performance method in a less stringent value. There are at least two reasons for this variation in the CG results. First, the CG default baseline contained in the final rule was based on batch information available just prior to the final rule (the best available data at the time). However, during the process of approving individual baselines, many errors in the submitted CG data were discovered. The resulting data set upon which the analyses for this proposal were based is a much different data set than that upon which the value contained in the final rule was determined, even apart from the inclusion of year 2000 data. Evaluation of oxygen use under the two methods (Fuel Parameter and Batch) is the second likely cause of discrepancy between this analysis and the final rule analysis. Averaging oxygen use, and accounting for different oxygenates, across all batches is probably less certain than accounting for oxygen use on a per batch basis.

TABLE 1.—MSAT DEFAULT BASELINE VALUES

		Final rule (66 FR 17230, 3/29/01)	Revised*	
			Fuel parameter basis	Batch performance basis
RFG (% reduction)	1998–2000 Average	26.01	28.80	27.48
	Default baseline value**	26.71 [6] (correct value = 25.31)	28.10	26.78
CG (mg/mile)	1998–2000 Average	92.14	90.89	94.88
	Default Baseline Value**	94.64	93.39	97.38

* ''Revised'' refers to new values determined from data from the period 1998–2000
** Includes compliance margin of 0.7 % reduction for RFG, and 2.5 mg/mile for CG, per 80.915(h)

The Batch Performance approach for calculating the average toxics performance during 1998–2000 is a more appropriate methodology than the Fuel Parameter approach. The Batch Performance method better reflects and accounts for the actual gasoline (based on composition) that was in the market

[4] Excluding gasoline used in California and in other specified situations. See 40 CFR 80.820.

[5] 40 CFR 80.45.

[6] The 2001 final rule, at 80.915(h), listed the compliance margin for reformulated gasoline as −0.75. However, when EPA calculated the default baseline for RFG, it incorrectl7y added a value of 0.7 to the estimated average 1998–1999 gasoline toxics performance of 26.01% reduction (instead of subtracting 0.7). See MSAT Technical Support Document at p.157. Therefore, EPA incorrectly listed the default baseline value for RFG in the March 29, 2001 final rule as a 26.71% reduction (25.01 + 0.7), The correct estimated value for inclusion in the final MSAT rule should have been a 25.31% reduction (26.01 − 0.7). As discussed below, today's action corrects this mistake for the 2002–2004 compliance year. The average reformulated gasoline toxics performance calculated using data from the baseline period 1998 through 200 is a 27.48% reduction. Applying the compliance margin to this value results in a reformulated gasoline default compliance baseline value of 26.78% reduction (27.48 − 0.7).

during 1998–2000. Also, the Batch Performance method most closely resembles how refiners and importers determine compliance—on a batch by batch basis—by analyzing each batch and then determining the average toxics performance of the batches. This batch by batch calculation also avoids introduction of inaccuracy into the averaging process from the non-linear nature of the emissions model. Thus EPA is proposing that the revised MSAT default baseline values be based on the Batch Performance method.

C. Effective Date

EPA is proposing that the revised MSAT default baseline values proposed today be effective beginning with the 2005 annual compliance period. The CG revised default baseline value requires no consideration of lead time or feasibility as it is less stringent than the current value. The proposed revised RFG default baseline value is slightly more stringent than the current value, and does require lead time and feasibility considerations. While it was evident from our initial rulemaking that there would be an adjustment to the default baseline values, EPA believes it is reasonable to provide an appropriate amount of lead time for affected parties to consider and plan for compliance with the new standards. This primarily affects those parties subject to the default RFG baseline who are planning to produce or import RFG during 2005. EPA does not expect that those parties subject to the RFG default baseline who are not planning to produce or import RFG prior to 2006 will be significantly impacted by the revised value proposed today. Flexibilities provided by the MSAT program, such as deficit and credit carryover, are available to affected parties should they encounter compliance difficulties with the proposed revised standard in 2005.

As discussed, the increase in stringency of the MSAT default RFG standard is not unexpected, as the RFG toxics performance standard increased from 16.5% reduction for 1998 and 1999 to 21.5% reduction in 2000. Refiners and importers subject to the MSAT RFG default baseline could look to the RFG Survey [7] results for the periods 1998, 1999, and 2000 to estimate the likely change in the RFG default baseline value when year 2000 data was included. The year 2000 average RFG toxics performance calculated by the Batch Performance method is very close to the corresponding value estimated using the RFG survey data (29.1 and 30.1 % reduction, respectively). EPA believes the magnitude of the change in the RFG default baseline value is small enough that it can be addressed by small modifications in fuel composition during the course of the year.

Compliance with the gasoline sulfur requirements (§ 80.195) will further assist compliance with the proposed slightly more stringent RFG MSAT default baseline standard. Beginning in 2005, the gasoline sulfur regulations require that a refinery's average sulfur (across all its gasoline) not exceed 30 ppm, with a 300 ppm per-gallon cap in 2005 and an 80 ppm per-gallon cap beginning in 2006. During the MSAT baseline period, RFG sulfur averaged less than 200 ppm. Most affected parties will have to significantly reduce their gasoline pool sulfur levels through production or import of appropriate batches. In the Complex Model, changes in sulfur levels have a directionally consistent impact on toxics performance; a reduction in sulfur reduces toxics emissions, or in the case of RFG, increases the percent reduction in toxics emissions.

Further, EPA believes that delaying the implementation of the revised RFG default baseline reduces the small decrease in RFG toxic emissions that results from the revision proposed today. Thus, EPA believes that implementing the revised default baseline values beginning in 2005 is feasible and appropriate.

D. Correction

Today's proposed action would also correct, for calendar years 2002, 2003, and 2004, the RFG default MSAT value listed in the March 29, 2001, final rule. In that action, the compliance margin was incorrectly applied to the RFG average toxics reduction estimated for the period 1998–1999. We continue to believe that this compliance margin is appropriate based on the reasoning provided in the 2001 final rule. Thus, in addition to proposing the default toxics baseline that would apply beginning in 2005, today's action would also correct the RFG default toxics baseline applicable to 2002, 2003 and 2004, gasoline, by appropriately applying the compliance margin to the RFG average toxics reduction estimated in the 2001 final rule. Subtracting the 0.7 compliance margin from the 26.01% reduction performance estimate produces an RFG default baseline of 25.31% reduction.[8] Accordingly, for the 2002, 2003, and 2004, compliance periods, the default toxics baseline for RFG is a 25.31% reduction.

E. Environmental and Economic Impact

EPA included a discussion of the environmental and economic impacts of the MSAT rule in the March 2001 preamble to the rule. Today's proposal to update the default baseline values would not significantly change the environmental or economic analyses discussed in the final MSAT rule. However, EPA expects that there are likely minor impacts. First, because the proposed RFG default baseline value becomes slightly more stringent, there may be some cost to affected parties to comply with this revised value over the current value. However, as discussed above, it was very clear from the final rule that the default values would be revised. Because of the increase in the RFG toxics performance standard in 2000, and the fact that the reason for the revision to the MSAT default baseline was primarily to include year 2000 data, one could reasonably expect that the revised RFG value would be more stringent than that included in the final MSAT rule. With this slight increase in stringency will likely come a small increase in environmental benefits compared to the current standard. However, it is difficult to estimate the full impact (both economic and environmental) since most of those subject to the MSAT default RFG baseline do not import or produce RFG on a regular basis or do not produce significant quantities of RFG or may never produce RFG. Based on 2003 compliance reports, we estimate that about 40% of the RFG suppliers (refiners and importers) are subject to the MSAT default baseline, and none of those are considered small refiners or importers. Additionally, we estimate that these entities supplied less than 10 percent of the RFG volume.

The change in the CG default baseline value may result in an increase in emissions compared to the current standard. Given the discrepancy in CG data quality between the data used in the baseline calculation in the final rule and in this proposal, it is difficult to fully determine the environmental impact of this change. Most of those subject to the CG default baseline are

[7] The RFG Survey Association is an association of refiners, importers and blenders that performs surveys, or sampling, of reformulated gasoline at the retail level. This sampling is required under the reformulated gasoline regulations. These surveys collect and analyze samples from retail gasoline stations in the major cities where RFG is required. Each individual survey is conducted during a one-week period. Currently, over 150 surveys are conducted each year in federal RFG ares, with a total of more than 10,000 samples collected and analyzed. On the EPA website, EPA publishes estimates of the average toxics performance of gasoline in a given survey area based on the survey information.

[8] MSAT Technical Support Document, p.157.

importers or blenders who do not produce or import large quantities of CG and/or who produce or import on an irregular basis. The bulk of the CG volume is subject to an individual MSAT standard. Thus, for the total pool of CG, the environmental effect of this change in the default baseline is likely to be small.

III. Public Participation

We request comments on all aspects of this proposal. The comment period for this proposed rule will end 30 days after publication in the **Federal Register**.

If you would like to speak at a public hearing on this proposed rule, please contact us within 20 days of publication of the proposal in the **Federal Register**, as described above in **DATES**. If a request to speak at a public hearing is received, we will hold the hearing at least 30 days after publication of the proposal in the **Federal Register**. The public hearing would start at 10 a.m. local time at the EPA Office Building, 2000 Traverwood, Ann Arbor, MI 48105, or at an alternate site nearby.

To contact us for updated information about the possibility of a public hearing, please see the **FOR FURTHER INFORMATION CONTACT** section.

If you would like to present testimony at a public hearing, we ask that you notify the contact person listed above at least ten days beforehand. You should estimate the time you will need for your presentation and identify any needed audio/visual equipment. We suggest that you bring copies of your statement or other material for the EPA panel and the audience. It would also be helpful if you send us a copy of your statement or other materials before the hearing.

We will arrange for a written transcript of the hearing and keep the official record of the hearing open for 30 days to allow for the public to supplement the record. You may make arrangements for copies of the transcript directly with the court reporter.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this proposed rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

Because the amendments in this proposed rule would not change the information collection requirements of the underlying MSAT rule, this action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

C. Regulatory Flexibility Act

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A petroleum refining company with fewer than 1500 employees or a petroleum wholesaler or broker with fewer than 100 employees, based on the North American Industrial Classification System (NAICS); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

We have determined that approximately 25 refiners and importers meet the NAICS criteria described above and are subject to the MSAT default baseline for their reformulated gasoline. None of these entities produced or imported RFG during the MSAT baseline period or since then. Based on our knowledge of these refiners and importers, in fact, we would not expect any of them to produce or import RFG in the near future. Thus, we do not expect the revised RFG MSAT default value to adversely impact these small entities compared to the current RFG MSAT default value. In the event these refiners and importers choose to produce or import RFG, they will have had sufficient notice of the standard. Additionally, because the toxics determination is a function of many fuel parameters, as well as the volumes of the batches, the slight increase in stringency of the RFG MSAT default value should not pose a significant burden toward achieving compliance.

Although this proposed rule would not have a significant economic impact on a substantial number of small entities, the impact of this proposed rule will be reduced for small entities by various provisions in the MSAT rule. The MSAT rule contains deficit and credit carryforward provisions which provide compliance flexibility to regulated entities. Under these provisions, refiners and importers are allowed to carry a toxics deficit (indicating noncompliance with their MSAT standard) forward for one year, using credits generated in the prior or post years to make up the deficit. The underlying rule also includes a compliance margin to account for

ordinary variations in fuel quality. Because RFG toxics performance is a function of many fuel parameters, as well as the volumes of the batches, the slight increase (about 6%) in the stringency of the RFG MSAT default value should not pose a significant burden toward achieving compliance. Beginning in 2005, the requirement that a refiner's or importer's average gasoline sulfur level not exceed 30 ppm should provide additional assistance to regulated entities in complying with the MSAT requirements, since sulfur reductions also decrease toxics emissions, as determined by the Complex Model.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposed rule does not contain a federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Today's action would simply modify the original rule in a limited manner, and would not significantly change the original rule. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has also determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments, because it would be applicable only to parties which produce or import gasoline.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The rule would amend existing regulatory provisions applicable only to producers and importers of gasoline and would not alter State authority to regulate these entities. The amendments will impose no direct costs on State or local governments. Thus, Executive Order 13132 does not apply to this proposed rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

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.''

This proposed 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 Executive Order 13175. The rule would amend existing regulatory provisions applicable only to producers and importers of gasoline and will impose no direct costs on State or local governments. Thus, Executive Order 13175 does not apply to this proposed rule.

G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62FR19885, April 23, 1997) applies to any rule that: (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposed rule is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866. Nevertheless, as we explained in the preamble to the final MSAT rule in March 2001, we believe it is important to develop a better understanding of the effects on public health, including children's health. EPA is considering children's health issues in our Technical Analysis Plan.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply,

Distribution, or Use'(66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) 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 proposed action does not involved technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

V. Statutory Provisions and Legal Authority

The statutory authority for the fuels controls in today's proposed rule can be found in sections 202 and 211(c) of the Clean Air Act (CAA), as amended. Support for any procedural and enforcement-related aspects of the fuel controls in today's proposed rule, including recordkeeping requirements, comes from sections 114(a) and 301(a) of the CAA.

List of Subjects in 40 CFR Part 80

Administrative practice and procedure, Air pollution control, Confidential business information, Environmental protection, Gasoline, Labeling, Motor vehicle fuel, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: December 22, 2004.

Michael O. Leavitt,

Administrator.

For the reasons set forth in the preamble, 40 CFR part 80 is proposed to be amended as set forth below:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7545, and 7601(a).

2. Section 80.855 is amended by revising paragraphs (b)(1)(i) and (b)(1)(ii) to read as follows:

§ 80.855 What is the compliance baseline for refineries or importers with insufficient data?

* * * * *

(b)(1) * * *

(i) For conventional gasoline, prior to January 1, 2005, 94.64 mg/mile; starting January 1, 2005, 97.38 mg/mile.

(ii) For reformulated gasoline, prior to January 1, 2005, 25.31 percent reduction from statutory baseline; starting January 1, 2005, 26.78 percent reduction from statutory baseline.

* * * * *

[FR Doc. 05–42 Filed 1–3–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[OAR–2003–0010; FRL–7857–1]

RIN 2060–AK02

Regulation of Fuels and Fuel Additives: Modification of Anti-Dumping Baselines for Gasoline Produced or Imported for Use in Hawaii, Alaska and U.S. Territories

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Today's action proposes to allow refiners and importers who produce or import conventional gasoline for use in Alaska, Hawaii, the Commonwealth of Puerto Rico and the Virgin Islands to change the way that they calculate emissions from such gasoline for purposes of calculating their conventional gasoline anti-dumping baselines and evaluating annual average emissions. Specifically, for gasoline sold in these areas, refiners and importers could elect to modify their baselines to replace the anti-dumping statutory baseline with the single seasonal statutory baseline that is most appropriate to the regional climate, and to use the seasonal component of the Complex Model that is most appropriate to the regional climate to calculate individual baselines and annual average emissions. This action would allow refiners and importers to petition EPA to use the summer statutory baseline and the summer Complex Model for all anti-dumping baseline and compliance calculations for conventional gasoline produced or imported for use in Hawaii, Puerto Rico and the Virgin Islands and would allow refiners and importers to petition EPA to use the winter statutory baseline and the winter Complex Model for all anti-dumping baseline and compliance calculations for conventional gasoline produced or imported for use in Alaska. We are proposing these actions to address certain inconsistencies in the RFG program's anti-dumping provisions which may have significant unintended negative impacts on refiners and importers who produce or import gasoline for these areas. Today's action would also extend similar seasonal baseline and compliance modifications to the provisions applicable to conventional gasoline under Gasoline Toxics, also known as the Mobile Source Air Toxics rule, or MSAT.

DATES: Comments must be received on or before February 3, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2003–0010 by one of the following methods:

1. Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

3. E-mail: *http://www.epa.gov/edocket,* Attention Docket ID No. OAR–2003–0010.

4. Mail: Air and Radiation Docket, Environmental Protection Agency, Mailcode: 6406J, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.

5. Hand Delivery: EPA Docket Center, Environmental Protection Agency, 1301 Constitution Avenue, NW., Room B102, Mail Code 6102T, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. OAR–2003–0010. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information

(CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Marilyn Bennett, Transportation and Regional Programs Division, Office of Transportation and Air Quality (6406J), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 343–9624; fax number: (202) 343–2803; e-mail address: *mbennett@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Entities potentially affected by this action include those involved with the production and importation of conventional gasoline motor fuel. Regulated categories and entities affected by this action include:

Category	NAICS codes [a]	SIC codes [b]	Examples of potentially regulated parties
Industry	324110	2911	Petroleum Refiners, Importers.

[a] North American Industry Classification System (NAICS).
[b] Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could be potentially regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria of Part 80, subparts D, E and F of title 40 of the Code of Federal Regulations. If you have any question regarding applicability of this action to a particular entity, consult the person in the preceding **FOR FURTHER INFORMATION CONTACT** section above.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

2. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

4. Describe any assumptions and provide any technical information and/or data that you used.

5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns, and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

3. *Docket Copying Costs.* You may be charged a reasonable fee for photocopying docket materials, as provided in 40 CFR Part 2.

D. Outline of This Preamble

I. General Information
II. Background
III. Anti-dumping Compliance for Gasoline Produced or Imported for Use in Alaska, Hawaii, Puerto Rico and the Virgin Islands
IV. Mobile Source Air Toxics Rule (MSAT)
V. Public Participation
VI. Statutory and Executive Order Reviews
VII. Statutory Provisions and Legal Authority

II. Background

A. The Anti-Dumping Requirements

Section 211(k) of the Clean Air Act (''CAA'' or ''Act'') requires EPA to establish standards for reformulated gasoline (RFG) to be used in specified ozone nonattainment areas. The Act also requires non-reformulated, or conventional, gasoline used in the rest of the country to be as clean as the gasoline produced or imported in 1990.

CAA Section 211(k)(8). The requirements for conventional gasoline are called the anti-dumping requirements. The anti-dumping requirements prevent refiners from dumping into conventional gasoline the dirty gasoline components that are removed when RFG is produced. To be in compliance with the anti-dumping requirements, the exhaust toxics and nitrogen oxides (NO_X) emissions performance of a refinery's or importer's conventional gasoline must be no dirtier than the refinery's or importer's 1990 exhaust toxics and NO_X emissions performance, on an annual average basis.

EPA requires refiners to calculate the exhaust toxics and NO_X emissions performance of gasoline using the Complex Model. The Complex Model is a predictive model used to determine emissions based on several fuel parameters, such as sulfur, benzene and Reid vapor pressure (RVP). *See* 40 CFR 80.45. The Complex Model has both a summer version and a winter version.[1] The summer Complex Model is based on data reflecting the performance of gasoline sold in the summer; *i.e.*, gasoline with lower RVP to comply with volatility requirements at 40 CFR 80.27 and which is typical of summer climatic conditions. The winter Complex Model is a modified version of the summer model which sets the RVP at 8.7 psi and adjusts for winter climate conditions. Both models are based on MOBILE model outputs.[2] MOBILE model outputs for the summer model assume ambient temperatures of 69 deg. F to 94 deg. F. MOBILE model outputs for the winter model assume ambient temperatures of 39 deg. F to 57 deg. F. MOBILE model outputs show significantly greater ''winter'' emissions due to longer engine and catalyst warm-up times. As a result, for identical fuel compositions (based on those fuel parameters evaluated in the Complex Model), the winter Complex Model results in significantly higher emissions of exhaust toxics and NO_X than the summer Complex Model, on a mg/mile basis.

B. Compliance With the Anti-Dumping Requirements

The anti-dumping regulations require refineries and importers of conventional gasoline to comply with an established baseline for exhaust toxics and NO_X. The baseline will be either an ''individual baseline'' or the ''anti-dumping statutory baseline.'' An individual baseline is based on the average performance of the gasoline that the individual refinery or importer produced or imported during the calendar year 1990. The anti-dumping statutory baseline is based on the average quality of gasoline sold throughout the United States during 1990. The anti-dumping statutory baseline applies to refineries and importers that are unable to calculate an individual baseline based on 1990 gasoline performance. If a refinery or importer has an individual baseline, gasoline production during a given annual averaging period, up to the refinery's or importer's 1990 production or import volume, must be no ''dirtier'' than the refinery's or importer's individual 1990 baseline for exhaust toxics and NO_X. Gasoline produced or imported during the annual averaging period in excess of the refinery's or importer's 1990 gasoline production or import volume must be no dirtier than the anti-dumping statutory baseline for exhaust toxics and NO_X. For refineries and importers that are subject to the anti-dumping statutory baseline, all gasoline produced or imported during the annual averaging period must meet the anti-dumping statutory baseline for exhaust toxics and NO_X.

Requiring compliance with the anti-dumping statutory baseline for gasoline production in excess of the refinery's or importer's 1990 gasoline production volume is intended to prevent the overall degradation of the conventional gasoline pool as a result of increased production by refineries with individual baselines that are dirtier than the 1990 national average, and/or decreased production by refineries with individual baselines that are cleaner than the 1990 national average. *See* 57 FR 13487–88 (April 16, 1992). Requiring compliance with the anti-dumping statutory baseline for gasoline produced by refineries and importers who are unable to establish an individual baseline is intended to ensure that such gasoline will not degrade the conventional gasoline pool compared to the 1990 average.

To comply with the anti-dumping requirements, each refinery and importer must evaluate the overall quality of the conventional gasoline that it produces or imports during each annual averaging period. The refinery or importer must then compare the quality of its conventional gasoline to the refinery's or importer's baseline (individual 1990 baseline or anti-dumping statutory baseline, as appropriate). So long as the conventional gasoline produced or imported has overall emissions, as calculated by the Complex Model, that are no worse than the performance reflected in the refinery's or importer's baseline, the refinery or importer is in compliance with EPA's anti-dumping requirements.

The anti-dumping statutory baseline includes both summertime and wintertime seasonal components. The Act provides the specifications for the summertime component of the statutory baseline gasoline, and indicates that such specifications apply to ''gasoline sold during the high ozone period (as determined by the Administrator).''[3] CAA Section 211(k)(10)(B)(i). EPA determined wintertime baseline gasoline specifications based on an estimate of the average quality of wintertime gasoline in 1990, as required under the Act. CAA Section 211(k)(10)(B)(ii). The wintertime baseline gasoline specifications were derived from survey data collected in representative cities in the continental U.S.[4] Baseline summertime and wintertime gasolines have different average fuel parameter values because of the different weather conditions in summer and winter and the effect of the volatility controls on summertime gasoline. The anti-dumping statutory baseline, which approximates the average emissions of gasoline sold in the U.S. in 1990, is the volume-weighted average of the summertime and wintertime baseline gasoline emissions, as calculated using the appropriate seasonal version of the Complex Model. *See* 59 FR 7793 (February 16, 1994).

[1] A detailed discussion of the development of the summer and winter versions of the Complex Model is included in the Final Regulatory Impact Analysis for Reformulated Gasoline (December 13, 1993). Public Docket No. A–92–12.

[2] For a discussion of the MOBILE Model, see the Regulatory Impact Analysis for the final RFG rule, December 13, 1993.

[3] EPA's volatility regulations at 40 CFR 80.27 define ''high ozone season'' as ''the period from June 1 to September 15 of any calendar year.'' In the preamble to the RFG final rule, EPA also defined ''high ozone season'' as June 1 through September 15 for purposes of compliance with the RFG and anti-dumping requirements. EPA chose this period because it covers the vast majority of days during which the national ambient air quality standard for ozone is exceeded nationwide and is consistent with the period covered by EPA's gasoline volatility control requirements. *See* 59 FR 7722 (February 16, 1994). The Act specifies that the volatility controls apply only to the 48 contiguous states and the District of Columbia. CAA Section 211(h)(5).

[4] Winter statutory gasoline parameter values were derived by combining data from survey samples collected in 23 continental U.S. cities by the Southwest Research Institute (SWRI) and in 53 continental U.S. cities by the Motor Vehicle Manufacturer's Association (MVMA). Winter baseline emissions were determined on a nationwide basis based on this survey data. For further discussion of the methodology used in determining the winter statutory baseline, *see* 56 FR 31179 (July 9, 1991).

C. Calculating Individual Baselines and Annual Average Emissions

A refinery's or importer's individual 1990 baseline is calculated using the summer version of the Complex Model to assess the performance of the refinery's or importer's 1990 summer gasoline and the winter version of the Complex Model to assess the performance of the refinery's or importer's 1990 winter gasoline. For purposes of these calculations, the regulations consider summer gasoline to be gasoline that is subject to EPA's volatility requirements, and winter gasoline to be gasoline that is not subject to EPA's volatility requirements. 40 CFR 80.91(e)(2)(ii)(A). Gasoline sold in the territories of Puerto Rico and the Virgin Islands, and in Alaska and Hawaii, is not subject to the volatility requirements.[5] *See* CAA Section 211(h)(5). Thus, for purposes of calculating a refinery's or importer's individual 1990 baseline emissions, none of the gasoline produced or imported for use in these areas is considered summer gasoline under the current regulations. As a result, all of the gasoline produced or imported for use in these areas was evaluated using the winter Complex Model for purposes of calculating individual 1990 baseline emissions.[6]

Similarly, to determine annual average emissions for compliance purposes, each year refineries and importers calculate emissions from their summer gasoline using the summer Complex Model and emissions from their winter gasoline using the winter Complex Model. For purposes of calculating annual average emissions, the regulations specify that summer gasoline is gasoline that meets the volatility requirements and winter gasoline is gasoline that does not meet the volatility requirements. 40 CFR 80.101(g)(5) and (g)(6). Because gasoline produced or imported for use in Alaska, Hawaii, Puerto Rico and the Virgin Islands is not subject to the volatility requirements, refineries and importers currently are required to evaluate all of their gasoline produced or imported for use in these areas during the annual averaging period using the winter Complex Model.

As discussed above, refiners and importers must provide gasoline that complies with their individual anti-dumping baseline up to their 1990 baseline volume, after which any excess volumes must comply with the anti-dumping statutory baseline.[7] Refiners and importers without an individual baseline must comply with the anti-dumping statutory baseline for all of the conventional gasoline they produce or import during each annual averaging period.[8] This general approach to compliance applies to both refiners and importers of gasoline sold in the continental U.S. and refiners and importers of gasoline produced or imported for use in Alaska, Hawaii, Puerto Rico and the Virgin Islands.

III. Anti-Dumping Compliance for Gasoline Produced or Imported for Use in Alaska, Hawaii, Puerto Rico and the Virgin Islands

A. Need for Action

As discussed above, under the anti-dumping regulations, gasoline produced or imported in excess of a refinery's or importer's 1990 baseline volume during the annual averaging period must comply with the anti-dumping statutory baseline. All gasoline produced or imported during each annual averaging period by refineries and importers who are unable to establish an individual baseline also must comply with the anti-dumping statutory baseline. In most circumstances, use of the anti-dumping statutory baseline is an appropriate and necessary tool to ensure that conventional gasoline quality does not degrade in comparison to the average quality of gasoline sold in 1990. However, the current use of the anti-dumping statutory baseline may result in unintended and unnecessary adverse impacts on refiners and importers who produce or import gasoline for use in Alaska, Hawaii, Puerto Rico and the Virgin Islands that is subject to the anti-dumping statutory baseline. For such gasoline, the current anti-dumping requirements may result in an inconsistent application of EPA's seasonal Complex Models.

As discussed above, the anti-dumping statutory baseline is an estimate of the average quality of 1990 gasoline. This estimate was calculated using the summer Complex Model to evaluate gasoline sold during the volatility control period and the winter Complex Model for all other gasoline. For compliance purposes, conventional gasoline sold in the continental United States is evaluated using the summer Complex Model if it is gasoline that meets the summer volatility requirements, and the winter Complex Model if it is gasoline that does not meet the summer volatility requirements. Thus, for conventional gasoline sold in the continental U.S. that is required to comply with the anti-dumping statutory baseline, we expect there to be general agreement between the seasonal models used to develop the baseline and the seasonal models used to evaluate annual compliance. Accordingly, application of the anti-dumping statutory baseline for such gasoline provides reasonable assurance that the quality of the conventional gasoline will not degrade relative to the average quality of gasoline in 1990.

Gasoline produced or imported for use in Alaska, Hawaii, Puerto Rico and the Virgin Islands in excess of the refinery's or importer's 1990 baseline volume of gasoline produced or imported for use in these areas, and all gasoline produced or imported for use in these areas by a refiner or importer who does not have an individual baseline, also must comply with the anti-dumping statutory baseline. As discussed above, the anti-dumping statutory baseline was developed using both the summer and winter seasonal models. Since the annual emissions performance of gasoline produced or imported for use in these areas must be evaluated using only the winter Complex Model, for these areas, there is not an agreement between the seasonal model reflected in the baseline and the seasonal model used for calculating

[5] The U.S. territories of Guam, the Commonwealth of the Northern Mariana Islands and American Samoa also are not subject to the volatility requirements pursuant to CAA section 211(h)(5); however, these territories have received exemptions from the anti-dumping requirements, and, as a result, are not affected by today's rule. *See* 61 FR 53854 (October 16, 1996)(Guam); 62 FR 63853 (December 3, 1997)(Northern Mariana Islands); 65 FR 71067 (November 29, 2000)(American Samoa).

[6] Pursuant to a rulemaking on June 9, 1999 (64 FR 30904), refiners and importers who have Puerto Rico gasoline, or Puerto Rico and Virgin Islands gasoline, in their individual baseline and that sell a volume of Puerto Rican gasoline greater than their 1990 baseline volume of Puerto Rican gasoline, are allowed to petition EPA to replace the winter Complex Model with the summer Complex Model for anti-dumping baseline and compliance calculations. *See* 40 CFR 80.93(d) and 80.101(f)(4)(iii) and (g)(1)(ii)(B).

[7] For refineries and importers with individual 1990 baselines who produce gasoline volumes in excess of their 1990 volume during an averaging period, the regulations require the use of a specified ''compliance baseline'' equation. 40 CFR 80.101(f). In general, this equation adjusts the refinery's or importer's individual baseline to reflect the parameter values of the statutory baseline for that volume of the refinery's or importer's total annual gasoline production which is in excess of the refinery's or importer's 1990 baseline volume. This adjusted compliance baseline then is the refinery's or importer's anti-dumping standard for that annual averaging period, and the annual average emissions from all conventional gasoline produced by that refinery or importer during the annual averaging period must meet that standard.

[8] Since most importers are unable to establish an individual 1990 baseline, importers generally are required to comply with the anti-dumping statutory baseline.

annual compliance.[9] Because the winter Complex Model predicts higher emissions than the summer Complex Model, in these situations, the refinery or importer is required to comply with a standard that, in effect, is more stringent than intended. That is, the refiner or importer must produce or import gasoline that is actually cleaner than the average gasoline produced or imported for use in 1990.[10] This unintended result can have a significant adverse economic effect on those refineries and importers whose baselines include gasoline produced or imported for use in Alaska, Hawaii, Puerto Rico and the Virgin Islands and who have increased the volume of gasoline that they produce or import for these areas above their 1990 baseline volumes of gasoline produced or imported for these areas, and those refineries and importers who are subject to the anti-dumping statutory baseline for all of their gasoline.

B. Proposed Action

1. What Change to the Baselines Is EPA Proposing?

We believe that the performance of the gasoline produced or imported for use in Alaska, Hawaii, Puerto Rico and the Virgin Islands should be compared to a baseline that is seasonally consistent with the compliance model that is used for purposes of compliance evaluation. To address this, we considered allowing refiners and importers in these areas to use the winter Complex Model for all baseline and compliance calculations, and to replace the anti-dumping statutory baseline with only the winter statutory baseline for compliance purposes. However, since the seasonal Complex Models were developed taking climatic conditions into account, we believe that selection of the seasonal model should generally reflect the climate of the region. As a result, we are proposing the following changes for refiners and importers who produce or import conventional gasoline for use in Alaska, Hawaii, Puerto Rico and the Virgin Islands.

First, we are proposing to allow refineries and importers to petition EPA to modify their baselines so that all gasoline produced or imported for use in these areas that is currently subject to the anti-dumping statutory baseline will be subject to a single seasonal statutory baseline. Thus, those volumes of gasoline produced or imported for use in these areas in excess of the refinery's or importer's 1990 individual baseline volume of gasoline produced or imported for use in these areas, and those volumes of gasoline produced or imported by a refinery or importer without an individual baseline, would no longer be subject to both seasonal components of the anti-dumping statutory baseline. Instead, such gasoline would be subject to the appropriate single seasonal component of the anti-dumping statutory baseline. This approach would alleviate the current inconsistency (as described above) by more accurately approximating the performance of average 1990 gasoline. This approach would allow refineries and importers to calculate their baseline emissions for gasoline produced or imported for use in these areas using a seasonal version of the Complex Model that agrees with the seasonal version of the Complex Model that they must use to calculate annual emissions performance.

Second, we are proposing that any refinery or importer that elects to change its baseline must use the single seasonal statutory baseline that is most appropriate to the regional climate, and the seasonal component of the Complex Model that is most appropriate to the regional climate, for calculating both individual baseline emissions and annual average emissions. Thus, for the reasons discussed below, refineries and importers of gasoline produced or imported for use in Hawaii, Puerto Rico and the Virgin Islands that elect to change their baselines in accordance with today's proposal would need to use the summer statutory baseline and the summer Complex Model for all calculations. Refineries and importers of gasoline produced or imported for use in Alaska that elect to change their baselines in accordance with today's proposal would need to use the winter statutory baseline and the winter Complex Model for all calculations.

We believe that it is generally appropriate to treat Alaska, Hawaii, Puerto Rico and the Virgin Islands essentially as isolated subcomponents of the overall U.S. gasoline pool.[11] Unlike areas within the continental U.S., these areas are geographically isolated, and, therefore, do not typically receive gasoline from the fungible system that supplies most of the U.S. These areas also have potentially unique automobile fleets and ambient airshed characteristics. Most importantly, these areas are climatically isolated from the continental U.S. and have relative constant and uniform temperatures.[12]

The relatively constant warm year-round ambient temperatures in Hawaii, Puerto Rico and the Virgin Islands are generally consistent with conditions typical of a high ozone season and with the conditions under which EPA intended the summer Complex Model to apply. Thus, for purposes of anti-dumping compliance, we believe that the high ozone season essentially applies in these areas year round. Therefore, today's proposal would allow refineries and importers to petition EPA to modify their individual 1990 baselines for gasoline produced or imported for use in these areas using only the summer Complex Model. We would then require gasoline produced or imported for use in these areas to comply with this new individual baseline for gasoline up to the refinery's or importer's 1990 baseline volume of gasoline to these areas. Gasoline production or imports in excess of the refinery's or importer's 1990 baseline

[9] Gasoline produced or imported for Hawaii, Alaska, Puerto Rico and the Virgin Islands was evaluated using only the winter Complex Model for purposes of calculating a refinery's or importer's individual 1990 baseline. Since annual production or imports for these areas is also evaluated using the winter Complex Model, there is a general agreement between the seasonal model used to develop the baseline and the seasonal model used to calculate annual emissions for gasoline production or imports up to the refinery's or importer's 1990 baseline volume of gasoline produced or imported for these areas.

[10] Because the winter Complex Model predicts higher emissions for exhaust toxics and NO_X than the summer Complex Model, the average emissions of gasoline produced or imported for use in Alaska, Hawaii, Puerto Rico and the Virgin Islands during an annual averaging period, which is evaluated using only the winter Complex Model, will appear to have higher emissions than that same gasoline would appear to have if evaluated using the summer Complex Model for some of the volume of gasoline. If, for example, gasoline produced or imported for use in these areas has properties identical to the properties of anti-dumping baseline gasoline, that gasoline (as evaluated using only the winter Complex Model) will appear to have higher emissions than anti-dumping baseline gasoline, and would be deemed out of compliance with the anti-dumping statutory baseline emissions standard.

[11] Certain provisions of the Clean Air Act also treat Alaska, Hawaii, Puerto Rico, the Virgin Islands and the other U.S. territories differently than areas within the continental U.S. Recognizing that these areas may have unique local factors that render compliance with fuels requirements infeasible or unreasonable, the Act specifically provides that these areas may petition EPA for an exemption from the fuels requirements. *See* CAA Section 325. The Act extends this provision to Alaska and Hawaii for purposes of compliance with the diesel sulfur requirements. *See* CAA Section 211(i)(4). In addition, as discussed above, the Act exempts Alaska, Hawaii and the U.S. Territories from the volatility requirements for conventional gasoline. *See* CAA Section 211(h)(5). Thus, we believe that today's proposal is consistent with the Act's recognition that, because of their unique geographical and climatic circumstances, it may be appropriate under certain circumstances to treat these areas in a different manner than areas within the continental U.S.

[12] Similar distinctions within the continental U.S. would be difficult to make because of the fungibility of the gasoline distribution system, the interconnectedness of regional airsheds, the mobility of the automobile fleet, and the lack of distinctly isolated climatic regions.

volume of gasoline to these areas would be subject to only the summer statutory baseline. The proposal would allow refineries and importers that are currently subject to the anti-dumping statutory baseline to petition EPA to change their baseline to only the summer statutory baseline for gasoline produced or imported for these areas. Refineries and importers would use only the summer Complex Model for all compliance calculations for all gasoline produced or imported for use in these areas. In the case of refineries and importers with an individual 1990 baseline which does not include any gasoline produced or imported for use in these areas, any gasoline produced or imported for use in these areas during the annual averaging period would be subject to the refinery's or importer's individual summer 1990 baseline, and the summer Complex Model would be used for all compliance calculations.

We also believe that the relatively constant colder year-round ambient temperatures in Alaska are generally consistent with the conditions outside of the high ozone season and with the conditions under which EPA intended the winter Complex Model to apply. Thus, today's proposal would allow refineries and importers to petition EPA to establish an individual 1990 baseline for gasoline produced or imported for use in Alaska using only the winter Complex Model. We then would require gasoline produced or imported for use in Alaska to comply with this new individual baseline up to the refinery's or importer's 1990 baseline volume of Alaska gasoline. Gasoline produced or imported for use in Alaska in excess of the refinery's or importer's 1990 baseline volume of Alaska gasoline would be subject to only the winter statutory baseline. The proposal would allow refineries and importers currently required to comply with the anti-dumping statutory baseline to petition EPA to change their baseline to only the winter statutory baseline for Alaska gasoline. Refineries and importers would continue to use the winter Complex Model for all compliance calculations for Alaska gasoline. In the case of refineries and importers with an individual 1990 baseline that does not include any gasoline produced or imported for use in Alaska, any gasoline produced or imported for use in Alaska during the annual averaging period would be subject to the refinery's or importer's individual winter 1990 baseline, and the winter Complex Model would be used for all compliance calculations.

We considered, as an alternative approach, continuing the application of the anti-dumping statutory baseline in these areas and requiring annual production or imports in these areas to be evaluated using both seasonal components of the Complex Model rather than a single seasonal Complex Model. However, we believe it is more appropriate to use a single seasonal statutory baseline and a single seasonal version of the Complex Model to evaluate compliance in these areas. Requiring application of the anti-dumping statutory baseline, with its two seasonal components, and use of both seasonal components of the Complex Model for calculating annual averages, is appropriate for gasoline produced or imported for use in the continental U.S., where most areas experience seasonal changes in temperature that generally correspond to the high ozone/non-high ozone periods. However, given that the temperatures in Alaska, Hawaii, Puerto Rico and the Virgin Islands are relatively constant year round, we believe that the single seasonal statutory baseline and single seasonal version of the Complex Model most appropriate to the climatic conditions of the area would provide a more accurate evaluation of gasoline produced or imported for use in these areas. Therefore, we believe that today's proposed action would provide a more appropriate mechanism for ensuring that gasoline in these areas does not degrade in comparison to gasoline sold in these areas in 1990.

We request comment on this proposed action and on other possible approaches to address the inconsistencies in the anti-dumping regulations discussed above regarding the application of the anti-dumping statutory baseline and the seasonal Complex Models for gasoline produced or imported for use in Alaska, Hawaii, Puerto Rico and the Virgin Islands.

2. What Change Does EPA Propose To Make to the Anti-Dumping Regulations To Implement the Proposal?

To implement the changes described above, today's rule proposes to revise the anti-dumping regulations to allow any refinery or importer with an individual 1990 baseline that produces or imports gasoline for use in Hawaii, Puerto Rico and the Virgin Islands the option to petition EPA to use the summer seasonal model for all baseline and compliance calculations for gasoline produced or imported for these areas.[13] As discussed above, given the consistently warm climate in Hawaii, Puerto Rico and the Virgin Islands, we believe that the summer Complex Model is the most appropriate model for evaluating emissions in these areas under the anti-dumping program. Thus, we are proposing to modify the baseline submission provisions at § 80.93(d) to allow refineries and importers to petition EPA to evaluate all of their 1990 conventional gasoline produced or imported for use in these areas using the summer Complex Model. This would require a refinery or importer to calculate a separate 1990 individual baseline for gasoline produced or imported for use in these areas, and to recalculate its current anti-dumping baseline to reflect the subtraction of baseline gasoline produced or imported for use in these areas.[14]

Today's action also would revise the anti-dumping compliance baseline equation at § 80.101(f)(4) by replacing the anti-dumping statutory baseline component with the summer statutory baseline component for gasoline produced or imported for use in Hawaii, Puerto Rico and the Virgin Islands in excess of the refinery's or importer's 1990 baseline volume of gasoline produced or imported for these areas. The proposed modification of the baseline submission provisions at § 80.93(d) also would allow refineries and importers currently subject to the anti-dumping statutory baseline for all of their gasoline to petition EPA to change their baseline to only the summer statutory baseline for any conventional gasoline produced or imported for use in these areas. The proposal includes a new § 80.101(f)(3) which would require such refineries

[13] As discussed in footnote 6 above, in a final rule dated June 9, 1999 (64 FR 30904), EPA modified the anti-dumping regulations to allow refiners and importers who have Puerto Rico gasoline, or Puerto Rico and Virgin Islands gasoline, in their 1990 baseline to petition EPA to replace the winter Complex Model with the summer Complex Model for purposes of compliance for their Puerto Rico gasoline. Today's rule does not substantively change the provisions for Puerto Rico gasoline promulgated on June 9, 1999. Rather, today's rule extends the use of the summer only Complex Model to gasoline produced or imported for use in Puerto Rico by refiners and importers that do not have individual baselines and those that have an individual baseline but do not have any Puerto Rico gasoline in their baselines.

[14] For refineries and importers with individual baselines that produce or import gasoline for the continental U.S. as well as Alaska, Hawaii, Puerto Rico or the Virgin Islands, the approach in today's proposal likely would result in a reduction of the total volume of gasoline that currently would be subject to the anti-dumping statutory baseline, since, under the proposal, gasoline produced or imported for Alaska, Hawaii, Puerto Rico or the Virgin Islands in excess of the refinery's or importer's baseline volume of gasoline for these areas would no longer be included in the volume of gasoline subject to the anti-dumping statutory baseline. This may have an impact on the refinery's or importer's compliance baseline for the annual averaging period.

and importers to comply with the summer statutory baseline for gasoline produced or imported for use in these areas. In addition, the proposal would modify 40 CFR 80.101(g)(1) to require refineries and importers that petition EPA under § 80.93(d) to evaluate all of their gasoline produced or imported for these areas during the annual averaging period using only the summer Complex Model.

As discussed above, given Alaska's consistently colder climate, we believe that the winter Complex Model is the most appropriate model for evaluating emissions of conventional gasoline produced or imported for use in Alaska under the anti-dumping program. Today's proposal, therefore, does not change the current requirement for Alaska 1990 baseline gasoline and annual average emissions to be evaluated using the winter Complex Model. However, the modifications to the baseline submission provisions at § 80.93(d) would require refineries and importers of Alaska gasoline that elect to change their baseline to calculate a separate baseline for Alaska gasoline, and to recalculate their current anti-dumping baseline to reflect the subtraction of 1990 baseline Alaska gasoline. Today's action would revise the anti-dumping compliance baseline equation at § 80.101(f)(4) by replacing the anti-dumping statutory baseline component with the winter statutory baseline component for gasoline produced or imported in excess of the refinery's or importer's 1990 baseline volume of Alaska gasoline. The modifications to the baseline submission provisions at § 80.93(d) also would allow refineries and importers currently subject to the anti-dumping statutory baseline for all of their gasoline to petition EPA to change their baseline to the winter statutory baseline for any conventional gasoline produced or imported for use in Alaska. The new § 80.101(f)(3) would require such refineries and importers to comply with the winter statutory baseline for gasoline produced or imported for use in Alaska.

In addition to the proposed changes to the anti-dumping regulations discussed above, today's action proposes to modify §§ 80.91(e)(2)(ii)(A) and 80.101(g)(6) to clarify the summer/winter distinction with regard to gasoline produced or imported for use in Alaska, Hawaii, Puerto Rico and the Virgin Islands. We request comment on all of the proposed modifications to the anti-dumping regulations.

3. How Does a Refiner or Importer Change Its Baseline?

We are proposing that the changes in today's rule would be optional for any refiner for a refinery, or importer, that produces or imports gasoline intended for use in Alaska, Hawaii, Puerto Rico and the Virgin Islands, and would be limited to those refiners and importers that petition the Agency for these changes. However, a refinery or importer that changes from the anti-dumping statutory baseline to a single seasonal statutory baseline must use the appropriate seasonal statutory baseline for all gasoline produced or imported for use in any of the areas subject to this rule, and must use the appropriate seasonal Complex Model for all future calculations. For example, an importer of Puerto Rican gasoline that petitions EPA to change from the anti-dumping statutory baseline to a single seasonal statutory baseline must change to the summer statutory baseline and must use the summer Complex Model for all future calculations for Puerto Rican gasoline and also for any gasoline the importer imports into Hawaii and/or the Virgin Islands. Refineries and importers whose 1990 individual baselines include gasoline produced or imported for these areas would be required to recalculate their individual baselines, as described above, and submit the new baselines with their petition. Once such a petition is submitted and granted, the new method for determining compliance with the anti-dumping requirements would apply from then on and the refinery or importer could not revert back to its original baseline. The new baseline would apply to the refinery regardless of ownership; *i.e.*, if a refinery obtains a new baseline under today's rule, the new baseline would apply to the refinery even if the refinery is subsequently sold to another refiner.

Refineries and importers that produce or import gasoline for these areas and do not petition EPA to change their baselines would continue to be subject to their current baselines and would continue to use the Complex Model that is required for calculating emissions under the current regulations.

We believe that it is appropriate to make this baseline change optional since, as discussed below, an election not to adopt a baseline change would not result in any adverse environmental impact. We request comment on the proposal to allow these changes to be optional.

4. What Are the Environmental Effects of This Proposed Action?

We believe that the proposal to allow refineries and importers to change their baselines would not undermine the environmental goals of the anti-dumping program (*i.e.*, to ensure that conventional gasoline will be no dirtier than 1990 gasoline). Although it is possible that the gasoline supplied by parties to the affected areas could have increases in emissions, these changes will not result in gasoline with emissions that are greater than conventional gasoline in these areas, or nationwide, compared to 1990 levels. Today's rule provides an alternative compliance method for refiners and importers who, under the current regulations, are required to produce or import gasoline that is actually cleaner than the average 1990 gasoline produced or imported for use in the affected areas or nationwide. As a result, even if all of these affected parties choose the new compliance method, the goals of the anti-dumping program would be met. To the extent that parties choose to retain their current compliance method, there would continue to be an added environmental benefit above and beyond that specifically required to meet the goals of the anti-dumping program.

We request comment on the environmental effects of today's proposed changes to the anti-dumping rules.

5. When Would the Baseline Changes Become Effective?

We are proposing that the baseline changes proposed in today's rule would become effective beginning with the annual averaging period in which a refiner's or importer's petition is granted.

6. Are Refiners and Importers Required To Provide Documentation That Gasoline Was Produced or Imported for Use in an Affected Area?

We are proposing to require refiners and importers who change their baseline in accordance with today's rule to retain documents which substantiate that gasoline complying with the new baseline, in fact, was produced or imported for use in the affected area. We believe that such information will be included in business documents associated with the sale and distribution of the gasoline. In the absence of such documentation, the refiner or importer would have no assurance that the product would be used in the affected area, and, thus, would have no basis for applying the new baseline. We request

comment on the proposed documentation retention requirement.

IV. Mobile Source Air Toxics Rule (MSAT)

A. Background

40 CFR part 80, subpart J, contains the provisions applicable to refiners and importers for determining their baselines and compliance values for the gasoline toxics program, also known as the Mobile Source Air Toxics (MSAT) program. As with the conventional gasoline anti-dumping requirements, the toxics performance provisions in the MSAT program apply on a refinery-by-refinery (and importer-by-importer) basis. For each refinery, a refiner must identify the appropriate toxics performance baseline for its conventional gasoline and its RFG. Similarly, each importer must identify an appropriate toxics performance baseline for the gasoline that it imports. Refiners and importer must then demonstrate compliance with each applicable baseline on an annual average basis using the Complex Model.

The MSAT provisions require that refiners and importers establish an individual toxics baseline, separately for RFG and conventional gasoline, based on the average toxics performance of their gasoline during the baseline period, 1998 through 2000. Refiners and importers are also required to establish a total baseline volume based on their volume of gasoline production during this baseline period. Alternatively, a refiner or importer may be subject to the default toxic baseline established by EPA if a refinery or importer did not have sufficient production or imports during the MSAT baseline period to calculate an average toxics performance for their baseline gasoline. Refineries or importers subject to the default baseline do not have an MSAT baseline volume.

MSAT compliance is determined on an annual average basis. The gasoline produced or imported during the averaging period can be no more polluting than the refiner's or importer's MSAT baseline level for that type of gasoline (RFG or conventional). For RFG, total toxics emissions are evaluated, and toxics performance is reported as a percent reduction from the statutory baseline. For conventional gasoline, only exhaust toxics emissions are evaluated, and toxics performance is reported in mg/mile. Any volume produced or imported in excess of a refiner's or importer's individual MSAT baseline volume can be no more polluting than the RFG toxics standard or the refiner's or importer's conventional gasoline anti-dumping toxics baseline level, as applicable.

B. Action

EPA believes that it is appropriate to modify the MSAT requirements in a manner that is consistent with the changes being proposed today for the conventional gasoline anti-dumping program. These changes to the MSAT program are necessary because, generally, the MSAT provisions applicable to conventional gasoline are of the same form as the anti-dumping provisions, and because such changes are needed to maintain agreement between methods used to establish baselines and those used to evaluate gasoline performance for purposes of compliance. Thus, EPA is proposing to require a refiner or importer that submits a petition under the anti-dumping program as described in today's action to also petition for a separate or modified MSAT baseline applicable to gasoline produced or imported into Alaska and/or Hawaii, Puerto Rico, and the Virgin Islands.

EPA is proposing the following MSAT baselines and compliance determinations for refiners and importers who submit petitions as discussed in today's proposal for gasoline produced or imported into Alaska and/or Hawaii and/or Puerto Rico and/or the Virgin Islands:

(1) Affected parties who did not produce or import any gasoline during the baseline period (1998–2000), may petition EPA to have the appropriate seasonal MSAT conventional gasoline default baseline for gasoline produced or imported for use in Alaska and/or Hawaii, Puerto Rico, and the Virgin Islands, and use the appropriate seasonal version of the Complex Model for evaluating gasoline produced or imported for these areas. Such parties would be subject to the annual MSAT conventional gasoline default baseline for all other gasoline produced or imported (*i.e.*, gasoline for use in the continental U.S.)

(2) Affected parties who produced gasoline during the baseline period, but who did not produce or import gasoline for Alaska and/or Hawaii, Puerto Rico, or the Virgin Islands during the baseline period, may petition EPA to have the appropriate individual refinery or importer conventional gasoline seasonal MSAT baseline for these areas, and evaluate any gasoline produced or imported for use in these areas using the appropriate seasonal Complex Model. Such gasoline shall not be considered in determining whether a refiner or importer has produced or imported any incremental gasoline volumes above the refiner's or importer's MSAT baseline volume.

(3) Affected parties who only produced or imported gasoline for Alaska and/or Hawaii, Puerto Rico, or the Virgin Islands during the baseline period may petition EPA for a revised MSAT baseline using the appropriate seasonal version of the Complex Model, and use the appropriate seasonal version of the Complex Model for all compliance determinations for such gasoline. Gasoline produced or imported for use in these areas up to the refiner's or importer's MSAT baseline volume would be subject to the refiner's or importer's seasonally appropriate MSAT baseline. Any incremental volumes above the baseline volume would be subject to the refiner's or importer's appropriate seasonal anti-dumping baseline. Any gasoline produced or imported for use in the continental U.S. would be subject to the annual MSAT conventional gasoline default baseline.

(4) Affected parties who produced or imported gasoline during the baseline period for use in the continental U.S. *and* for use in Alaska and/or Hawaii, Puerto Rico, or the Virgin Islands may petition EPA to have a separate, seasonally appropriate MSAT baseline and a separate MSAT baseline volume for gasoline produced or imported for use in Alaska and/or Hawaii, Puerto Rico, and the Virgin Islands. Such refiners or importers must then use the appropriate seasonal component of the Complex Model to evaluated gasoline sold in these areas. Additionally, such refiners must establish a separate annual baseline and baseline volume for all other gasoline, which must be evaluated using the annual Complex Model.

We believe that the changes to the MSAT regulations proposed in today's rule are consistent with the Agency's findings in the MSAT rulemaking, 66 FR 17233–34 (March 29, 2001) respecting air toxics under the Act. In that rule, EPA adopted standards under Section 202(l) of the Act, which requires EPA to establish regulations which reflect the greatest degree of reduction in emissions of air toxics achievable through the application of available technology. In the MSAT rule, EPA determined that the performance of gasoline during the 1998 through 2000 baseline period reflected the greatest degree of toxics reduction achievable in the near term. Thus, EPA promulgated regulations under Subpart J requiring refiners and importers to produce or import gasoline that is no dirtier than the gasoline they produced or imported during the baseline period, and requiring refiners and importers who

did not produce or import gasoline during the baseline period to produce or import gasoline no dirtier than the national annual average toxics emissions during the baseline period (*i.e.,* the MSAT default baseline). *See* 66 FR 17233.

Under the current regulations, refiners and importers who produce or import gasoline for use in Alaska, and/or Hawaii, Puerto Rico or the Virgin Islands who are subject to the MSAT default baseline are, in fact, required to produce or import gasoline that is cleaner than the national annual average during the MSAT baseline period. This is because the MSAT default baseline was determined using both seasonal components of the Complex Model, while parties in the affected areas are required to evaluate their gasoline using only the winter Complex Model (which, as discussed above, gives higher emission values for the same gasoline than if the gasoline were evaluated using both seasonal components of the model). Today's proposed rule corrects this inconsistency while continuing to require such parties to produce or import gasoline that is no more polluting than the average gasoline during the MSAT baseline period, as required under EPA's MSAT regulations. Similarly, parties with individual MSAT baselines will continue to meet the requirements under the Act and EPA's regulations for gasoline produced or imported up to their baseline volume, without being required to produce or import gasoline that is cleaner than their average gasoline during the MSAT baseline period.

For parties with an individual MSAT baseline who produce or import gasoline in excess of their MSAT baseline volume, the MSAT regulations require the excess volume to meet the refiner's or importer's standard under the anti-dumping rule (*i.e.,* excess volume may not be more polluting than the refiner's or importer's individual anti-dumping baseline level). Therefore, we believe it is appropriate for gasoline produced or imported in excess of the MSAT baseline volume to be subject to the anti-dumping baseline that is established for purposes of anti-dumping compliance, as discussed earlier in this notice.

For these reasons, we believe it is appropriate for EPA to permit refiners and importers to modify their MSAT baseline, as described above, consistent with the changes allowed under today's proposed rule for refiners' and importers' anti-dumping baselines, with respect to gasoline sold in Alaska and/or Hawaii, Puerto Rico or the Virgin Islands.

V. Public Participation

EPA desires full public participation in arriving at its final decisions and solicits comments on all aspects of this proposal. Wherever applicable, full supporting data and detailed analysis should also be submitted to allow EPA to make maximum use of the comments. All comments should be directed, by February 3, 2005, to the EPA Air Docket, Docket No. OAR–2003–0010. Any proprietary information being submitted for the Agency's consideration should be markedly distinguished from other submittal information and clearly labeled ''Confidential Business Information.'' Proprietary information should be sent directly to the contact person listed above, and not to the public docket, to ensure that it is not inadvertently placed in the docket. Information thus labeled and directed shall be covered by a claim of confidentiality and will be disclosed by EPA only to the extent allowed and by the procedures set forth in 40 CFR part 2. If no claim of confidentiality accompanies a submission when it is received by EPA, it may be made available to the public without further notice to the commenter.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 1591.17. OMB has approved the information collection requirements contained in the final RFG/anti-dumping rulemaking (*see* 59 FR 7716 (February 16, 1994)) and has assigned OMB control number 2060–0277 (EPA ICR No. 1591.13). EPA ICR 1591.17 associated with this rule will be encompassed in the next renewal of ICR 1591.13.

This proposed rule addresses certain adverse impacts on refiners and importers of conventional gasoline under the current rule and provides refiners and importers parties with additional flexibility to comply with the regulations. The flexibility afforded under this rule is optional. Modest information collection requirements in the form of a one-time only petition to EPA and minimal recordkeeping requirements are required of those refiners who wish to avail themselves of the flexibility provided in this rule.

The estimated hour burden for this rule is 20 hours per petition. The estimated number of petitions is 10. The estimated cost burden for the petition is $60 per hour. The total estimated cost for each respondent is $1,200. The total estimated cost for all respondents is $12,000. We do not anticipate that any burdens will be associated with the additional recordkeeping requirements, since the information required to be retained normally is included on business documents retained by refiners and importers.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of

information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this ICR under Docket ID number OAR–2003–0010. The public docket is available for viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room B 102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www/epa.gov/edocket.* Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number OAR–2003–0010. Also, you can send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after January 4, 2005, a comment to OMB is best assured of having its full effect if OMB receives it by February 3, 2005. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

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 proposed rule on small entities, small entity is defined as: (1) A small business that has not more than 1,500 employees (13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule involves optional provisions intended to promote successful implementation of the requirements for conventional gasoline and to address existing adverse economic impacts of the current rule.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local or tribal governments or the private sector. This proposed rule would impose no enforceable duty on any State, local or tribal governments or the private sector. This proposed rule affects gasoline refiners and importers of conventional gasoline by proposing optional provisions for evaluating the emissions of conventional gasoline in certain situations. This proposed rule would have the effect of reducing the burden of the conventional gasoline regulations on these regulated parties. Therefore, the requirements of the Unfunded Mandates Act do not apply to this proposed action.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule proposes options for evaluating the emissions of conventional gasoline. The requirements of the rule would be enforced by the federal government at the national level. Thus, Executive Order 13132 does not apply to this proposed rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

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.''

This proposed 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 Executive Order 13175. This rule applies to gasoline refiners and importers who supply conventional gasoline. Today's action proposes certain modifications to the federal requirements for conventional gasoline, and does not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, 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.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Acts That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not an economically ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it does not have a significant adverse effect on the supply, distribution, or use of energy. This proposed rule would provide additional flexibility for refiners and importers of conventional gasoline which may allow these regulated parties to better respond to fluctuations in gasoline supply or demand in certain situations.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) 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 proposed rule does not establish new analytical test methods under the RFG and conventional gasoline programs.

VII. Statutory Provisions and Legal Authority

The statutory authority for the actions proposed today comes from section 211(c) and (k) of the CAA (42 U.S.C. 7545(c) and (k)), which allows us to regulate fuels that either contribute to air pollution which endangers public health or welfare or which impairs emission control equipment. Additional support for the procedural aspects of the fuels's controls in today's proposed rule, including the petition requirement, comes from sections 114(a) and 301(a) of the CAA. Today's action is a proposed rulemaking under section 307(d) of the CAA.

List of Subjects in 40 CFR Part 80

Environmental protection, Air pollution control, Fuel additives, Gasoline, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: December 22, 2004.

Michael O. Leavitt,

Administrator.

For the reasons set out in the preamble, part 80 of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 80—REGULATION OF FUEL AND FUEL ADDITIVES

1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7545, and 7601(a).

Subpart E—[Amended]

2. Section 80.91 is amended by revising paragraph (e)(2)(ii)(A) to read as follows:

§ 80.91 Individual baseline determination.

* * * * *

(e) * * *

(2) * * *

(ii) * * *

(A)(*1*) All gasoline produced to meet EPA's 1990 summertime volatility requirements shall be considered summer gasoline. All other gasoline shall be considered winter gasoline, except:

(*2*) Gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands that is subject to an approved petition under § 80.93(d) shall be considered summer gasoline for purposes of paragraph (e) of this section.

* * * * *

3. Section 80.93 is amended by revising paragraph (d) to read as follows:

§ 80.93 Individual baseline submission and approval.

* * * * *

(d) *Requirements for a petition applicable to gasoline produced or imported for use in Alaska, Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands.* (1)(i) Any refiner for any refinery or importer with gasoline produced or imported for use in Alaska in its individual 1990 baseline may petition EPA to establish a separate 1990 baseline for gasoline produced or imported for use in Alaska using the winter Complex Model, and to use the winter statutory baseline values under § 80.91(c)(5) for any gasoline produced or imported for use in Alaska which is

in excess of the refinery's or importer's 1990 volume of gasoline produced or imported for use in Alaska for purposes of determining the refinery's or importer's compliance baseline under § 80.101(f)(4).

(ii) Any refiner for any refinery or importer with an individual 1990 baseline which did not include any gasoline produced or imported for use in Alaska in 1990 may petition EPA to establish a baseline for gasoline produced or imported for use in Alaska, which is the refinery's or importer's winter baseline values, for purposes of determining the refinery's or importer's compliance baseline under § 80.101(f)(3) for any gasoline which the refiner or importer produces or imports for use in Alaska.

(iii) Any refiner or importer subject to the anti-dumping statutory baseline under § 80.91(c)(5) may petition EPA to have the winter statutory baseline values under § 80.91(c)(5) apply for purposes of determining the refinery's or importer's compliance baseline under § 80.101(f)(3) for any gasoline which the refiner or importer produces or imports for use in Alaska.

(2)(i) Any refiner for any refinery or importer with gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and/or the Virgin Islands in its individual 1990 baseline may petition EPA to establish a separate 1990 baseline for gasoline produced or imported for use in these areas using the summer Complex Model, and to use the summer statutory baseline values under § 80.91(c)(5) for any gasoline produced or imported for use in these areas in excess of the refinery's or importer's 1990 volume of gasoline produced or imported for use in these areas, for purposes of determining the refinery's or importer's compliance baseline under § 80.101(f)(4).

(ii) Any refiner for any refinery or importer with an individual 1990 baseline which did not include any gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and/or the Virgin Islands in 1990 may petition EPA to establish a baseline for gasoline produced or imported for use in these areas, which is the refinery's or importer's summer baseline values, for purposes of determining the refinery's or importer's compliance baseline under § 80.101(f)(3) for any gasoline which the refiner or importer produces or imports for use in these areas.

(iii) Any refiner or importer subject to the anti-dumping statutory baseline under § 80.91(c)(5) may petition EPA to have the summer statutory baseline values under § 80.91(c)(5) apply for purposes of determining the refinery's or importer's compliance baseline under § 80.101(f)(3) for any gasoline which the refiner or importer produces or imports for use in Hawaii, the Commonwealth of Puerto Rico, and/or the Virgin Islands.

(iv) Any petition submitted in accordance with paragraphs (d)(2)(i), (d)(2)(ii) or (d)(2)(iii) of this section shall apply to gasoline produced or imported for use in the areas specified, inclusively.

(3) A petition under paragraphs (d)(1) or (d)(2) of this section must include the following:

(i) Identification of the refinery or importer;

(ii) EPA company and facility registration numbers issued under § 80.76;

(iii) Identification of a contact person; and

(iv) For petitions submitted under paragraphs (d)(1)(i) and (d)(2)(i) of this section:

(A) Revised 1990 individual baseline determination wherein the baseline for gasoline produced or imported for use in Alaska has been evaluated using the winter Complex Model, or gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and/or the Virgin Islands has been evaluated using the summer Complex Model, as applicable, with the calculations clearly and fully described and displayed; and

(B) Revised 1990 individual baseline determination for gasoline in the refinery's or importer's original individual 1990 baseline which was not produced or imported for use in Alaska, and/or Hawaii, the Commonwealth of Puerto Rico, and/or the Virgin Islands, inclusive.

(C) Baseline auditor agreement with the revised baseline values.

(4) A petition submitted under this section must be sent in duplicate to: U.S. EPA, Transportation and Regional Programs Division, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

(5) EPA reserves the right to request additional information. If such information is not forthcoming in a timely manner, the petition will not be approved.

4. Section 80.101 is amended by revising paragraphs (f)(2), (f)(4)(iii), (g)(1)(ii)(B), (g)(2) introductory text, (g)(2)(i), and (g)(6), and adding paragraphs (f)(3) and (g)(1)(ii)(C) to read as follows:

§ 80.101 Standards applicable to refiners and importers.

* * * * *

(f) * * *

(2)(i) In the case of any refiner for any refinery or importer for whom the anti-dumping statutory baseline applies under § 80.91, the anti-dumping statutory baseline for each parameter or emissions performance shall be the compliance baseline for that refinery or importer.

(ii) In the case of any refiner for any refinery or importer that has received approval of a petition submitted under § 80.93(d)(1)(iii), the compliance baseline for each emissions performance for that refinery or importer for gasoline produced or imported for use in Alaska shall be the winter statutory baseline value under § 80.45(b)(3), Table 5.

(iii) In the case of any refiner for any refinery or importer that has received approval of a petition submitted under § 80.93(d)(2)(iii), the compliance baseline for each emissions performance for that refinery or importer for gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and/or the Virgin Islands shall be:

(A) The summer statutory baseline value under § 80.45(b)(3), Table 5 for NO_X.

(B) The summer statutory baseline value under § 80.45(b)(3), Table 5 for Toxics less the corresponding value for Benzene under § 80.45(b)(3), Table 4.

(3)(i) In the case of any refiner for any refinery or importer that has received approval of a petition submitted under § 80.93(d)(1)(ii), the compliance baseline for each emissions performance for that refinery or importer for gasoline produced or imported for use in Alaska shall be the refinery's or importer's winter baseline value determined under § 80.91.

(ii) In the case of any refiner for any refinery or importer that has received approval of a petition submitted under § 80.93(d)(2)(ii), the compliance baseline for each emissions performance for that refinery or importer for gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and/or the Virgin Islands shall be the refinery's or importer's summer baseline value determined under § 80.91.

(4) * * *

(iii) Any refiner or importer with gasoline produced or imported for use in Alaska, Hawaii, the Commonwealth of Puerto Rico, or the Virgin Islands in its individual baseline that has received approval of a petition submitted under § 80.93(d), must calculate the compliance baseline for each parameter or emissions performance according to the following formulas:

$$CB_{i,j} = B_{i,j} \times \left(\frac{V_{1990j}}{V_j}\right) + DB_{i,j} \times \left(1 - \frac{V_{1990j}}{V_j}\right) V_j \geq V_{1990j} > 0$$

$$CB_{i,j} = B_{i,j} \; V_j < V_{1990j} \text{ or } V_{1990j} = 0$$

$$CB_i = \frac{CB_{i,1} \times V_1 + CB_{i,2} \times V_2 + CB_{i,3} \times (V_3 - V_r)}{(V_1 + V_2 + V_3 - V_r)}$$

Where:

CB_i = The compliance baseline for parameter or emission performance i

$CB_{i,j}$ = The compliance baseline for parameter or emission performance i applicable to the conventional gasoline in production volume Vj

j is a subscript identifying a portion of gasoline and RBOB produced or imported as follows:

j=1: Conventional gasoline supplied to Hawaii, the Commonwealth of Puerto Rico and the Virgin Islands, if gasoline supplied to these areas is covered by a petition for a separate baseline.

j=2: Conventional gasoline supplied to Alaska, if gasoline supplied to this area is covered by a petition for a separate baseline.

j=3: Conventional gasoline, reformulated gasoline, RBOB and California gasoline produced or imported by a refiner or importer, and not included in portions 1 or 2.

V_j = The averaging period volume for portion j.

V_r = The volume of reformulated gasoline, RBOB and California gasoline included in V_3.

$B_{i,j}$ = The refiner/importer's individual baseline for parameter i applicable to the conventional gasoline in portion j, or the applicable statutory baseline if assigned in lieu of an individual baseline.

$DB_{i,j}$ = The statutory baseline for parameter i applicable to the conventional gasoline in portion j (*i.e.* the annual or seasonal statutory baseline).

V_{1990j} = The 1990 baseline volume applicable to portion j.

(g) * * *

(1) * * *

(ii) * * *

(B) Any refiner for any refinery or importer that has received EPA approval of a petition submitted in accordance with the provisions of § 80.93(d) must use the applicable summer complex model under § 80.45 to evaluate its averaging period gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands.

(C) Any refiner for any refinery or importer that has received EPA approval of a petition submitted in accordance with the provisions of § 80.93(d) must use the applicable winter complex model under § 80.45, using an RVP of 8.7 psi, to evaluate its averaging period gasoline produced or imported for use in Alaska.

(2) In the case of any refiner or importer subject to the anti-dumping statutory baseline, the summer statutory baseline and/or the winter statutory baseline, the refiner or importer shall determine compliance using the following methodology:

(i) Calculate the compliance total for the averaging period for sulfur, T–90, olefins, exhaust benzene emissions, exhaust toxics and exhaust NO_X emissions, as applicable, based upon the anti-dumping statutory baseline value, the summer statutory baseline value, or the winter statutory baseline value, as applicable, for that parameter using the formula specified at 80.67.

* * * * *

(6)(i) The emissions performance of gasoline that has an RVP greater than the RVP required under § 80.27 (''winter gasoline'') shall be determined using the applicable winter complex model under § 80.45, using an RVP of 8.7 psi for compliance calculation purposes under this subpart E.

(ii) Except as provided in paragraph (g)(1)(ii) of this section, the emissions performance of gasoline produced or imported for use in areas that are not subject to the requirements of § 80.27 shall be determined using the applicable winter complex model under § 80.45, using an RVP of 8.7 psi for compliance calculation purposes under this subpart E.

* * * * *

5. Section 80.104 is amended by adding paragraph (a)(2)(xiii) to read as follows:

§ 80.104 Recordkeeping requirements.

* * * * *

(a) * * *

(2) * * *

(xiii) In the case of gasoline subject to the requirements of § 80.101(f)(2)(ii), (f)(2)(iii), (f)(3)(i) or (f)(3)(ii), documents that reflect that the gasoline was produced or imported for use in Alaska, Hawaii, the Commonwealth of Puerto Rico, and/or the Virgin Islands, as applicable.

* * * * *

Subpart J—[Amended]

6. Section 80.825 is amended by revising paragraph (c)(2) to read as follows:

§ 80.825 How is the refinery or importer annual average toxics value determined?

* * * * *

(c) * * *

(2)(i) The toxics value, T_i, of each batch of conventional gasoline, and the annual average toxics value, T_a, for conventional gasoline under this subpart are in milligrams per mile (mg/mile) and volumes are in gallons.

(ii) Any refiner for any refinery or importer that has received EPA approval of a petition submitted in accordance with the provisions of § 80.93(d) shall determine the toxics value, T_i, of each batch of conventional gasoline produced or imported for use in Alaska, and/or Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands in accordance with § 80.101(g)(1)(ii).

* * * * *

7. Section 80.850 is amended by revising paragraph (c) and adding paragraph (d) to read as follows:

§ 80.850 How is the compliance baseline determined?

* * * * *

(c) Any refiner for any refinery or importer with an approved anti-dumping baseline under § 80.93(d)(1) for gasoline produced or imported for use in Alaska, and/or Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands, and for which a conventional gasoline baseline toxics value for such gasoline can be determined according to § 80.915(b)(1) shall determine its compliance baseline applicable to such gasoline according to the following equation:

$$T_{CBase} = \frac{T_{Base} \times V_{Base} + T_{Exist} \times V_{Inc} + T_{SBase} \times V_{SBase} + T_{SExist} \times V_{SInc} + T_{WBase} \times V_{WBase} + T_{WExist} \times V_{WInc}}{V_{Base} + V_{Inc} + V_{SBase} + V_{SInc} + V_{WBase} + V_{WInc}}$$

Where:

TCBase = Compliance baseline toxics value.

TBase = Baseline toxics value for the refinery or importer, calculated according to § 80.915(b)(1) for all gasoline except gasoline produced or imported for use in Alaska, Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands.

VBase = Baseline volume for the refinery or importer, calculated according to § 80.915(b)(2) for all gasoline except gasoline produced or imported for use in Alaska, Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands.

TExist = The refinery's or importer's anti-dumping compliance baseline value for exhaust toxics, in mg/mi, per § 80.101(f) for all gasoline except gasoline produced or imported for use in Alaska, Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands.

VInc = Volume of gasoline produced or imported, excluding the volume of gasoline produced or imported for use in Alaska, Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands during the averaging period, which is in excess of VBase.

TSBase = Baseline toxics value for the refinery or importer, calculated according to § 80.915(e)(2)(i) for gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands.

VSBase = Baseline volume for the refinery or importer, calculated according to § 80.915(e)(2)(ii) for gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands.

TSExist = The refinery's or importer's anti-dumping compliance baseline value for exhaust toxics, in mg/mi, per § 80.101(f) for gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands.

VSInc = Volume of gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands during the averaging period which is in excess of VSBase.

TWBase = Baseline toxics value for the refinery or importer, calculated according to § 80.915(e)(1)(i) for gasoline produced or imported for use in Alaska.

VWBase = Baseline volume for the refinery or importer, calculated according to § 80.915(e)(1)(ii) for gasoline produced or imported for use in Alaska.

TWExist = The refinery's or importer's anti-dumping compliance baseline value for exhaust toxics, in mg/mi, per § 80.101(f) for gasoline produced or imported for use in Alaska.

VWInc = Volume of gasoline produced or imported for use in Alaska during the averaging period which is in excess of VWBase.

(d) If the refinery or importer produced less gasoline during the compliance period than its applicable baseline volume, the value of V_{inc}, V_{SInc} or V_{WInc}, as applicable, will be zero.

8. Section 80.855 is amended by revising paragraph (b)(2) and adding paragraph (b)(3) to read as follows:

§ 80.855 What is the compliance baseline for refineries or importers with insufficient data?

* * * * *

(b) * * *

(2)(i) A refinery or importer which has an approved anti-dumping baseline under § 80.93(d) for gasoline produce or imported for use in Alaska, and that cannot determine an applicable toxics value according to paragraph (b)(1) of this section, shall have the following as its compliance baseline for the purposes of this subpart: 110.72 mg/mile.

(ii) A refinery or importer which has an approved anti-dumping baseline under § 80.93(d) for gasoline produce or imported for use in Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands and that cannot determine an applicable toxics value according to paragraph (b)(1) of this section, shall have the following as its compliance baseline for the purposes of this subpart: 77.82 mg/mile.

(3) By October 31, 2001, EPA will revise by regulation the default baseline values specified in paragraph (b)(1) of this section to reflect the final 1998–2000 average toxics values.

* * * * *

9. Section 80.910 is amended by revising paragraph (a) to read as follows:

§ 80.910 How does a refiner or importer apply for a toxics baseline?

(a)(1) A refiner or importer shall submit an application to EPA which includes the information required under paragraph (c) of this section no later than June 30, 2001, or 3 months prior to the first introduction of gasoline into commerce from the refinery or by the importer, whichever is later.

(2) A refiner or importer shall submit an application to EPA for the purposes of this subpart simultaneously with the submission of a petition under § 80.93(d).

* * * * *

10. Section 80.915 is amended by redesignating paragraphs (e) through (h) as paragraphs (f) through (i) and adding new paragraph (e) to read as follows:

§ 80.915 How are the baseline toxics value and baseline toxics volume determined?

* * * * *

(e)(1)(i) A refiner or importer which is approved for a petition submitted under § 80.910(a)(2) for gasoline produced or imported for use in Alaska shall calculate the applicable toxics baseline value using the following equation:

$$T_{WBase} = \frac{\sum_{i=1}^{n} (V_i \times T_i)}{\sum_{i=1}^{n} V_i} + M$$

Where:

TWBase = Baseline toxics value for gasoline produced or imported for use in Alaska.

Vi = Volume of gasoline batch i produced or imported for use in Alaska between January 1, 1998 and December 31, 2000, inclusive.

Ti = Toxics value of gasoline batch i produced or imported for use in Alaska between January 1, 1998 and December 31, 2000, inclusive.

i = Individual batch of gasoline produced or imported for use in Alaska between January 1, 1998 and December 31, 2000, inclusive.

n = Total number of batches of gasoline produced or imported for use in Alaska between January 1, 1998 and December 31, 2000, inclusive.

M = Compliance margin.

(ii) The baseline volume associated with the baseline value calculated in paragraph (e)(1)(i) of this section shall be calculated using the methodology in paragraph (b)(2) of this section for the gasoline described in paragraph (e)(1)(i) of this section.

(2)(i) A refiner or importer which is approved for a petition submitted under § 80.910(a)(2) for gasoline produced or imported for use in Hawaii, the

Commonwealth of Puerto Rico, and the Virgin Islands shall calculate the applicable toxics baseline value using the following equation:

$$T_{SBase} = \frac{\sum_{i=1}^{n} (V_i \times T_i)}{\sum_{i=1}^{n} V_i} + M$$

Where:

TSBase = Baseline toxics value for gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands.

Vi = Volume of gasoline batch i produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands between January 1, 1998 and December 31, 2000, inclusive.

Ti = Toxics value of gasoline batch i produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands between January 1, 1998 and December 31, 2000, inclusive.

i = Individual batch of gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands between January 1, 1998 and December 31, 2000, inclusive.

n = Total number of batches of gasoline produced or imported for use in Hawaii, the Commonwealth of Puerto Rico, and the Virgin Islands between January 1, 1998 and December 31, 2000, inclusive.

M = Compliance margin.

(ii) The baseline volume associated with the baseline value calculated in paragraph (e)(2)(i) of this section shall be calculated using the methodology in paragraph (b)(2) of this section for the gasoline described in paragraph (e)(2)(i) of this section.

* * * * *

[FR Doc. 05–43 Filed 1–3–05; 8:45 am]

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Chemical mixtures; exemption of List II chemicals acetone, etc.; comments due by 1-14-05; published 12-15-04 [FR 04-27449]

NUCLEAR REGULATORY COMMISSION

Classifed information; access authorization and facility security clearance regulations; comments due by 1-14-05; published 12-15-04 [FR 04-27405]

Environmental statements; availability, etc.:

Fort Wayne State Developmental Center; Open for comments until further notice; published 5-10-04 [FR 04-10516]

SMALL BUSINESS ADMINISTRATION

Disaster loan areas:

Maine; Open for comments until further notice; published 2-17-04 [FR 04-03374]

OFFICE OF UNITED STATES TRADE REPRESENTATIVE

Trade Representative, Office of United States

Generalized System of Preferences:

2003 Annual Product Review, 2002 Annual Country Practices Review, and previously deferred product decisions; petitions disposition; Open for comments until further notice; published 7-6-04 [FR 04-15361]

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:

BAE Systems (Operations) Ltd.; comments due by 1-10-05; published 12-16-04 [FR 04-27511]

Boeing; comments due by 1-10-05; published 11-24-04 [FR 04-26031]

CENTRAIR 101; comments due by 1-14-05; published 12-13-04 [FR 04-27197]

Lockheed; comments due by 1-10-05; published 12-16-04 [FR 04-27520]

Mooney Airplane Co., Inc.; comments due by 1-12-05; published 11-22-04 [FR 04-25595]

Airworthiness standards:

Special conditions—

AMSAFE, Inc.; Cessna Models 172 (R and S), 182 (S, T, and T182T), and 206 (H and T206H); comments due by 1-13-05; published 12-14-04 [FR 04-27358]

Class E airspace; comments due by 1-10-05; published 11-30-04 [FR 04-26345]

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.J. Res. 102/P.L. 108–479

Recognizing the 60th anniversary of the Battle of Peleliu and the end of Imperial Japanese control of Palau during World War II and urging the Secretary of the Interior to work to protect the historic sites of the Peleliu Battlefield National Historic Landmark and to establish commemorative programs honoring the Americans who fought there. (Dec. 21, 2004; 118 Stat. 3905)

H.R. 2457/P.L. 108–480

To authorize funds for an educational center for the Castillo de San Marcos National Monument, and for other purposes. (Dec. 23, 2004; 118 Stat. 3907)

H.R. 2619/P.L. 108–481

Kilauea Point National Wildlife Refuge Expansion Act of 2004 (Dec. 23, 2004; 118 Stat. 3910)

H.R. 3632/P.L. 108–482

Intellectual Property Protection and Courts Amendments Act of 2004 (Dec. 23, 2004; 118 Stat. 3912)

H.R. 3785/P.L. 108–483

To authorize the exchange of certain land in Everglades National Park. (Dec. 23, 2004; 118 Stat. 3919)

H.R. 3818/P.L. 108–484

Microenterprise Results and Accountability Act of 2004 (Dec. 23, 2004; 118 Stat. 3922)

H.R. 4027/P.L. 108–485

To authorize the Secretary of Commerce to make available to the University of Miami property under the administrative jurisdiction of the National Oceanic and Atmospheric Administration on Virginia Key, Florida, for use by the University for a Marine Life Science Center. (Dec. 23, 2004; 118 Stat. 3932)

H.R. 4116/P.L. 108–486

American Bald Eagle Recovery and National Emblem Commemorative Coin Act (Dec. 23, 2004; 118 Stat. 3934)

H.R. 4548/P.L. 108–487

To authorize appropriations for fiscal year 2005 for intelligence and intelligence-related activities of the United States Government, the Community Management Account, and the Central Intelligence Agency Retirement and Disability System, and for other purposes. (Dec. 23, 2004; 118 Stat. 3939)

H.R. 4569/P.L. 108–488

To provide for the development of a national plan for the control and management of Sudden Oak Death, a tree disease caused by the fungus-like pathogen Phytophthora ramorum, and for other purposes. (Dec. 23, 2004; 118 Stat. 3964)

H.R. 4657/P.L. 108–489

District of Columbia Retirement Protection Improvement Act of 2004 (Dec. 23, 2004; 118 Stat. 3966)

H.R. 5204/P.L. 108–490

To amend section 340E of the Public Health Service Act (relating to children's hospitals) to modify provisions regarding the determination of the amount of payments for indirect expenses associated with operating approved graduate medical residency training programs. (Dec. 23, 2004; 118 Stat. 3972)

H.R. 5363/P.L. 108–491

To authorize salary adjustments for Justices and judges of the United States for fiscal year 2005. (Dec. 23, 2004; 118 Stat. 3973)

H.R. 5382/P.L. 108–492

Commercial Space Launch Amendments Act of 2004 (Dec. 23, 2004; 118 Stat. 3974)

H.R. 5394/P.L. 108–493

To amend the Internal Revenue Code of 1986 to modify the taxation of arrow components. (Dec. 23, 2004; 118 Stat. 3984)

H.R. 5419/P.L. 108–494

To amend the National Telecommunications and Information Administration Organization Act to facilitate the reallocation of spectrum from governmental to commercial users; to improve, enhance, and promote the Nation's homeland security, public safety, and citizen activated emergency response capabilities through the use of enhanced 911 services, to further upgrade Public Safety Answering Point capabilities and related functions in receiving E-911 calls, and to support in the construction and operation of a ubiquitous and reliable citizen activated system; and to provide that funds received as universal service contributions under section 254 of the Communications Act of 1934 and the universal service support programs established pursuant thereto are not subject to certain provisions of title 31, United States Code, commonly known as the Antideficiency Act, for a period of time. (Dec. 23, 2004; 118 Stat. 3986)

S. 1301/P.L. 108–495

Video Voyeurism Prevention Act of 2004 (Dec. 23, 2004; 118 Stat. 3999)

S. 2657/P.L. 108–496

Federal Employee Dental and Vision Benefits Enhancement Act of 2004 (Dec. 23, 2004; 118 Stat. 4001)

S. 2781/P.L. 108–497

Comprehensive Peace in Sudan Act of 2004 (Dec. 23, 2004; 118 Stat. 4012)

S. 2856/P.L. 108–498

To limit the transfer of certain Commodity Credit Corporation funds between conservation programs for technical assistance for the programs. (Dec. 23, 2004; 118 Stat. 4020)

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