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Contents

Federal Register

Vol. 70, No. 20

Tuesday, February 1, 2005

Agricultural Marketing Service
NOTICES
Reports and guidance documents; availability, etc.:
National Organic Program; guidance documents; development, issuance and use, 5129–5135

Agriculture Department
See Agricultural Marketing Service
See Animal and Plant Health Inspection Service
See Foreign Agricultural Service
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 5129

Animal and Plant Health Inspection Service
RULES
Exportation and importation of animals and animal products:
Highly pathogenic avian influenza; list of affected regions—
Malaysia, 5043–5044

Arts and Humanities, National Foundation
See National Foundation on the Arts and the Humanities

Centers for Disease Control and Prevention
NOTICES
Reports and guidance documents; availability, etc.:
Assisted reproductive technology programs; pregnancy success rates, 5187–5188

Coast Guard
RULES
Drawbridge operations:
Louisiana, 5048
Ports and waterways safety:
Potomac and Anacostia Rivers, DC and VA; security zone, 5050–5052
Safety and security zones, etc.; list of temporary rules, 5045–5047
St. Croix, U.S. Virgin Islands; security zones, 5048–5050
PROPOSED RULES
Ports and waterways safety:
St. Croix, U.S. Virgin Islands; security zones, 5083–5085

Commerce Department
See Economic Development Administration
See International Trade Administration
See National Institute of Standards and Technology
See National Oceanic and Atmospheric Administration
See Patent and Trademark Office

Corporation for National and Community Service
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 5168

Customs and Border Protection Bureau
NOTICES
Automation program test:
Automated Commercial Environment—
Periodic monthly payment statement process and secure data portal brokerage accounts; eligibility and application requirements, 5199–5200

Defense Department
NOTICES
Federal Acquisition Regulation (FAR):
Agency information collection activities; proposals, submissions, and approvals, 5168–5169
Meetings:
Defense Science Board, 5169–5170
Scientific Advisory Board, 5170
Travel per diem rates, civilian personnel; changes, 5170–5175

Economic Development Administration
NOTICES
Trade adjustment assistance eligibility determination petitions:
C & M Technologies Group, Inc., et al., 5135–5136

Education Department
NOTICES
Postsecondary education:
Accrediting agencies and State approval agencies for vocational and nurse education institutions; national recognition, 5175–5176

Energy Department
See Federal Energy Regulatory Commission

Environmental Protection Agency
RULES
Air quality planning purposes; designation of areas:
New Jersey
CFR correction, 5057–5058
Water pollution; effluent guidelines for point source categories:
Transportation equipment cleaning operations; correction, 5058–5061
PROPOSED RULES
Air quality implementation plans; approval and promulgation; various States:
Washington, 5085–5093
Water pollution; effluent guidelines for point source categories:
Transportation equipment cleaning operations; correction, 5100–5101
Water programs:
Federal Insecticide, Fungicide, and Rodenticide Act; implementation—
Pesticides applied to U.S. waters; statement and guidance, 5093–5100
NOTICES
Agency information collection activities; proposals, submissions, and approvals; extension of comment period, 5178–5180
Meetings:
Good Neighbor Environmental Board, 5180–5181

Executive Office of the President
See Science and Technology Policy Office

Federal Aviation Administration
PROPOSED RULES
Airworthiness directives:
Aerospatiale, 5081–5083
Airbus, 5073–5076
Boeing, 5066–5070
Bombardier, 5078–5081
Empresa Brasileira de Aeronautica S.A. (EMBRAER), 5070–5073, 5076–5078
Saab, 5064–5066
NOTICES
Meetings:
Performance-Based Operations Aviation Rulemaking Committee, 5264–5265

Federal Communications Commission
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 5181–5182

Federal Emergency Management Agency
NOTICES
Disaster and emergency areas:
Indiana, 5200
Ohio, 5200
Statewide per capita impact indicator; increase, 5201

Federal Energy Regulatory Commission
NOTICES
Electric rate and corporate regulation filings, 5176–5178
Applications, hearings, determinations, etc.:
Jersey Central Power & Light Co., et al., 5176

Federal Motor Carrier Safety Administration
NOTICES
Motor carrier safety standards:
Driver qualifications—
Adams, Willie F., vision requirement exemption, 5265–5266

Federal Reserve System
NOTICES
Banks and bank holding companies:
Change in bank control, 5182
Formations, acquisitions, and mergers, 5182–5183
Meetings; Sunshine Act, 5183

Fish and Wildlife Service
PROPOSED RULES
Endangered and threatened species:
Findings on petitions, etc.—
Karst meshweaver, 5123–5128
Salt Creek tiger beetle, 5101–5117
Scimitar-horned oryx, addax, and dama gazelle, 5117–5123
NOTICES
Endangered and threatened species and marine mammal permit applications, 5203–5204
Meetings:
Trinity Adaptive Management Working Group, 5204
Pipeline right-of-way applications:
California, 5204–5205
Reports and guidance documents; availability, etc.:
Annual funding agreements—
Confederated Salish and Kootenai Tribes, MT, 5205–5210

Food and Drug Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 5188–5189

Foreign Agricultural Service
NOTICES
Trade adjustment assistance; applications, petitions, etc.:
Mississippi shrimp producers, 5135

General Services Administration
NOTICES
Federal Acquisition Regulation (FAR):
Agency information collection activities; proposals, submissions, and approvals, 5168–5169

Health and Human Services Department
See Centers for Disease Control and Prevention
See Food and Drug Administration
See National Institutes of Health
NOTICES
Organization, functions, and authority delegations:
Office of Public Health Emergency Preparedness, 5183–5184
Program exclusions; list; corrections, 5184–5187

Homeland Security Department
See Coast Guard
See Customs and Border Protection Bureau
See Federal Emergency Management Agency
See U.S. Citizenship and Immigration Services
RULES
Human Resources Management System; establishment, 5271–5347

Housing and Urban Development Department
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 5202–5203

Indian Affairs Bureau
NOTICES
Irrigation projects; operations and maintenance charges:
Rate adjustments, 5210–5218

Interior Department
See Fish and Wildlife Service
See Indian Affairs Bureau
See Land Management Bureau
See Reclamation Bureau

Internal Revenue Service
RULES
Income taxes:
S corporations; section 1374 effective dates; correction, 5044–5045

International Trade Administration
NOTICES
Antidumping:
Corrosion-resistant carbon steel flat products from—
Japan, 5137–5143
Frozen warmwater shrimp from —
Brazil, 5143–5145
China, 5149–5152
Ecuador, 5156–5158
India, 5147–5149
Thailand, 5145–5147

Vietnam, 5152–5156
Antidumping and countervailing duties:
Administrative review requests, 5136–5137
Grants and cooperative agreements; availability, etc.:
Special American Business Internship Training Program, 5158–5161

Judicial Conference of the United States
NOTICES
Meetings:
Judicial Conference Advisory Committee on—
Bankruptcy, Civil, Criminal Procedure, and Evidence Rules, 5223

Land Management Bureau
NOTICES
Environmental statements; notice of intent:
Powder River Federal Coal Production Region, WY, 5218–5219

National Aeronautics and Space Administration
NOTICES
Federal Acquisition Regulation (FAR):
Agency information collection activities; proposals, submissions, and approvals, 5168–5169

National Council on Disability
NOTICES
Meetings; Sunshine Act, 5223–5224

National Foundation on the Arts and the Humanities
NOTICES
Meetings:
Arts Advisory Panel, 5224

National Highway Traffic Safety Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 5266–5267
Motor vehicle safety standards:
Exemption petitions, etc.—
Bridgestone/Firestone North America Tire, LLC, 5267

National Institute of Standards and Technology
NOTICES
Meetings:
Manufacturing Extension Partnership National Advisory Board, 5161

National Institutes of Health
NOTICES
Meetings:
National Cancer Institute, 5189–5190
National Center on Minority Health and Health Disparities, 5190–5191
National Heart, Lung, and Blood Institute, 5191
National Institute of Allergy and Infectious Diseases, 5193
National Institute of Child Health and Human Development, 5194
National Institute of Dental and Craniofacial Research, 5193
National Institute of Diabetes and Digestive and Kidney Diseases, 5192–5193, 5195
National Institute of General Medical Sciences, 5193–5194
National Institute of Mental Health, 5194–5195
National Institute of Neurological Disorders and Stroke, 5192
National Institute on Deafness and Other Communication Disorders, 5192
National Library of Medicine, 5195–5196
Scientific Review Center, 5196–5199

National Oceanic and Atmospheric Administration
RULES
Fishery conservation and management:
Alaska; fisheries of Exclusive Economic Zone—
Pollock, 5062–5063
Caribbean, Gulf, and South Atlantic fisheries—
Gulf of Mexico and South Atlantic coastal migratory pelagic resources, 5061–5062
PROPOSED RULES
Meetings:
Gulf of Mexico Fishery Management Council, 5128
NOTICES
Grants and cooperative agreements; availability, etc.:
2005 FY funds availability; omnibus notice, 5161–5167
Meetings:
Mid-Atlantic Fishery Management Council, 5167–5168

National Science Foundation
NOTICES
Meetings:
Interagency Arctic Research Policy Committee, 5224

Nuclear Regulatory Commission
NOTICES
Meetings:
New plant licensing; regulatory structure; workshop, 5228–5232
Meetings; Sunshine Act, 5233
Operating licenses, amendments; no significant hazards considerations; biweekly notices, 5233–5254
Reports and guidance documents; availability, etc.:
Standard review plan for review of license renewal applications for nuclear power plants and generic aging lessons learned report; public workshop, 5254–5255
Applications, hearings, determinations, etc.:
South Carolina Electric & Gas Co., 5224–5226
Tennessee Valley Authority, 5226–5228

Patent and Trademark Office
RULES
Patent cases:
Patent Cooperation Treaty applications entering the national stage; fees, 5053–5055

Pension Benefit Guaranty Corporation
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 5255–5258

Personnel Management Office
RULES
Human Resources Management System; establishment, 5271–5347
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 5258

Postal Service
RULES
Domestic Mail Manual:
Letter and flat sized mailpieces; repositionable notes, 5055–5057

Reclamation Bureau
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 5219–5223

Science and Technology Policy Office
NOTICES
Meetings:
National Science and Technology Council; workshop, 5181

Securities and Exchange Commission
NOTICES
Securities:
Suspension of trading—Courtside Products, Inc., 5258–5259
Self-regulatory organizations; proposed rule changes:
Boston Stock Exchange, Inc., 5259–5261
Pacific Exchange, Inc., 5261–5263
Philadelphia Stock Exchange, Inc., 5263–5264

Small Business Administration
NOTICES
Meetings:
Regulatory Fairness Boards—
Region IX; hearing, 5264
Applications, hearings, determinations, etc.:
Bay Partners LS Fund, LP, 5264

State Department
NOTICES
Foreign Operations, Export Financing, and Related Programs Appropriations Act:
Guatemala Armed Forces; human rights certification, 5264

Surface Transportation Board
NOTICES
Rail carriers:
Waybill data; release for use, 5267–5268
Railroad services abandonment:
Railroad Switching Service of Missouri, Inc., 5268

Transportation Department
See Federal Aviation Administration
See Federal Motor Carrier Safety Administration
See National Highway Traffic Safety Administration
See Surface Transportation Board

Treasury Department
See Internal Revenue Service
NOTICES
Meetings:
Federal Tax Reform, President's Advisory Panel, 5268–5269

U.S. Citizenship and Immigration Services
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 5201–5202

Separate Parts In This Issue

Part II
Homeland Security Department; Personnel Management Office, 5271–5347

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

5 CFR
Ch. XCVII.....5272
9701.....5272

9 CFR
94.....5043

14 CFR

Proposed Rules:
39 (7 documents) ...5064, 5066, 5070, 5073, 5076, 5078, 5081

26 CFR
1.....5044

33 CFR
100.....5045
117.....5048
165 (3 documents) 5045, 5048, 5050

Proposed Rules:
165.....5083

37 CFR
1.....5053

39 CFR
111.....5055

40 CFR
81.....5057
442.....5058

Proposed Rules:
52.....5085
122.....5093
442.....5100

50 CFR
622.....5061
679.....5062

Proposed Rules:
17 (3 documents) ...5101, 5117, 5123
622.....5128

Rules and Regulations

Federal Register
Vol. 70, No. 20
Tuesday, February 1, 2005

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

9 CFR Part 94

[Docket No. 04–091–1]

Add Malaysia to List of Regions in Which Highly Pathogenic Avian Influenza Subtype H5N1 Is Considered To Exist

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the regulations concerning the importation of animals and animal products by adding Malaysia to the list of regions in which highly pathogenic avian influenza (HPAI) subtype H5N1 is considered to exist. We are taking this action because there has been an outbreak of HPAI subtype H5N1 in Malaysia. This action is necessary to prevent the introduction of HPAI subtype H5N1 into the United States.

DATES: This interim rule was effective August 7, 2004. We will consider all comments that we receive on or before April 4, 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. 04–091–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 04–091–1.
- *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. 04–091–1'' 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: Dr. Julie Garnier, Staff Veterinarian, Technical Trade Issues Team, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737–1231; (301) 734–5677.

SUPPLEMENTARY INFORMATION:

Background

The Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA or the Department) regulates the importation of animals and animal products into the United States to guard against the introduction of animal diseases. The regulations in 9 CFR parts 93, 94, and 95 (referred to below as the regulations) govern the importation of certain animals, birds, poultry, meat, other animal products and byproducts, hay, and straw into the United States in order to prevent the introduction of various animal diseases, including avian influenza (AI).

There are many strains of AI virus that can cause varying degrees of clinical illness in poultry such as chickens, turkeys, pheasants, quail, ducks, geese, and guinea fowl, as well as a wide variety of other birds. AI viruses can be classified into low pathogenic (LPAI) and highly pathogenic (HPAI) forms based on the severity of the illness they cause. Most AI virus strains are LPAI and typically cause little or no clinical signs in infected birds. However, some LPAI virus strains are capable of mutating under field conditions into HPAI viruses.

HPAI is an extremely infectious and fatal form of the disease for chickens. HPAI can strike poultry quickly without any infection warning signs and, once established, the disease can spread rapidly from flock to flock. HPAI viruses can also be spread by manure, equipment, vehicles, egg flats, crates, and people whose clothing or shoes have come in contact with the virus. HPAI viruses can remain viable at moderate temperatures for long periods in the environment and can survive indefinitely in frozen material. One gram of contaminated manure can contain enough virus to infect 1 million birds.

In some instances, strains of HPAI viruses can be infectious to people. Human infections with AI viruses under natural conditions have been documented in recent years. Since December 2003, a growing number of Southeast Asian countries have reported outbreaks of HPAI responsible for the deaths of millions of birds and at least 22 humans.

The rapid spread of HPAI, with outbreaks occurring at the same time in a number of regions, is historically unprecedented and of growing concern for human and animal health. According to the World Health Organization, particularly alarming is the HPAI strain of most of these outbreaks, H5N1, which has crossed the species barrier and caused severe disease, with high mortality, in humans. The current AI outbreaks have caused significant concern among health authorities worldwide because of the potential for the human and avian flu viruses to swap genes, creating a new virus to which humans would have little or no immunity.

On May 10, 2004 (69 FR 25820–25826, Docket No. 04–011–1), we published an interim rule that amended the regulations to, among other things, establish additional restrictions on the importation of birds and poultry and unprocessed bird and poultry products from regions where HPAI subtype H5N1 is considered to exist. The interim rule also added to the regulations a list of regions (Cambodia, China, Indonesia, Japan, Laos, South Korea, Thailand, and Vietnam) in which HPAI subtype H5N1 is considered to exist.

On August 19, 2004, Malaysia alerted the World Organization for Animal Health and the United States that an outbreak of HPAI subtype H5N1 had occurred in that country. The outbreak occurred in the northeastern State of Kelantan, close to the border with Thailand, a country where the presence of the disease has already been confirmed. Currently, control measures for the disease in Malaysia include depopulation of all poultry and birds within a 1-kilometer radius of the infected flock, quarantine within 10 kilometers of the infected flock, movement restrictions, and clinical surveillance in the State of Kelantan.

Therefore, in order to prevent the introduction of HPAI subtype H5N1 into the United States, we are amending the regulations by adding Malaysia to the list in § 94.6(d) of regions where HPAI subtype H5N1 exists. We are making this action effective retroactively to August 7, 2004, which is the date that Malaysian veterinary authorities estimate to be the date of primary infection. As a result of this action, the importation into the United States of birds, poultry, and unprocessed bird and poultry products from Malaysia is restricted and U.S. origin pet birds and performing or theatrical birds and poultry returning to the United States from Malaysia will be subject to additional permit and quarantine requirements.

Emergency Action

This rulemaking is necessary on an emergency basis to prevent the introduction of HPAI subtype H5N1 into 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.

This rule amends the regulations by adding Malaysia to the list of regions in which HPAI subtype H5N1 is considered to exist. This action is necessary on an emergency basis to prevent the introduction of HPAI, subtype H5N1 into the United States.

The U.S. does not recognize Malaysia as free of exotic Newcastle disease, thus the importation of poultry and non-processed poultry products from Malaysia is restricted. The United States, Canada, and Mexico imported no live poultry, poultry meat, eggs, or feathers from Malaysia in 2003/2004. The only exception was two commercial shipments, consisting of 6,791 and 9,646 pet birds, respectively, which were imported from Malaysia in October 2003 and February 2004. Both shipments consisted of assorted finches. Live birds are quarantined in U.S. ports prior to clearance for entry into the country, during which time testing for infectious diseases, including AI, takes place.

Since no live poultry or poultry products are imported from Malaysia at this time, it is unlikely that this interim rule will have any substantial effects on trade, or on small or large businesses. APHIS also does not anticipate significant changes in program operations, or effects on other Federal agencies, State governments, or local governments.

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 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 in conflict with this rule; (2) has retroactive effect to August 7, 2004; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This 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 9 CFR Part 94

Animal diseases, Imports, Livestock, Meat and meat products, Milk, Poultry and poultry products, Reporting and recordkeeping requirements.

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

■ 1. 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.

§ 94.6 [Amended]

■ 2. In § 94.6, paragraph (d) is amended by adding the word ''Malaysia,'' after the word ''Laos,''.

Done in Washington, DC, this 26th day of January 2005.

Elizabeth E. Gaston,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 05–1796 Filed 1–31–05; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9170]

RIN 1545–BD99

Section 1374 Effective Dates; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document corrects temporary regulations (TD 9170) that were published in the **Federal Register** on Wednesday, December 22, 2004 (69 FR 76612), that provide guidance concerning the applicability of section 1374 to S corporations that acquire assets in carryover basis transactions from C corporations on or after December 27, 1994, and to certain corporations that terminate S

corporation status and later elect again to become S corporations.

DATES: This document is effective on December 22, 2004.

FOR FURTHER INFORMATION CONTACT: Stephen R. Cleary, (202) 622–7750 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final and temporary regulations (TD 9170) that is the subject of this correction are under 1374 of the Internal Revenue Code.

Need for Correction

As published, the final and temporary regulations (TD 9170) contains an error that may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Parts 1

Income Tax, Reporting and recordkeeping requirements.

Correction of Publication

■ Accordingly, 26 CFR Part 1 is corrected by making the following correcting amendment:

PART 1—INCOME TAXES

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

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

■ 2. In § 1.1374–8T, the section heading, and paragraphs (a)(1) and (a)(2) are revised to read as follows:

§ 1.1374–8T 1374(d)(8) transactions (temporary).

(a)(1) (Reserved) For further guidance see § 1.1374–8(a).

(2) Section 1374(d)(8) applies to any § 1.1374(d)(8) transaction, as defined in paragraph (a)(1) of this section, that occurs on or after December 27, 1994, without regard to the date of the corporation's election to be an S corporation under section 1362.

* * * * *

Cynthia E. Grigsby,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedures and Administration).

[FR Doc. 05–1734 Filed 1–31–05; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[USCG–2005–20151]

Quarterly Listings; Safety Zones, Security Zones, Special Local Regulations and Regulated Navigation Areas

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary rules issued.

SUMMARY: This document provides required notice of substantive rules issued by the Coast Guard and temporarily effective between October 1, 2004 and December 31, 2004, that were not published in the **Federal Register.** This quarterly notice lists temporary special local regulations, security zones, safety zones, and regulated navigation areas, all of limited duration for which timely publication in the **Federal Register** was not possible.

DATES: This document lists temporary Coast Guard rules that because effective and were terminated between October 1, 2004, and December 31, 2004.

ADDRESSES: The Department of Transportation Docket Management Facility maintains the public docket for this notice. Documents indicated in this notice will be available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20593–0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may electronically access the public docket for this notice on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: For questions on this notice contact LT Jeff Bray, Office of Regulations and Administrative Law, telephone (202) 267–2830. For questions on viewing, or on submitting material to the docket, contact Renee Z. Wright, Acting Program Manager, Docket Operations, telephone (202) 493–0402.

SUPPLEMENTARY INFORMATION: Coast Guard District Commanders and Captains of the Port (COTP) must be immediately responsive to the safety and security needs within their jurisdiction; therefore, District Commanders and COTPs have been delegated the authority to issue certain regulations. Safety Zones may be established for safety or environmental purposes. A safety zone may be stationary and described by fixed limits or it may be described as a zone round a vessel in motion. Security zones limit access to prevent injury or damage to vessels, ports, or waterfront facilities and may also describe a zone around a vessel in motion. Special local regulations are issued to enhance the safety of participants and spectators at regattas and other marine events. Regulated navigation areas established regulations for vessels navigating within the area. Timely publication of these rules in the **Federal Register** is often precluded when a rule responds to an emergency, or when an event occurs without sufficient advance notice. The affected public is, however, informed of these rules through local notices to mariners, press releases, and other means. Moreover, actual notification is provided by Coast Guard patrol vessels enforcing the restrictions imposed by the rule. Because **Federal Register** publication was not possible before the beginning of the effective period, mariners were personally notified of the contents of these special local regulations, security zones, safety zones or regulated navigation areas by Coast Guard officials on-scene prior to any enforcement action. However, the Coast Guard, by law, must publish in the **Federal Register** notice of substantive rules adopted. To meet this obligation without imposing undue expense on the public, the Coast Guard periodically publishes a list of these temporary special local regulations, security zones, safety zones and regulated navigation areas. Permanent rules are not included in this list because they are published in their entirety in the **Federal Register.** Temporary rules are also published in their entirety if sufficient time is available to do so before they are placed in effect or terminated. The safety zones, special local regulations, security zones and regulated navigation areas listed in this notice have been exempted from review and under Executive Order 12866, Regulatory Planning and Review, because of their emergency nature, or limited scope and temporary effectiveness.

The following rules were placed in effect temporarily during the period from October 1, 2004, through December 31, 2004, unless otherwise indicated.

Dated: January 24, 2004.

Steve G. Venckus,

Chief, Office of Regulations and Administrative Law.

DISTRICT QUARTERLY REPORT—4TH QUARTER 2004

District docket	Location	Type	Effective date
01–04–119	Boston, Massachusetts	Safety Zone	10/20/2004.
01–04–130	Portsmouth, NH, Piscataqua River Bridges	Security Zone	10/27/2004.
01–04–131	Monohansett Island, MA	Safety Zone	10/1/2004.
01–04–134	Providence, RI	Safety Zone	10/20/2004.
01–04–135	Boston, Massachusetts	Safety Zone	10/22/2004.
01–04–136	Norwalk River, CT	Safety Zone	10/16/2004.
01–04–150	Long Island, NY	Regulated Nav. Area	12/4/2004.
05–04–180	Morehead City, NC	Special Local Regs	10/2/2004.
05–04–183	Middle River, MD	Special Local Regs	10/2/2004.
05–04–187	West Point, Yorktown, VA	Safety Zone	10/1/2004.
05–04–192	Annapolis, MD	Special Local Regs	11/6/2004.
05–04–194	Baltimore Harbor, MD	Safety Zone	10/8/2004.
05–04–195	Delaware River, NJ	Special Local Regs	10/9/2004.
05–04–199	Delaware River	Security Zone	10/18/2004.
05–04–205	Virginia Beach, VA	Safety Zone	11/2/2004.
05–04–213	Elizabeth River, Norfolk, Virginia	Safety Zone	12/10/2004.
05–04–222	Elizabeth River, Portsmouth, VA	Safety Zone	12/11/2004.
07–04–119	Delray Beach, FL	Special Local Regs	10/15/2004.
07–04–121	Deerfield Beach, FL	Special Local Regs	10/10/2004.
07–04–141	Riveira Beach, FL	Special Local Reg	12/4/2004.
07–04–142	RivieraBeach, FL	Special Local Reg	12/11/2004.
07–04–144	Charleston, SC	Special Local Reg	12/4/2004.
09–04–142	Grosse Pointe Shores, MI	Safety Zone	10/3/2004.
09–04–143	Toledo, OH	Security Zone	10/29/2004.
09–04–144	Chios Pride, Lake Michigan, Menominee, Michigan	Safety Zone	11/29/2004.
09–04–146	Marathon Barge Operations, Rouge River, Detro	Safety Zone	10/13/2004.
09–04–147	Staten Island Ferry 3, Menominee River, Marine	Safety Zone	12/18/2004.
11–04–009	San Francisco Bay, CA	Special Local Regs	10/8/2004.
11–04–013	San Francisco Bay, CA	Special Local Reg	12/30/2004.
13–04–041	Budd Inlet, West Bay, Olympia, Washington	Security Zone	11/17/2004.
13–04–042	Budd Inlet, West Bay, Olympia, Washington	Security Zone	12/1/2004.

COTP QUARTERLY REPORT—4TH QUARTER 2004

COTP docket	Location	Type	Effective date
Baltimore 04–002	Chesapeake Bay, MD	Safety Zone	11/30/2004.
Corpus Christi 04–004	Corpus Christi, TX	Safety Zone	10/22/2004.
Huntington 04–002	Huntington, WV	Safety Zone	10/4/2004.
Louisville 04–010	Curdsville, KY	Safety Zone	11/16/2004.
Memphis 04–003	Caruthersville, AR	Safety Zone	10/9/2004.
Memphis 04–004	Memphis, TN	Safety Zone	10/12/2004.
Memphis 04–005	Benzal, AR	Safety Zone	10/16/2004.
Memphis 04–006	Mississippi River, Tunica, MS	Security Zone	10/12/2004.
Memphis 04–007	North Little Rock, AR	Safety Zone	10/29/2004.
Memphis 04–008	Little Rock, AR	Safety Zone	11/17/2004.
Memphis 04–009	Little Rock, AR	Security Zone	11/18/2004.
Miami 04–105	Bayside Park, Miami, FL	Safety Zone	10/29/2004.
Miami 04–116	Biscayne Bay, Miami, FL	Security Zone	10/29/2004.
Miami 04–140	Bay Front Park, Miami, FL	Safety Zone	11/27/2004.
Miami 04–149	Bay Front Park, Miami, FL	Safety Zone	12/31/2004.
Miami 04–150	Indian Riverside Park, Jensen Beach, FL	Safety Zone	12/31/2004.
Mobile 04–010	Orange Beach, AL	Safety Zone	10/2/2004.
Mobile 04–011	Pascagoula, MS	Safety Zone	10/11/2004.
Mobile 04–015	Panama City, FL	Safety Zone	10/14/2004.
Mobile 04–016	Panama City, FL	Security Zone	10/14/2004.
Mobile 04–017	Panama City, FL	Security Zone	10/14/2004.
Mobile 04–019	Bayou Grande, Pensacola, FL	Security Zone	10/10/2004.
Mobile 04–020	Bayou Chico, Pensacola, FL	Security Zone	10/10/2004.
Mobile 04–023	Pensacola Bay Bridge, Pensacola, FL	Security Zone	10/10/2004.
Mobile 04–024	Fort Walton Beach, FL	Security Zone	10/10/2004.
Mobile 04–025	Fort Walton Beach, FL	Security Zone	10/10/2004.
Mobile 04–026	Niceville, FL	Security Zone	10/10/2004.
Mobile 04–027	Choctawhatchee Bay, Destin, FL	Security Zone	10/10/2004.
Mobile 04–033	Pensacola to St. Marks, FL	Safety Zone	10/5/2004.
Mobile 04–050	Pascagoula, MS	Safety Zone	10/4/2004.
Mobile 04–051	East of Harvey Locks	Safety Zone	10/5/2004.
Mobile 04–054	Pascagoula, MS	Safety Zone	10/8/2004.
Mobile 04–058	Pascagoula, MS	Safety Zone	12/2/2004.
Mobile 04–061	Pensacola, FL	Safety Zone	12/3/2004.
New Orleans 04–031	New Orleans, LA	Safety Zone	10/22/2004.

COTP QUARTERLY REPORT—4TH QUARTER 2004—Continued

COTP docket	Location	Type	Effective date
New Orleans 04–032	New Orleans, LA	Safety Zone	10/29/2004.
New Orleans 04–033	New Orleans, LA	Safety Zone	10/6/2004.
New Orleans 04–034	New Orleans, LA	Safety Zone	10/10/2004.
New Orleans 04–035	Lafitte, LA	Safety Zone	10/11/2004.
New Orleans 04–036	Natchez, MS	Safety Zone	10/15/2004.
New Orleans 04–037	Vicksburg, MS	Safety Zone	10/16/2004.
New Orleans 04–038	New Orleans, LA	Safety Zone	10/21/2004.
New Orleans 04–040	Algiers Point, LA	Safety Zone	11/19/2004.
New Orleans 04–041	Monroe, LA	Safety Zone	12/4/2004.
Paducah 04–010	Nashville, TN	Safety Zone	10/16/2004.
Paducah 04–012	Knoxville, TN	Safety Zone	11/26/2004.
Paducah 04–013	Willard, IL	Safety Zone	11/27/2004.
Paducah 04–014	Chattanooga, TN	Safety Zone	12/3/2004.
Paducah 04–015	Chattanooga, TN	Safety Zone	12/3/2004.
Paducah 04–016	Paris Landing, TN	Safety Zone	12/5/2004.
Paducah 04–017	Chattanooga, TN	Safety Zone	12/7/2004.
Pittsburgh 04–007	Pittsburgh, PA	Safety Zone	10/29/2004.
Pittsburgh 04–008	Pittsburgh, PA	Safety Zone	10/18/2004.
Pittsburgh 04–009	Chester, WV	Safety Zone	10/3/2004.
Pittsburgh 04–010	Pittsburgh, PA	Security Zone	10/3/2004.
Pittsburgh 04–011	Pittsburgh, PA	Safety Zone	10/2/2004.
Pittsburgh 04–012	Pittsburgh, PA	Safety Zone	10/11/2004.
Pittsburgh 04–013	Pittsburgh, PA	Safety Zone	10/20/2004.
Pittsburgh 04–014	Pittsburgh, PA	Security Zone	10/12/2004.
Pittsburgh 04–016	Rochester, PA	Safety Zone	10/21/2004.
Pittsburgh 04–017	Wheeling, WV	Safety Zone	10/18/2004.
Pittsburgh 04–018	Wheeling, WV	Safety Zone	10/24/2004.
Pittsburgh 04–019	Pittsburgh, PA	Safety Zone	10/23/2004.
Pittsburgh 04–024	Pittsburgh, PA	Safety Zone	10/29/2004.
Pittsburgh 04–025	Wheeling, WV	Safety Zone	10/29/2004.
Pittsburgh 04–026	Pittsburgh, PA	Safety Zone	10/18/2004.
Pittsburgh 04–027	Pittsburgh, PA	Safety Zone	10/11/2004.
Pittsburgh 04–029	Pittsburgh, PA	Safety Zone	10/17/2004.
Pittsburgh 04–030	Pittsburgh, PA	Safety Zone	10/1/2004.
Port Arthur 04–016	Orange, TX	Safety Zone	10/27/2004.
Port Arthur 04–017	Orange, TX	Safety Zone	11/5/2004.
San Diego 04–033	The Bridgewater Channel	Safety Zone	10/29/2004.
San Juan 04–138	Saint Croix	Security Zone	11/14/2004.
Savannah 04–152	Bull Island, SC, and Surrounding Waterways	Security Zone	12/21/2004.
St. Louis 04–032	Pepin, WI	Safety Zone	10/28/2004.
St. Louis 04–033	Hudson, WI	Security Zone	10/10/2004.
St. Louis 04–041	Mississippi River, MO	Safety Zone	10/4/2004.
St. Louis 04–042	St. Louis, MO	Safety Zone	10/14/2004.
St. Louis 04–043	Minneapolis, MN	Safety Zone	10/22/2004.
St. Louis 04–044	Dubuque, IA	Security Zone	10/26/2004.
St. Louis 04–045	La Crosse, WI	Security Zone	10/25/2004.
St. Louis 04–046	Minneapolis, MN	Safety Zone	11/30/2004.
Tampa 04–107	Tampa Bay, FL	Safety Zone	10/1/2004.
Tampa 04–113	Albert Whitted Air Show; Tampa Bay, FL	Safety Zone	10/9/2004.
Tampa 04–117	Tampa Bay, FL	Safety Zone	10/12/2004.
Tampa 04–127	Tampa Bay, FL	Security Zone	10/19/2004.
Tampa 04–128	St. Petersburg, FL	Security Zone	10/22/2004.
Tampa 04–130	Tampa Bay, FL	Security Zone	10/22/2004.
Tampa 04–135	Tampa Bay, FL	Safety Zone	10/26/2004.
Tampa 04–137	Tampa Bay, FL	Safety Zone	11/8/2004.
Tampa 04–147	Tampa Bay, FL	Safety Zone	12/31/2004.

[FR Doc. 05–1761 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–15–M

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–05–010]

Drawbridge Operation Regulations; Gulf Intracoastal Waterway—Bayou Boeuf, Amelia, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the BNSF RR Swing Bridge across Bayou Boeuf, mile 10.2, at Amelia, St. Mary Parish, LA. This deviation allows the bridge to remain closed to navigation for six hours per day Monday through Thursday from February 28 until March 31, 2005. The deviation is necessary to remove and replace the cross ties on the bridge.

DATES: This deviation is effective from 7 a.m. on Monday, February 28, 2005 until 1 p.m. on Thursday, March 31, 2005.

ADDRESSES: Materials referred to in this document are available for inspection or copying at the office of the Eighth Coast Guard District, Bridge Administration Branch, Hale Boggs Federal Building, Room 1313, 500 Poydras Street, New Orleans, Louisiana 70130–3310 between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (504) 589–2965. The Bridge Administration Branch of the Eighth Coast Guard District maintains the public docket for this temporary deviation.

FOR FURTHER INFORMATION CONTACT: David Frank, Bridge Administration Branch, telephone (504) 589–2965.

SUPPLEMENTARY INFORMATION: The BNSF RR has requested a temporary deviation in order to remove and replace the cross ties of the Bayou Boeuf Swing Bridge across Bayou Boeuf, mile 10.2, at Amelia, St. Mary Parish, LA. The repairs are necessary to ensure the safety of trains crossing the bridge. This temporary deviation will allow the bridge to remain in the closed-to-navigation position from 7 a.m. until 1 p.m. Monday through Thursday from February 28, 2005 until March 31, 2005. The bridge may be opened to pass vessels in an emergency after personnel are cleared from the bridge.

As the bridge has no vertical clearance in the closed-to-navigation position, vessels will not be able to transit through the bridge site when the bridge is closed. Navigation at the site of the bridge consists mainly of tows with barges and some recreational pleasure craft. Due to prior experience, as well as coordination with waterway users, it has been determined that this closure will not have a significant effect on these vessels.

In accordance with 33 CFR 117.35(c), this work will be performed with all due speed in order to return the bridge to normal operation as soon as possible. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: January 24, 2005.

Marcus Redford,

Bridge Administrator.

[FR Doc. 05–1762 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP SAN JUAN 05–005]

RIN 1625–AA87

Moving and Fixed Security Zone: Port of Fredericksted, Saint Croix, U.S. Virgin Islands

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary moving and fixed security zone around cruise ships entering, departing, mooring or anchoring at the Port of Fredericksted in Saint Croix, U.S. Virgin Islands. This temporary final rule is a security measure designed to protect cruise ships at this port. All vessels, with the exception of cruise ships, are prohibited from entering the moving and fixed security zone around a cruise ship without the express permission of the Captain of the Port San Juan or a designated representative.

DATES: This rule is effective on January 29, 2005, at 5 a.m., until July 23, 2005.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket COTP San Juan 05–005 and are available for inspection or copying at Prevention Command Office, San Juan, #5 La Puntilla Final, Old San Juan, PR 00901–1800, between 7 a.m. and 3:30 p.m. Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Junior Grade Katiuska Pabon, Prevention Command San Juan at (787) 729–5381.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. Publishing an NPRM, which would incorporate a comment period before a final rule could be issued, would be contrary to the public interest. Immediate action is needed to protect the public, ports and waterways of the United States from potential subversive acts against cruise ships at the Port of Fredericksted.

For the same reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

Background and Purpose

Based on the September 11, 2001, terrorist attacks on the World Trade Center buildings in New York and the Pentagon in Arlington, Virginia, there is an increased risk that subversive activity could be launched from vessels in close proximity to cruise ships entering, departing, mooring or anchoring at any port of call. Following these attacks, national security and intelligence officials have warned that future terrorists attacks are likely and may include maritime interests such as cruise ships. The Captain of the Port San Juan is reducing this risk by preventing unauthorized vessels from entering the moving and fixed security zone around a cruise ship entering, departing, anchoring or mooring at the Port of Fredericksted without the authorization of the Captain of the Port San Juan or designated representative. Concurrent with this temporary final rule, the Coast Guard is promulgating a Notice of Proposed Rulemaking (NPRM), COTP San Juan 05–002, to make these regulations permanent security measures for the Port of Fredericksted and allow public comment on them.

Captain of the Port San Juan can be contacted on VHF Marine Band Radio, Channel 16 (156.8 MHz), or by telephone number (787) 289–0739. The United States Coast Guard Communications Center will notify the public via Broadcast Notice to Mariners VHF Marine Band Radio, Channel 22,

when a moving and fixed security zone is activated around a cruise ship at Fredericksted.

Discussion of Rule

This temporary final rule is a security measure to protect cruise ships entering, departing, mooring or anchoring at the Port of Fredericksted, St. Croix, U.S. Virgin Islands. The moving and fixed security zone that surrounds a cruise ship is activated when an arriving cruise ship is within one nautical mile of the west end of the Fredericksted Pier and is deactivated when a departing cruise ship is beyond one nautical mile from the west end of the Fredericksted Pier. All vessels are prohibited from entering the fixed and moving security zone that extends in a 50-yard radius around a cruise ship without the express permission of the Captain of the Port San Juan when the zone is activated.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). The Coast Guard expects the economic impact of this security zone to be minimal, because entry into the security zone is prohibited for a limited time. Additionally, vessels may be allowed to enter the security zone with the express permission of the Captain of the Port San Juan or designated representative.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic effect upon a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor at the Port of Fredericksted, St. Croix, U.S. Virgin Islands, when a fixed or moving security zone around a cruise ship is in effect. This rule will be in effect for a limited time. Vessels may be allowed to enter the security zone with the express permission of the Captain of the Port San Juan or a designated representative. Finally, we will issue maritime advisories that will be widely available when we expect a security zone to go into effect.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process. If the rule will affect your small business, organization, or government jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** for assistance in understanding this rule.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, 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.

Energy Effects

We have analyzed this 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. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use

voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design or operation; test methods; sampling procedures; and related management system practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation.

Under figure 2–1, paragraph (34)(g), of the Instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' (CED) are not required for this rule.

List of Subjects in 33 CFR Part 165

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

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. From January 29, 2005, at 5 a.m., until July 23, 2005, add a new temporary § 165.T07–05–005 to read as follows:

§ 165.T07–05–005 Moving and Fixed Security Zone, Port of Fredericksted, Saint Croix, U.S. Virgin Islands.

(a) *Location.* A moving and fixed security zone is established that surrounds all cruise ships entering, departing, mooring or anchoring in the Port of Fredericksted, Saint Croix, U.S. Virgin Islands. The security zone extends from the cruise ship outward and forms a 50-yard radius around the vessel, from surface to bottom. The security zone for a cruise ship entering port is activated when the vessel is within one nautical mile west of the Fredericksted Pier lights. The security zone for a vessel is deactivated when the cruise ship is beyond one nautical mile west of the Fredericksted Pier lights. The Fredericksted Pier lights are at the following coordinates: 17°42′55″ N, 64°42′55″ W. All coordinates are North American Datum 1983 (NAD 1983).

(b) *Regulations.* All vessels, with the exception of cruise ships, are prohibited from entering the moving and fixed security zone around a cruise ship without the express permission of the Captain of the Port San Juan or designated representative. Persons desiring to transit through a security zone may contact the Captain of the Port San Juan who can be reached on VHF Marine Band Radio, Channel 16 (156.8 MHz) or by calling (787) 289–0739, 24-hours-a-day, 7-days-a-week. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or designated representative.

(c) *Definition.* As used in this section, *cruise ship* means a passenger vessel greater than 100 feet in length that is authorized to carry more than 150 passengers for hire, except for a ferry.

(d) *Effective period.* This section is effective from 5 a.m. on January 29, 2005, until July 23, 2005.

Dated: January 24, 2005.

D.P. Rudolph,

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

[FR Doc. 05–1753 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD05–05–004]

RIN 1625–AA87

Security Zone; Potomac and Anacostia Rivers, Washington, DC and Arlington and Fairfax Counties, VA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary security zone encompassing the waters of the Potomac and Anacostia Rivers in order to safeguard high-ranking public officials from terrorist acts and incidents. This action is necessary to ensure the safety of persons and property, and prevent terrorist acts or incidents. This rule prohibits vessels and people from entering the security zone and requires vessels and persons in the security zone to depart the security zone, unless specifically exempt under the provisions in this rule or granted specific permission from the Coast Guard Captain of the Port Baltimore.

DATES: This rule is effective from 8 a.m. eastern standard time on February 2, 2005 through 8 a.m. eastern standard time on February 3, 2005.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket CGD05–05–004 and are available for inspection or copying at Commander, Coast Guard Activities Baltimore, 2401 Hawkins Point Road, Baltimore, Maryland 21226–1791, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald Houck, Waterways Management Branch, at Commander, Coast Guard Activities Baltimore, 2401 Hawkins Point Road, Baltimore, Maryland 21226–1791, telephone number (410) 576–2674.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM and for making this rule effective less than 30 days after publication in the **Federal Register.** The Department of Homeland Security designated the 2005 State of the Union Address a National Special Security Event (NSSE) on January 7, 2005. The Coast Guard is establishing this security zone to support the United States Secret Service, the designated lead Federal agency for an NSSE, in their efforts to coordinate security operations and establish a secure environment for this highly visible and publicized event. This temporary security zone of short duration is necessary to provide for the security of high-ranking United States officials and the public at large. Additionally, the publication of an NPRM is contrary to the public interest as our Nation continues its heightened security posture. Therefore, immediate action is

required to address the ongoing threat to U.S. national interests.

For the same reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The measures contemplated by the rule are intended to protect the public by preventing waterborne acts of terrorism, which terrorists have demonstrated a capability to carry out. Immediate action is needed to defend against and deter these terrorist acts. Any delay in the effective date of this rule is contrary to public and national interests.

Background and Purpose

The U.S. Maritime Administration (MARAD) in Advisory 02–07 advised U.S. shipping interests to maintain a heightened state of alert against possible terrorist attacks. MARAD more recently issued Advisory 03–06 informing operators of maritime interests of increased threat possibilities to vessels and facilities and a higher risk of terrorist attack to the transportation community in the United States. The ongoing hostilities in Afghanistan and Iraq have made it prudent for U.S. ports and waterways to be on a higher state of alert because the al Qaeda organization and other similar organizations have declared an ongoing intention to conduct armed attacks on U.S. interests worldwide.

Due to increased awareness that future terrorist attacks are possible the Coast Guard, as lead Federal agency for maritime homeland security, has determined that the Coast Guard Captain of the Port must have the means to be aware of, deter, detect, intercept, and respond to asymmetric threats, acts of aggression, and attacks by terrorists on the American homeland while still maintaining our freedoms and sustaining the flow of commerce. This security zone is part of a comprehensive port security regime designed to safeguard human life, vessels, and waterfront facilities against sabotage or terrorist attacks.

The Captain of the Port is establishing a security zone to address the aforementioned security concerns and to take steps to prevent the catastrophic impact that a terrorist attack against a gathering of high-ranking United States officials at or near the U.S. Capitol Building would have. This temporary security zone applies to all waters of the Potomac River, from the Woodrow Wilson Memorial Bridge upstream to the Key Bridge, and the waters of the Anacostia River downstream from the Highway 50 Bridge to the confluence with the Potomac River, including the waters of the Georgetown Channel Tidal Basin. Vessels underway at the time this security zone is implemented must immediately proceed out of the zone. We will issue Broadcast Notices to mariners to further publicize the security zone and any revisions to the zone. This security zone is issued under authority contained in 50 U.S.C. 191 and 33 U.S.C. 1226.

Except for Public vessels and vessels at berth, mooring or at anchor, this rule temporarily requires all vessels in the designated security zone as defined by this rule to depart the security zone.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to operate or transit on the Potomac River, from the Woodrow Wilson Memorial Bridge upstream to the Key Bridge, or on the waters of the Anacostia River downstream from the Highway 50 Bridge to the confluence with the Potomac River, including the waters of the Georgetown Channel Tidal Basin. This security zone will not have a significant economic impact on a substantial number of small entities due to the lack of seasonal vessel traffic associated with recreational boating and commercial fishing during the effective period. Further, vessels with compelling interests that outweigh the port's security needs may be granted waivers from the requirements of the security zone.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. If your small business or organization would be affected by this final rule and you have questions concerning its provisions or options for compliance, please contact one of the points of contact listed under **FOR FURTHER INFORMATION CONTACT**.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and

Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, 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.

Energy Effects

We have analyzed this 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. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' are not required for this rule.

List of Subjects in 33 CFR Part 165

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

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T05–004 to read as follows:

§ 165.T05–004 Security Zone; Potomac and Anacostia Rivers, Washington, DC and Arlington and Fairfax Counties, Virginia.

(a) *Definitions.* For the purposes of this section—

Captain of the Port Baltimore means the Commander, U.S. Coast Guard Activities Baltimore, Maryland and any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Commander, U.S. Coast Guard Activities Baltimore, Maryland to act as a designated representative on his or her behalf.

State and/or local law enforcement officers means any State or local government law enforcement officer who has the authority to enforce State criminal laws.

(b) *Location.* The following area is a security zone: All waters of the Potomac River, from shoreline to shoreline, bounded by the Woodrow Wilson Memorial Bridge upstream to the Key Bridge, and all waters of the Anacostia River, from shoreline to shoreline, downstream from the Highway 50 Bridge to the confluence with the Potomac River, including the waters of the Georgetown Channel Tidal Basin.

(c) *Regulations.* (1) The general regulations governing security zones found in § 165.33 of this part apply to the security zone described in paragraph (b).

(2) Entry into or remaining in this zone is prohibited unless authorized by the Coast Guard Captain of the Port Baltimore or his designated representative. Except for Public vessels and vessels at berth, mooring, or at anchor, all vessels in this zone are to depart the security zone.

(3) Persons desiring to transit the area of the security zone must first obtain authorization from the Captain of the Port Baltimore. To seek permission to transit the area, the Captain of the Port Baltimore can be contacted at telephone number (410) 576–2693. The Coast Guard vessels enforcing this section can be contacted on VHF Marine Band Radio, VHF channel 16 (156.8 MHz). Upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port Baltimore and proceed at the minimum speed necessary to maintain a safe course while within the zone.

(d) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the zone by Federal, State, and local agencies.

(e) *Effective period.* This section is effective from 8 a.m. eastern standard time on February 2, 2005 through 8 a.m. eastern standard time on February 3, 2005.

Dated: January 20, 2005.

Curtis A. Springer,

Captain, U.S. Coast Guard, Captain of the Port, Baltimore, Maryland.

[FR Doc. 05–1760 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–15–U

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No.: 2005–P–052]

RIN 0651–AB84

Revision of Search and Examination Fees for Patent Cooperation Treaty Applications Entering the National Stage in the United States

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Interim rule.

SUMMARY: Among other changes to patent and trademark fees, the Consolidated Appropriations Act, 2005 (Consolidated Appropriations Act), splits the national fee for Patent Cooperation Treaty (PCT) applications entering the national stage into a separate national fee, search fee and examination fee, during fiscal years 2005 and 2006. The Office is in this notice reducing the search fee and examination fee for certain PCT applications entering the national stage. The Office has implemented the changes to the patent fees provided in the Consolidated Appropriations Act in a separate final rule.

DATES: *Effective Date:* February 1, 2005.

Applicability Date: The changes in this interim rule apply to all international applications entering the national stage under 35 U.S.C. 371 for which the basic national fee specified in 35 U.S.C. 41 is paid on or after December 8, 2004.

Comment Deadline Date: To be ensured of consideration, written comments must be received on or before April 4, 2005. No public hearing will be held.

ADDRESSES: Comments should be sent by electronic mail message over the Internet addressed to *AB84.Comments@uspto.gov.* Comments may also be submitted by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, or by facsimile to (571) 273–7735, marked to the attention of Robert W. Bahr. Although comments may be submitted by mail or facsimile, the Office prefers to receive comments via the Internet. If comments are submitted by mail, the Office prefers that the comments be submitted on a DOS formatted 3½ inch disk accompanied by a paper copy.

Comments may also be sent by electronic mail message over the Internet via the Federal eRulemaking Portal. See the Federal eRulemaking Portal Web site (*http://www.regulations.gov*) for additional instructions on providing comments via the Federal eRulemaking Portal.

The comments will be available for public inspection at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available through anonymous file transfer protocol (ftp) via the Internet (address: *http://www.uspto.gov*). Because comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: Robert W. Bahr, Senior Patent Attorney, Office of the Deputy Commissioner for Patent Examination Policy, by telephone at (571) 272–8800, by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, or by facsimile to (571) 273–7735, marked to the attention of Robert W. Bahr.

SUPPLEMENTARY INFORMATION: The Consolidated Appropriations Act (section 801 of Division B) provides that 35 U.S.C. 41(a), (b), and (d) shall be administered in a manner that revises patent application fees (35 U.S.C. 41(a)) and patent maintenance fees (35 U.S.C. 41(b)), and provides for a separate filing or national fee (35 U.S.C. 41(a)), search fee (35 U.S.C. 41(d)(1)), and examination fee (35 U.S.C. 41(a)(3)) during fiscal years 2005 and 2006. *See* Public Law 108–447, 118 Stat. 2809 (2004). The Consolidated Appropriations Act provides a fee of $500.00 for the search of the national stage of each international application (Section 803(c)(1) of Division B) and a fee of $200.00 for the examination of the national stage of each international application (35 U.S.C. 41(a)(3)(D)) during fiscal years 2005 and 2006.

35 U.S.C. 376 provides that: ''[t]he Director may also refund any part of the search fee, the national fee, the preliminary examination fee and any additional fees, where he determines such refund to be warranted.'' *See* 35 U.S.C. 376(b). Under the authority provided in 35 U.S.C. 376: (1) The Office will refund the entire search fee less $100.00 ($50.00 for small entities) if the search fee as set forth in §§ 1.445(a)(2) and (a)(3) has been paid on the international application to the United States Patent and Trademark Office as an International Searching Authority for all of the claims presented in the application entering the national stage; and (2) the Office will refund $100.00 ($50.00 for small entities) if an international search report on the international application has been prepared and is provided to the Office no later than the time at which the search fee is paid. In addition, under the authority provided in 35 U.S.C. 376, the Office will refund the entire examination fee less $100.00 ($50.00 for small entities) if an international preliminary examination report on the international application prepared by the United States International Preliminary Examining Authority states that the criteria of novelty, inventive step (non-obviousness), and industrial applicability, as defined in PCT Article 33(1) to (4) have been satisfied for all of the claims presented in the application entering the national stage.

Discussion of Specific Rules

Title 37 of the Code of Federal Regulations, Part 1, is amended as follows:

Section 1.492: Section 1.492(b) sets forth the search fees for an international application entering the national stage under 35 U.S.C. 371. Section 1.492(b) is amended to provide that: (1) The search fee for an international application entering the national stage under 35 U.S.C. 371 is $100.00 ($50.00 for a small entity) if the search fee as set forth in §§ 1.445(a)(2) and (a)(3) has been paid on the international application to the United States Patent and Trademark Office as an International Searching Authority for all of the claims presented in the application entering the national stage; (2) the search fee for an international application entering the national stage under 35 U.S.C. 371 is $400.00 ($200.00 for a small entity) if an international search report on the international application has been prepared and is provided to the Office no later than the time at which the search fee is paid; and (3) the search fee for an international application entering the national stage under 35 U.S.C. 371 is $500.00 ($250.00 for a small entity) in all other situations.

Section 1.492(c) sets forth the examination fee for an international application entering the national stage under 35 U.S.C. 371. Section 1.492(c) is amended to provide that: (1) The examination fee for an international application entering the national stage under 35 U.S.C. 371 is $100.00 ($50.00 for a small entity), if an international preliminary examination report on the international application prepared by the United States International Preliminary Examining Authority states that the criteria of novelty, inventive step (non-obviousness), and industrial

applicability, as defined in PCT Article 33(1) to (4), have been satisfied for all of the claims presented in the application entering the national stage; and (2) the examination fee for an international application entering the national stage under 35 U.S.C. 371 is $200.00 ($100.00 for a small entity) in all other situations.

Section 1.496: Section 1.496 is amended to revise its references to § 1.492 to reflect the changes in § 1.492.

Rule Making Considerations

Administrative Procedure Act: Pursuant to its authority under 35 U.S.C. 376(b), the Office has reduced the patent fees set forth in § 1.492 to less than the amount specified in 35 U.S.C. 41. Existing rights and obligations are not otherwise changed. The Office has good cause to implement this fee reduction without prior notice and comment. It is in the public interest to immediately implement the reduced search and examination fees because delay in the adoption of these fee reductions would cause harm to those applicants who currently meet the conditions for entitlement to a fee reduction. Without immediate implementation, applicants who are currently filing search and examination fees in order to avoid abandonment of their applications will be unnecessarily paying higher search and examination fees. The Office believes the public wants these new reduced fees to become effective as soon as possible as the public should benefit from the efficiencies and savings resulting therefrom. In addition, the Office believes that prior notice and comment is unnecessary because it does not expect the public to object to the reduction of search and examination fees. Moreover, the Office does not believe the public needs time to conform its conduct so as to avoid violation of these regulations. In order to give the public the immediate benefit of the Office's decision to reduce specified search and examination fees, the Office finds, pursuant to the authority provided at 5 U.S.C. 553(b)(B), good cause to adopt this change without prior notice and an opportunity for public comment, as such procedures are contrary to the public interest. *See Nat. Customs Brokers & Forwarders Ass'n* v. *U.S.,* 59 F.3d 1219, 1223–24 (Fed. Cir. 1995).

Nothing in this or any other law requires delayed implementation of the fee reductions. 35 U.S.C. 41(g) provides that: ''[n]o fee established by the Director under [35 U.S.C. 41] shall take effect until at least 30 days after notice of the fee has been published in the **Federal Register** and in the Official Gazette of the Patent and Trademark Office.'' Since the reduced search fees and examination fees specified in §§ 1.492(b) and (c) are established by the Office on the basis of the Office's authority under 35 U.S.C. 376(b) (rather than the authority in 35 U.S.C. 41), the thirty-day advance publication requirement of 35 U.S.C. 41(g) does not apply to the reduced search fees and examination fees specified in § 1.492(b) and (c).

Accordingly, the changes in this interim rule may be adopted without prior notice and opportunity for public comment under 5 U.S.C. 553(b) and (c), or thirty-day advance publication under 5 U.S.C. 553(d) or 35 U.S.C. 41(g).

Regulatory Flexibility Act: As prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 (or any other law), neither a regulatory flexibility analysis nor a certification under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are required. *See* 5 U.S.C. 603.

Executive Order 13132: This rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

Executive Order 12866: This rule making has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

Paperwork Reduction Act: This interim rule involves information collection requirements that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collection of information involved in this interim rule has been reviewed and previously approved by OMB under the following control number: 0651–0021. The Office is not resubmitting an information collection package to OMB for its review and approval because the changes in this interim rule do not affect the information collection requirements associated with the information collection under this OMB control number.

Interested persons are requested to send comments regarding this information collection, including suggestions for reducing this burden, to Robert J. Spar, Director, Office of Patent Legal Administration, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450, or to the Office of Information and Regulatory Affairs of OMB, New Executive Office Building, 725 17th Street, NW., Room 10235, Washington, DC 20503, Attention: Desk Officer for the United States Patent and Trademark Office.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of Information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

■ For the reasons set forth in the preamble, 37 CFR part 1 is amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2).

■ 2. Section 1.492 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1.492 National stage fees.

* * * * *

(b) Search fee for an international application entering the national stage under 35 U.S.C. 371 if the basic national fee was not paid before December 8, 2004:

(1) If the search fee as set forth in §§ 1.445(a)(2) has been paid on the international application to the United States Patent and Trademark Office as an International Searching Authority:

By a small entity (§ 1.27(a))	$50.00
By other than a small entity	$100.00

(2) If an international search report on the international application has been prepared and is provided to the Office no later than the time at which the search fee is paid:

By a small entity (§ 1.27(a))	$200.00
By other than a small entity	$400.00

(3) In all situations not provided for in paragraphs (b)(1) or (b)(2) of this section:

By a small entity (§ 1.27(a))	$250.00
By other than a small entity	$500.00

(c) The examination fee for an international application entering the national stage under 35 U.S.C. 371 if the basic national fee was not paid before December 8, 2004:

(1) If an international preliminary examination report on the international application prepared by the United States International Preliminary Examining Authority states that the

criteria of novelty, inventive step (non-obviousness), and industrial applicability, as defined in PCT Article 33(1) to (4) have been satisfied for all of the claims presented in the application entering the national stage:

By a small entity (§ 1.27(a))	$50.00
By other than a small entity	$100.00

(2) In all situations not provided for in paragraph (c)(1) of this section:

By a small entity (§ 1.27(a))	$100.00
By other than a small entity	$200.00

* * * * *

■ 3. Section 1.496 is amended by revising paragraph (b) to read as follows:

§ 1.496 Examination of international applications in the national stage.

* * * * *

(b) A national stage application filed under 35 U.S.C. 371 may have paid therein the examination fee as set forth in § 1.492(c)(1) if it contains, or is amended to contain, at the time of entry into the national stage, only claims which have been indicated in an international preliminary examination report prepared by the United States Patent and Trademark Office as satisfying the criteria of PCT Article 33(1) through (4) as to novelty, inventive step and industrial applicability. Such national stage applications in which the examination fee as set forth in § 1.492(c)(1) has been paid may be amended subsequent to the date of entry into the national stage only to the extent necessary to eliminate objections as to form or to cancel rejected claims. Such national stage applications in which the examination fee as set forth in § 1.492(c)(1) has been paid will be taken up out of order.

Dated: January 24, 2005.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 05–1850 Filed 1–31–05; 8:45 am]

BILLING CODE 3510–16–P

POSTAL SERVICE

39 CFR Part 111

Repositionable Notes on Letter and Flat Sized Mailpieces

AGENCY: Postal Service.

ACTION: Interim rule.

SUMMARY: The Postal Service is implementing an experimental classification, Repositionable Notes (RPNs), as a one-year provisional service allowing mailers to attach a reusable self-adhesive message note to the outside envelope or paper cover of discount First-Class Mail, Standard Mail, or Periodicals rate mailpieces for a fee. RPNs add impact, value, and ultimately a greater return on investment for direct mailers by calling attention to a product or service. This enhanced value to direct mail will provide an opportunity for the Postal Service to drive the growth of direct mail.

DATES: *Effective Date:* This interim rule is effective on April 3, 2005, and expires on April 3, 2006.

FOR FURTHER INFORMATION CONTACT: Donald Lagasse, 202–268–7269; *Donald.T.Lagasse@usps.gov.*

SUPPLEMENTARY INFORMATION: On January 11, 2005, following the recommended decision of the Postal Rate Commission issued on December 10, 2004, the Governors of the Postal Service approved a provisional classification for repositionable notes (RPN). It is important to note that this provisional classification does not change any of the current rate eligibility standards for discount First-Class Mail and Standard Mail letters.

The current standards allow mailers to place RPNs on First-Class Mail and Standard Mail letter-size mailpieces claimed at automation rates at no additional charge. This provisional classification applies a fee to the use of RPNs and expands the current standards to allow RPNs on all letter-size and flat-size mailpieces mailed at discount First-Class Mail, Standard Mail, or Periodicals rates.

To be eligible, RPNs attached to discount First-Class Mail, Standard Mail, or Periodicals rate pieces must meet the standards for RPNs in this interim rule. RPNs must:

- Measure 3 inches by 3 inches, plus or minus ⅛ inch for either dimension.
- Not contain phosphorescent or red fluorescent colorants.
- Not be manually affixed.
- Be adhered with a ¾ inch (plus ¾ inch or minus 1/16 inch) adhesive strip across the top portion on the reverse side of the note.
- Not be placed in a manner that interferes with the delivery address, rate markings, or postage.
- Not display a specific address or ZIP Code. References to general landmarks are permissible.

In addition to the physical standards stated above, the written and graphic characteristics of the information appearing on RPNs are considered when determining eligibility of mailpieces mailed at Standard Mail and Nonprofit Standard Mail rates.

In addition to the postage for the host piece, the rates for RPNs are as follows:

- $0.005 (½cent) per piece for RPNs attached to discount First-Class Mail letter- or flat-size pieces.
- $0.015 (1½ cents) per piece for RPNs attached to Standard Mail or Periodicals letter- or flat-size pieces.

Again, note that current rate eligibility standards for discount First-Class Mail and Standard Mail letter-size mailpieces are staying the same.

This provisional service will be implemented on April 3, 2005, and expire on April 3, 2006. The Postal Service will give notice before expiration about whether the service will be allowed to expire, made permanent, or extended in some way.

Accordingly, the Postal Service hereby adopts the following regulations on an interim basis. Although exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 410 (a)), the Postal Service invites comments on the following revisions to the Domestic Mail Manual, incorporated by reference in the Code of Federal Regulations. See 39 CFR Part 111.

List of Subjects in 39 CFR Part 111

Administrative Practice and Procedure, Postal Service.

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 3001–3011, 3201–3219, 3403–3406, 3621, 3626, 5001.

■ 2. Revise the following sections of the Domestic Mail Manual (DMM) as set forth below:

C Characteristics

* * * * *

C800 Automation-Compatible Mail

* * * * *

C810 Letters and Cards

* * * * *

7.0 REPOSITIONABLE NOTES

[Remove C810.7 and all subsections. This will be moved to the G900 section in order to change this service to an experiment.]

* * * * *

G General Information

* * * * *

G000 The USPS and Mailing Standards

* * * * *

G040 Information Resources

* * * * *

G043 Address List for Correspondence

[Remove address for Product Management—Correspondence and Transactions.]

* * * * *

G900 Experimental Classification and Rate Filings

* * * * *

G990 Experimental Classifications and Rates

* * * * *

[Add new G994 to read as follows:]

G994 Repositionable Notes

1.0 USE

a. Repositionable Notes (RPN) may be attached to letter- and flat-size discount First-Class Mail, Standard Mail, and Periodicals mailpieces.

b. For letter-size mailpieces, a single RPN may be attached only to the address side of the mailpiece.

c. For flat-size mailpieces, a single RPN may be attached to either the address side or non-address side of the mailpiece and attached in the locations described and shown in Exhibits 3.0a and 3.0b.

d. RPNs are included as an integral part of the mailpiece for weight and postage rate computation purposes.

e. The written and graphic characteristics of the notes are considered when determining eligibility of mailpieces mailed at the Standard Mail and Nonprofit Standard Mail rates.

2.0 MAILPIECE CHARACTERISTICS

Each mailpiece must:

a. Not be in a plastic wrapper (*e.g.*, polybag, polywrap, or shrinkwrap).

b. Be letter-size (including cards) or flat-size.

3.0 RPN CHARACTERISTICS

RPNs must:

a. Measure 3 inches by 3 inches, plus or minus 1/8 inch for either dimension.

b. Not contain phosphorescent or red fluorescent colorants.

c. Be adhered with a 3/4 inch (plus 1/4 inch or minus 1/16 inch) adhesive strip across the top portion on the reverse side of the note.

d. Not be placed in a manner that interferes with the delivery address, rate markings, or postage and must not display a specific address or ZIP Code. References to general landmarks are permissible.

e. Not be manually affixed.

f. On letter-size mailpieces, be positioned parallel with the length of the piece, affixed by standard labeling equipment, placed no closer than 3/8 inch from the left edge of the delivery address, and be at least 1/2 inch (plus or minus 1/8 inch) from the bottom and left edges of the mailpiece.

g. On flat-size mailpieces, be positioned according to Exhibit 3.0a if the RPN is placed on the address side of the flat or Exhibit 3.0b if the RPN is placed on the non-addressed side of the mailpiece.

Exhibit 3.0a Placing RPNs on Flats—Address Side

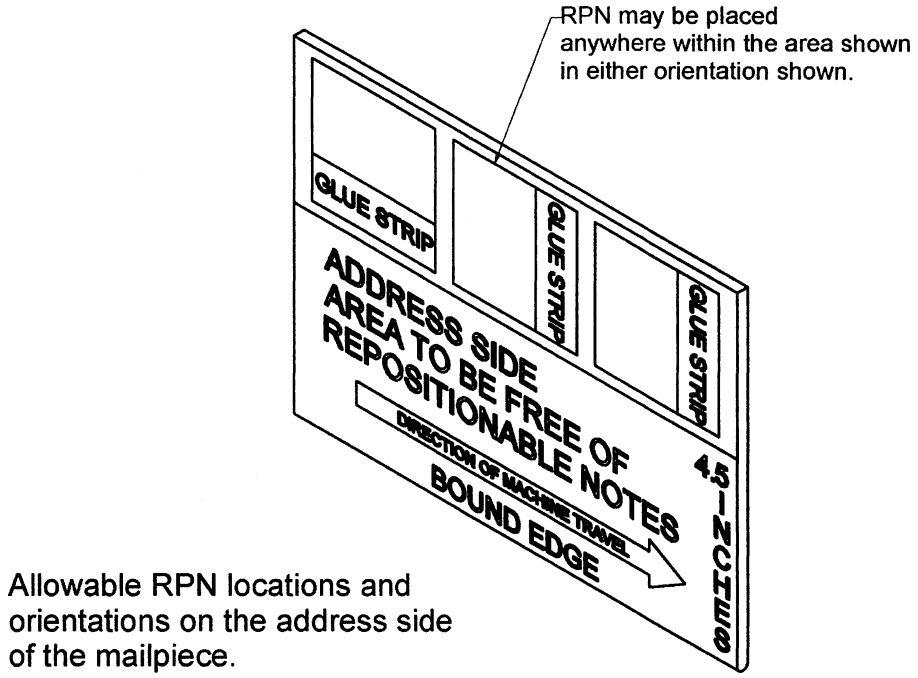
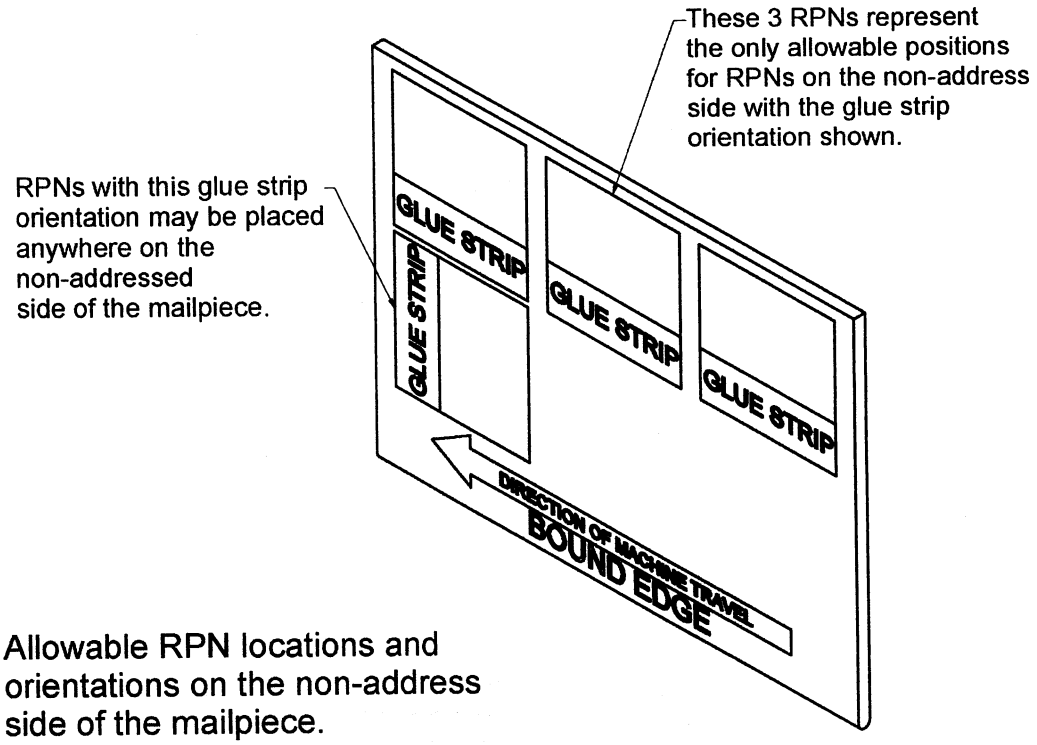


Exhibit 3.0b Placing RPNs on Flats—Non-address Side



4.0 RPNs ON AUTOMATION-RATE MAILPIECES

4.1 Letter-Size Pieces

Letter-size mailpieces with RPNS claiming automation rates must meet the standards in 1.0–3.0, C810, and the following additional standards:

a. Each mailpiece must be rectangular and have a surface smoothness of 195 Shefield Units or smoother.

b. Enveloped mailpieces. Each mailpiece prepared in an envelope must be constructed from paperstock having a basis weight of 20 pounds or greater. Window envelopes must have a closed panel made of polystyrene or glassine. Each enveloped mailpiece is limited to the following dimensions:

(1) For height, no less than 4⅛ inches and no more than 6 inches high.

(2) For length, no less than 8 inches and no more than 9½ inches long.

(3) For thickness, no less than 0.02 inch and no more than 0.125 inch thick.

c. Oversize cards. Each mailpiece prepared as an oversize card is limited to the following dimensions:

(1) For height, no less than 4½ inches and no more than 6 inches high.

(2) For length, no less than 8½ inches and no more than 9 inches long.

(3) For thickness, no less than 0.009 inch thick (cards 5¾ inches or more in height must be no less than 0.012 inch thick.)

4.2 Flat-Size Pieces

Flat-size mailpieces with RPNs claiming automation rates must meet the standards in 1.0–3.0 and C820:

5.0 RATES

Discount First-Class Mail—$0.005

Standard Mail and Periodicals—$0.015

6.0 COMPLIANCE

Mailers must comply as follows:

a. Repositionable notes must be obtained from an approved repositionable notes vendor (see *www.usps.com* for a listing of approved vendors). Prospective vendors can obtain USPS standards and test procedures from USPS Engineering (see G043 for address). Testing must be performed by a certified independent laboratory.

b. Mailers must present evidence at the time of mailing to show that their repositionable notes have been supplied by an approved vendor. The vendor name on the reverse of the note will be sufficient as evidence; in lieu of the vendor name printed on the notes, an invoice from the approved vendor for purchase of the repositionable notes will constitute such evidence.

c. Each mailing must include, as part of the mailing, two pieces addressed to the manager, USPS Engineering Letter Tech (Attn: RPN Sample), and two pieces addressed to the Manager, Pricing and Classification Service Center (Attn: RPN Sample). See G043 for addresses.

* * * * *

An appropriate amendment to 39 CFR part 111 will be published to reflect these changes.

Neva Watson,

Attorney, Legislative.

[FR Doc. 05–1699 Filed 1–31–05; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; State of New Jersey

CFR Correction

In Title 40 of the Code of Federal Regulations, Parts 81 to 85, revised as of July 1, 2004, in § 81.331, on page 274, in the table for New Jersey—Carbon Monoxide, the entry for the New York-N. New Jersey-Long Island Area is revised to read as follows:

§ 81.331 New Jersey.

* * * * *

NEW JERSEY—CARBON MONOXIDE

Designated Area	Designation		Classification	
	Date [1]	Type	Date [1]	Type
* *	*	*	*	* *
New York-N. New Jersey-Long Island Area:				
Bergen	October 22, 2002	Attainment.		
Essex County	.....do	Attainment.		
Hudson County	.....do	Attainment.		
Passaic County (part)				
City of Clifton	.....do	Attainment.		
City of Paterson	.....do	Attainment.		
City of Passaic	.....do	Attainment.		
Union County	.....do	Attainment.		
* *	*	*	*	* *

[1] This date is November 15, 1990, unless otherwise noted.

* * * * *

[FR Doc. 05–55500 Filed 1–31–05; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 442

[OW–2004–11; FRL–7866–7]

RIN 2040–AE65

Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards for the Transportation Equipment Cleaning Point Source Category

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to correct a typographical error in the Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards for the Transportation Equipment Cleaning Point Source Category. The regulatory language of the Pretreatment Standards for New Sources in the existing regulation refers to ''any existing source'' when it should say ''any new source.'' EPA is amending the language to correct this error.

DATES: This rule is effective on May 2, 2005 without further notice, unless EPA receives adverse comment by April 4, 2005. If we receive such comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. OW–2004–11, 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.
- Mail: Water Docket, Environmental Protection Agency, Mailcode: 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- Hand Delivery: Water Docket, 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. OW–2004–11. 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.

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 Water Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 to 4:30, Monday through Friday, excluding legal holidays. 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 Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: Mr. Jesse W. Pritts, Engineering and Analysis Division, Office of Water (4303T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone

number: (202) 566–1038; fax number: (202) 566–1053; e-mail address: *pritts.jesse@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information

A. What Entities Are Potentially Affected by This Final Rule?

Entities potentially affected by this action include facilities that discharge wastewater from transportation equipment cleaning activities and include the following types:

Category	Examples of regulated entities	Examples of common North American Industry Classification System (NAICS) codes
Industry	Facilities that generate wastewater from cleaning the interior of tank trucks, rail tank cars, intermodal tank containers, tank barges, or ocean/sea tankers used to transport materials or cargos that come into direct contact with tank or container interior, except where such tank cleanings are performed in conjunction with other industrial, commercial, or POTW operations.	311613, 311711, 311712, 311222, 311223, 311225, 484121, 484122, 484210, 484230, 488390, 488490.

EPA does not intend the preceding table to be exhaustive, but rather it provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the applicability criteria listed at 40 CFR 442.1. If you still have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What Process Governs Judicial Review for Today's Final Rule?

In accordance with 40 CFR 23.2, today's rule is considered promulgated for the purposes of judicial review as of 1 p.m. Eastern Daylight Time, February 15, 2005. Under section 509(b)(1) of the Clean Water Act (CWA), judicial review of today's effluent limitations guidelines and standards may be obtained by filing a petition in the United States Circuit Court of Appeals for review within 120 days from the date of promulgation of these guidelines and standards. Under section 509(b)(2) of the CWA, the requirements of this regulation may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

I. Legal Authority

The U.S. Environmental Protection Agency is promulgating these regulations under the authority of sections 301, 304, 306, 307, 308, 402, and 501 of the Clean Water Act, 33 U.S.C. 1311, 1314, 1316, 1317, 1318, 1342, and 1361 and under authority of the Pollution Prevention Act of 1990 (PPA), 42 U.S.C. 13101 *et seq.*, Public Law 101–508, November 5, 1990.

II. Summary of Direct Final Rule

On August 14, 2000 (65 FR 49666), EPA published effluent limitations and standards for the transportation equipment cleaning point source category. The rule contained a typographical error. The regulatory language of the Pretreatment Standards for New Sources in 40 CFR 442.16(b) refers to ''any existing source'' when it should say ''any new source.'' In correcting this error, EPA is not substantively altering the final rule or expanding any regulatory requirement. Section 442.16(b) clearly applies to pretreatment standards for new sources, and therefore the use of the word ''existing'' instead of ''new'' in this paragraph was simply a typographical error.

EPA is publishing this rule without prior proposal because we view this as a noncontroversial correction and anticipate no adverse comment. This rule is noncontroversial because it does not change the requirements of the rule, but merely corrects a typographical error. We would expect no adverse comment on today's action. However, in the ''Proposed Rules'' section of today's **Federal Register**, we are publishing a separate document that will serve as the proposal to revise the Transportation Equipment Cleaning Effluent Limitations Guidelines if adverse comments are filed. This rule will be effective on May 2, 2005 without further notice unless we receive adverse comment by April 4, 2005. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (see 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

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This rule merely corrects technology-based discharge limitations and standards. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (see 40 CFR 422 (August 14, 2000))

under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2040–0235, EPA ICR number 2018.01. The information collection requirements are unchanged by today's action. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672.

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 at 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (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 direct final rule on small entities, small entity is defined as: (1) A small business according to the regulations of the Small Business Administration (SBA) at 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 final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Today's action only corrects a typographical error in the Pretreatment Standards for New Sources and does not change the existing regulations.

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 UMRA section 202, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, UMRA section 205 generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of 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. EPA is required by UMRA section 203 to develop a small government agency plan before it establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments. 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 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. Since this action only corrects a typographical error in an existing regulation, there are no costs associated with this action. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Today's action does not establish any new regulatory requirements, but merely corrects a typographical error in the existing effluent limitations guidelines. Thus, today's rule is not subject to the requirements of section 203 of UMRA.

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 final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The rule corrects a typographical error to existing effluent limitations guidelines for the transportation equipment cleaning industry. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (see 59 FR 22951, November 9, 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.''

This final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. This rule does not establish any new regulatory requirements, but merely

corrects a typographical error to the existing transportation equipment cleaning effluent limitations guidelines. Thus, Executive Order 13175 does not apply to this 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'' (see 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 affect 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 direct final 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: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (see 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 action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 requires that each Federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not exclude persons (including populations) from participation in, deny persons (including populations) the benefits of, or subject persons (including populations) to discrimination under, such programs, policies, and activities because of their race, color, or national origin.

Since this action does not establish any new regulatory requirements but merely corrects a typographical error to the existing transportation equipment cleaning effluent guidelines, there are no environmental justice implications of today's action.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on May 2, 2005.

List of Subjects in 40 CFR Part 442

Environmental protection, Barge cleaning, Rail tank cleaning, Tank cleaning, Transportation equipment cleaning, Waste treatment and disposal, Water pollution control.

Dated: January 26, 2005.

Stephen L. Johnson,

Deputy Administrator.

■ 40 CFR part 442 is amended as follows:

PART 442—AMENDED

■ 1. The authority citation for part 442 continues to read as follows:

Authority: 33 U.S.C. 1311, 1314, 1316, 1317, 1318, 1342 and 1361.

■ 2. Section 442.16 is amended by revising paragraph (b) introductory text to read as follows:

§ 442.16 Pretreatment standards for new sources (PSNS).

* * * * *

(b) As an alternative to achieving PSNS as defined in paragraph (a) of this section, any new source subject to paragraph (a) of this section may have a pollution prevention allowable discharge of wastewater pollutants, as defined in § 442.2, if the source agrees to a control mechanism with the control authority as follows:

* * * * *

[FR Doc. 05–1862 Filed 1–31–05; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 001005281–0369–02; I.D. 012105B]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Closure

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

ACTION: Closure.

SUMMARY: NMFS closes the commercial run-around gillnet fishery for king mackerel in the exclusive economic zone (EEZ) in the southern Florida west coast subzone. This closure is necessary to protect the Gulf king mackerel resource.

DATES: The closure is effective 6 a.m., local time, Friday, January 28, 2005, through 6 a.m., January 17, 2006.

FOR FURTHER INFORMATION CONTACT: Steve Branstetter, telephone: 727–570–5305, fax: 727–570–5583, e-mail: *Steve.Branstetter@noaa.gov*.

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic fish (king mackerel, Spanish mackerel, cero, cobia, little tunny, and, in the Gulf of Mexico only, dolphin and bluefish) is managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP). The FMP was prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils) 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.

Based on the Councils' recommended total allowable catch and the allocation ratios in the FMP, on April 30, 2001 (66 FR 17368, March 30, 2001) NMFS implemented a commercial quota of 2.25 million lb (1.02 million kg) for the eastern zone (Florida) of the Gulf migratory group of king mackerel. That quota is further divided into separate quotas for the Florida east coast subzone and the northern and southern Florida west coast subzones. On April 27, 2000, NMFS implemented the final rule (65 FR 16336, March 28, 2000) that divided the Florida west coast subzone of the eastern zone into northern and southern subzones, and established their separate quotas. The quota implemented for the southern Florida west coast subzone is 1,040,625 lb (472,020 kg). That quota is further divided into two equal quotas of 520,312 lb (236,010 kg) for vessels in each of two groups fishing with run-around gillnets and hook-and-line gear (50 CFR 622.42(c)(1)(i)(A)(*2*)(*i*)).

Under 50 CFR 622.43(a)(3), NMFS is required to close any segment of the king mackerel commercial fishery when its quota has been reached, or is projected to be reached, by filing a notification at the Office of the **Federal Register** for public inspection. NMFS has determined that the commercial quota of 520,312 lb (236,010 kg) for Gulf group king mackerel for vessels using run-around gillnet gear in the southern Florida west coast subzone was reached on Thursday, January 27, 2005. Accordingly, the commercial fishery for king mackerel for such vessels in the southern Florida west coast subzone is closed at 6 a.m., local time, Friday, January 28, 2005, through 6 a.m., January 17, 2006, the beginning of the next fishing season, i.e., the day after the 2006 Martin Luther King Jr. Federal holiday.

The Florida west coast subzone is that part of the eastern zone south and west of 25°20.4′ N. lat. (a line directly east from the Miami-Dade County, FL, boundary). The Florida west coast subzone is further divided into northern and southern subzones. The southern subzone is that part of the Florida west coast subzone which from November 1 through March 31 extends south and west from 25°20.4′ N. lat. to 26°19.8′ N. lat.(a line directly west from the Lee/Collier County, FL, boundary), i.e., the area off Collier and Monroe Counties. From April 1 through October 31, the southern subzone is that part of the Florida west coast subzone which is between 26°19.8′ N. lat. and 25°48′ N. lat.(a line directly west from the Monroe/Collier County, FL, boundary), i.e., the area off Collier County.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B), as such prior notice and opportunity for public comment is unnecessary and contrary to the public interest. Such procedures would be unnecessary because the rule itself already has been subject to notice and comment, and all that remains is to notify the public of the closure. Allowing prior notice and opportunity for public comment is contrary to the public interest because of the need to immediately implement this action in order to protect the fishery since the capacity of the fishing fleet allows for rapid harvest of the quota. Prior notice and opportunity for public comment will require time and would potentially result in a harvest well in excess of the established quota.

For the aforementioned reasons, the AA also finds good cause to waive the 30 day delay in effectiveness of this action under 5 U.S.C. 553(d)(3).

This action is taken under 50 CFR 622.43(a) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 27, 2005.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 05–1802 Filed 1–27–05; 1:47 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 041202339–4339–01; I.D. 012705A]

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 630 of the Gulf of Alaska

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

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for pollock in Statistical Area 630 of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the first seasonal allowance of the pollock interim total allowable catch (TAC) for Statistical Area 630 of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), January 29, 2005, until superseded by the notice of 2005 and 2006 final harvest specifications of groundfish for the GOA, which will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The first seasonal allowance of the pollock interim TAC for Statistical Area 630 of the GOA is 3,091 metric tons (mt) as established by the interim harvest specifications for groundfish of the GOA (69 FR 74455, December 14, 2004).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the first seasonal allowance of the pollock interim TAC in Statistical Area 630 will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 2,891 mt, and is setting aside the remaining 200 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed

fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 630 of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of pollock in Statistical Area 630 of the GOA.

The AA also finds good cause to waive the 30 day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 27, 2005.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 05–1801 Filed 1–27–05; 1:47 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 70, No. 20
Tuesday, February 1, 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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20244; Directorate Identifier 2004–NM–204–AD]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB 2000 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Saab Model SAAB 2000 series airplanes. This proposed AD would require a one-time inspection to detect a broken terminal stud on a main relay of the electrical power generator, and corrective action if necessary. This proposed AD is prompted by disconnection of an electrical power generator during an inspection flight, which was caused by a broken terminal stud on the main relay. We are proposing this AD to prevent a broken terminal stud on the main relay of an electrical power generator, which could reduce the redundancy of electrical power systems, result in increased pilot workload, and contribute to reduced controllability of the airplane.

DATES: We must receive comments on this proposed AD by March 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 Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden.

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–2005–20244; the directorate identifier for this docket is 2004–NM–204–AD.

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

SUPPLEMENTARY INFORMATION:

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–2005–20244; Directorate Identifier 2004–NM–204–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 Luftfartsverket (LFV), which is the airworthiness authority for Sweden, notified us that an unsafe condition may exist on certain Saab Model SAAB 2000 series airplanes. The LFV advises that, during an inspection flight, when electrical loads from one electrical power generator were transferred to a second generator, the second generator disconnected and the airplane was temporarily powered by battery only. Investigation revealed a broken terminal stud on the main generator relay, probably caused by excessive torque when the relay was installed. This condition, if not corrected, could reduce the redundancy of electrical power systems, result in increased pilot workload, and contribute to reduced controllability of the airplane.

Relevant Service Information

Saab has issued Service Bulletin 2000–24–017, dated April 3, 2003. The service bulletin describes procedures for performing a one-time inspection to detect a broken terminal stud on a main relay of the electrical power generator, and corrective action if necessary. The procedures include installing the nuts and washers on the relay terminals using a torque wrench to test the strength of the terminals. If any broken terminal is found, the corrective action is replacing the relay with a new relay. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The LFV mandated the service information and issued Swedish airworthiness directive 1–190, dated April 4, 2003, to ensure the continued

airworthiness of these airplanes in Sweden.

FAA's Determination and Requirements of the Proposed AD

This airplane model is manufactured in Sweden and is type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the LFV has kept the FAA informed of the situation described above. We have examined the LFV'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 Between the Proposed AD and Service Information.''

Differences Between the Proposed AD and Service Information

The Accomplishment Instructions of the referenced service information describe procedures for submitting certain inspection results to the manufacturer. This proposed AD would not require that action.

The service bulletin specifies to inspect the terminal studs, but does not specify what method must be used for this inspection. We have determined that the procedures in the service bulletin should be described as a ''general visual inspection.'' Note 1 has been included in this AD to define this type of inspection.

Costs of Compliance

This proposed AD would affect about 3 airplanes of U.S. registry. The proposed actions would take about 5 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 $975, or $325 per airplane.

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 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):

SAAB Aircraft AB: Docket No. FAA–2005–20244; Directorate Identifier 2004–NM–204–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this AD action by March 3, 2005.

Affected ADs

(b) None.

Applicability:

(c) This AD applies to Saab Model SAAB 2000 series airplanes, certificated in any category, serial numbers –004 through –063 inclusive.

Unsafe Condition

(d) This AD was prompted by disconnection of an electrical power generator during an inspection flight, which was caused by a broken terminal stud on the main relay. We are issuing this AD to prevent a broken terminal stud on the main relay of an electrical power generator, which could reduce the redundancy of electrical power systems, result in increased pilot workload, and contribute to reduced controllability of the airplane.

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.

Inspection and Corrective Actions

(f) Within 6 months after the effective date of this AD, perform a one-time general visual inspection to detect a broken terminal stud on a main relay of the electrical power generator, and perform corrective actions as applicable, by doing all of the actions in the Accomplishment Instructions of Saab Service Bulletin 2000–24–017, dated April 3, 2003. Although the service bulletin specifies to submit certain information to the manufacturer, this AD does not include that requirement.

Note 1: For the purposes of this AD, a general visual inspection is: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

Alternative Methods of Compliance (AMOCs)

(g) 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

(h) Swedish airworthiness directive 1–190, dated April 4, 2003, also addresses the subject of this AD.

Issued in Renton, Washington, on January 21, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1793 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20243; Directorate Identifier 2004–NM–153–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) that applies to certain Boeing Model 747–100, –200, –300, and 747SP series airplanes. The existing AD currently requires certain inspections to find missing or alloy-steel taperlock fasteners (bolts) in the diagonal brace underwing fittings, and corrective actions if necessary. For airplanes with missing or alloy-steel fasteners, the existing AD also mandates replacement of certain fasteners with new fasteners, which constitutes terminating action for certain inspections. This proposed AD would expand the applicability to include additional airplane models and would require a new inspection to determine fastener material and to find missing or broken fasteners, and related investigative/corrective actions if necessary. This proposed AD is prompted by reports indicating that cracked fasteners made of A286 material were found on airplanes that had only fasteners made of A286 material installed in the area common to the diagonal brace underwing fittings. We are proposing this AD to prevent loss of the underwing fitting load path due to missing or damaged alloy-steel or A286 taperlock fasteners, which could result in separation of the engine and strut from the airplane.

DATES: We must receive comments on this proposed AD by March 18, 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.
- *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 Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

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–2005–20243; the directorate identifier for this docket is 2004–NM–153–AD.

FOR FURTHER INFORMATION CONTACT: Nicholas Kusz, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6432; fax (425) 917–6590.

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–2005–20243; Directorate Identifier 2004–NM–153–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 received 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

On June 19, 2001, we issued AD 2001–13–06, amendment 39–12286 (66 FR 34094, June 27, 2001), for certain Boeing Model 747–100, –200, –300, and 747SP series airplanes. That AD requires certain inspections to find missing or alloy-steel taperlock fasteners (bolts) in the diagonal brace underwing fittings; and corrective actions, if necessary. For airplanes with missing or alloy-steel fasteners, that AD also mandates replacement of certain fasteners with new fasteners, which constitutes terminating action for the repetitive inspection. That AD was prompted by a report indicating that broken taperlock fasteners (bolts) were found on the diagonal brace underwing fittings on the outboard strut at the Number 1 and Number 4 engine pylons on a Boeing Model 747–200 series airplane having titanium underwing fittings. We issued that AD to prevent loss of the underwing fitting load path due to missing or damaged alloy-steel taperlock fasteners, which could result in separation of the engine and strut from the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2001–13–06, we have received reports indicating that fractured fasteners have been found on Model 747–200B series airplanes that weren't included in the applicability of the existing AD. The fractured fasteners were made of A286 material, and only fasteners made of that material were installed in the diagonal brace underwing fitting. (After this, this proposed AD refers to fasteners made of A286 material as ''A286 fasteners.'') Previously, cracked or broken A286 fasteners were found only on airplanes that had a combination of alloy-steel and A286 fasteners. Thus, these previous incidents were attributed to overload of the A286 fasteners due to

fracture of adjacent alloy-steel bolts. Fractured alloy-steel or A286 fasteners could lead to loss of the underwing fitting load path, which could result in separation of the engine and strut from the airplane.

Alloy-steel or A286 fasteners may be installed in the diagonal brace underwing fitting on certain Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes. Therefore, all of these models and series may be subject to the unsafe condition revealed on the Boeing Model 747–200B series airplanes.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 747–57A2312, Revision 1, dated April 29, 2004. The service bulletin describes procedures for performing the following actions for the fasteners in the diagonal brace underwing fittings:

- A general visual inspection to ensure that all fasteners are installed and unbroken.
- A magnetic inspection to determine fastener material.
- If any alloy-steel or A286 fastener is found, repetitive ultrasonic inspections for damage of all 10 aft fasteners (regardless of material).
- Replacement of damaged fasteners with new, improved fasteners (including an open-hole eddy current inspection for cracking of the fastener holes, and repair if necessary).
- Replacement of all alloy steel and A286 fasteners with new, improved fasteners (including an open-hole eddy current inspection for cracking of the fastener holes, and repair if necessary), which eliminates the need for the repetitive inspections.

If any damage is found that exceeds certain limits, the service bulletin recommends contacting Boeing for appropriate action.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. This proposed AD would supersede AD 2001–13–06. This proposed AD would retain the requirements of the existing AD. This proposed AD would also expand the applicability of the existing AD and require accomplishing the actions specified in the service bulletin described previously, except as discussed under ''Differences Between the Proposed AD and Service Bulletin.''

Differences Between the Proposed AD and Service Bulletin

The service bulletin specifies a magnetic inspection to detect alloy-steel fasteners. We find that a detailed inspection is also necessary to detect A286 fasteners. For the purposes of this AD, an A286 fastener is any fastener to which the magnet is not attracted, and which cannot be conclusively determined to have a part number that begins with BACB30NX (fasteners of T1 material) or BACB30US (fasteners of Inconel material). This difference has been coordinated with the airplane manufacturer, and it agrees with our determination. If Boeing Alert Service Bulletin 747–57A2312 is revised in the future, the new revision will take into account the proposed requirements of this AD.

If any A286 fastener is found during the inspection to determine material type, the service bulletin specifies that you must do an ultrasonic inspection for damage of all 10 aft fasteners in the diagonal brace underwing fitting. However, this proposed AD would require you to perform an ultrasonic inspection for damage of only alloy-steel and A286 fasteners, unless a cracked (or otherwise damaged) fastener is found. If a cracked or otherwise damaged fastener is found, this proposed AD would require ultrasonic inspection for damage of all 10 aft fasteners. This difference has been coordinated with the airplane manufacturer, and it agrees with our determination. If Boeing Alert Service Bulletin 747–57A2312 is revised in the future, the new revision will take into account the proposed requirements of this AD.

Figure 1 of the service bulletin recommends that you perform a general visual inspection to ensure that all fasteners are installed and unbroken. We have determined that the procedures needed for this inspection constitute a detailed inspection. Note 1 of this AD defines a detailed inspection. This difference has been coordinated with the airplane manufacturer, and it agrees with our determination. If Boeing Alert Service Bulletin 747–57A2312 is revised in the future, the new revision will take into account the proposed requirements of this AD.

Section 1.E., Table 1, of the service bulletin specifies an initial inspection threshold of between 11,000 and 29,000 total flight cycles for the inspection to detect A286 fasteners. Section 1.E. of the service bulletin also specifies a grace period of 18 months after the issue date of Revision 1 of the service bulletin. This proposed AD would require compliance prior to the threshold specified in the service bulletin, or within 18 months after the effective date of the AD, whichever occurs later.

The service bulletin specifies that you may contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require you to repair those conditions in one of the following ways:

- Using a method that the Manager of the Seattle Aircraft Certification Office approves; or
- Using data that meet the certification basis of the airplane that have been approved by an Authorized Representative for the Boeing Delegation Option Authorization Organization who has been authorized by the FAA to make those findings.

Changes to Existing AD

This proposed AD would retain all requirements of AD 2001–13–06. Since AD 2001–13–06 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2001–13–06	Corresponding requirement in this proposed AD
Paragraph (a)	Paragraph (f).
Paragraph (b)	Paragraph (g).
Paragraph (c)	Paragraph (l).
Paragraph (d)	Paragraph (n).

Also, we have changed all references to a ''detailed visual inspection'' in the existing AD to ''detailed inspection'' in this action. Note 1 defines a ''detailed inspection.''

Costs of Compliance

There are about 739 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this proposed AD, at an average labor rate of $65 per work hour.

ESTIMATED COSTS

Action	Work hours	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Detailed and magnetic inspection (required by AD 2001–13–06).	2	None	$130	60	$7,800
Detailed and magnetic inspections (new proposed action).	3	None	195	140	27,300

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 removing amendment 39–12286 (66 FR 34094, June 27, 2001) and adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2005–20243; Directorate Identifier 2004–NM–153–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this airworthiness directive (AD) action by March 18, 2005.

Affected ADs

(b) This AD supersedes AD 2001–13–06, amendment 39–12286 (66 FR 34094, June 27, 2001).

Applicability:

(c) This AD applies to Model 747–100, 747–100B, 747–100B SUD, –200B, 747–200C, 747–200F, 747–300, 747 –400, 747–400D, 747–400F, 747SR, and 747SP series airplanes; certificated in any category; as identified in Boeing Alert Service Bulletin 747–57A2312, Revision 1, dated April 29, 2004.

Unsafe Condition

(d) This AD was prompted by reports indicating that cracked fasteners made of A286 material were found on airplanes that had only fasteners made of A286 material installed in the area common to the diagonal brace underwing fittings. We are issuing this AD to prevent loss of the underwing fitting load path due to missing or damaged alloy-steel or A286 taperlock fasteners, which could result in separation of the engine and strut from the airplane.

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.

Requirements of AD 2001–13–06:

Repetitive Inspections

(f) For Boeing Model 747–100, 747–200, 747–300, and 747SP series airplanes equipped with titanium diagonal brace underwing fittings, as identified in Boeing Alert Service Bulletin 747–57A2312, dated June 15, 2000: Within 12 months after August 1, 2001 (the effective date of AD 2001–13–06, amendment 39–12286), do a one-time detailed inspection of the diagonal brace underwing fitting at the Number 1 and Number 4 engine pylons to find missing taperlock fasteners (bolts), and a magnetic inspection to find alloy-steel fasteners per Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2312, dated June 15, 2000, or Revision 1, dated April 29, 2004.

Note 1: For the purposes of this AD, a detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.''

(1) If no alloy-steel fasteners are found and no fasteners are missing, no further action is required by this paragraph.

(2) If any alloy-steel fasteners are found or any fasteners are missing, before further flight, do an ultrasonic inspection of the alloy-steel fasteners to find damage per Part 2 of the Accomplishment Instructions of the service bulletin.

(i) If no damaged alloy-steel fasteners are found, and no fasteners are missing: Repeat the ultrasonic inspection thereafter at intervals not to exceed 18 months until accomplishment of the terminating action required by paragraph (g) of this AD.

(ii) If any damaged alloy-steel fasteners are found, or any fasteners are missing: Before further flight, do an ultrasonic inspection of all 10 aft fasteners (including non-alloy steel) per Part 2 of the Accomplishment Instructions of the service bulletin. Before further flight, replace damaged and missing fasteners with new fasteners per Part 3 of the Accomplishment Instructions of the service bulletin, except as provided by paragraph (l) of this AD. Thereafter, repeat the inspection of the remaining alloy-steel fasteners at intervals not to exceed 18 months until accomplishment of the terminating action required by paragraph (g) or the optional terminating action specified in paragraph (m) of this AD.

Terminating Action

(g) For Boeing Model 747–100, 747–200, 747–300, and 747SP series airplanes equipped with titanium diagonal brace underwing fittings, as identified in Boeing Alert Service Bulletin 747–57A2312, dated June 15, 2000: Within 48 months after August 1, 2001, do the actions required by paragraphs (g)(1) and (g)(2), or (g)(3) of this AD, per Boeing Alert Service Bulletin 747–57A2312, dated June 15, 2000, or Revision 1, dated April 29, 2004. Accomplishment of the actions specified in this paragraph constitutes terminating action for the repetitive inspection requirements of this AD.

(1) Perform an open-hole high frequency eddy current (HFEC) inspection to detect cracks, corrosion, or damage at the bolt hole locations of the aft 10 taperlock fasteners in the diagonal brace underwing fitting at the Number 1 and Number 4 engine pylons per Part 3 of the Accomplishment Instructions of the service bulletin. If any cracking is detected, before further flight, perform applicable corrective actions per the service bulletin, except as provided by paragraph (l) of this AD.

(2) Before further flight: Replace all 10 aft taperlock fasteners with new, improved fasteners per Part 3 of the Accomplishment Instructions of the service bulletin.

(3) Do an ultrasonic inspection to find damaged fasteners per Part 2 of the Accomplishment Instructions of the service bulletin. Before further flight, replace all damaged non-alloy steel and all alloy-steel fasteners with new fasteners per Part 3 of the Accomplishment Instructions of the service bulletin. Do an open-hole HFEC inspection before installation of the new fasteners; if any cracking, corrosion, or damage is found, before further flight, perform applicable corrective actions per the service bulletin, except as provided by paragraph (l) of this AD.

New Requirements of This AD:

Inspection for Missing/Broken Fasteners and To Determine Material Type

(h) For all fasteners in the diagonal brace underwing fitting at the Number 1 and Number 4 engine pylons: Perform the inspections in paragraphs (h)(1) and (h)(2) of this AD, as applicable.

(1) For airplanes not identified in paragraph (f) of this AD: Within 12 months after the effective date of this AD, perform a detailed inspection to ensure that all fasteners are installed and unbroken, and a magnetic inspection to detect alloy-steel fasteners, in accordance with Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2312, Revision 1, dated April 29, 2004.

(2) For all airplanes: Before the initial inspection threshold specified in Section 1.E., Table 1, of Boeing Alert Service Bulletin 747–57A2312, Revision 1, dated April 29, 2004; or within 18 months after the effective date of this AD; whichever is later; perform detailed and magnetic inspections, as applicable, to detect A286 fasteners in the diagonal brace underwing fitting at the Number 1 and Number 4 engine pylons, as specified in Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2312, Revision 1, dated April 29, 2004. For the purposes of this AD, an A286 fastener is any fastener to which the magnet is not attracted, and which cannot be conclusively determined to be BACB30NX (T1 material) or BACB30US (Inconel material) fasteners.

Ultrasonic Inspection for Damage

(i) For all alloy-steel or A286 fasteners identified during the inspections in accordance with paragraph (h) of this AD: Before further flight, perform an ultrasonic inspection for damage (including, but not limited to, cracking or corrosion) of each alloy-steel and A286 fastener, in accordance with Part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2312, Revision 1, dated April 29, 2004. If any bolt is missing or found damaged during the inspection required by this paragraph: before further flight, perform an ultrasonic inspection for damage of all 10 subject fasteners, in accordance with Part 2 of the Accomplishment Instructions of the service bulletin. Doing the actions required by this paragraph within the compliance time specified in paragraph (f) of this AD eliminates the need to do paragraph (f) of this AD.

Undamaged Fastener: Repetitive Inspections or No Further Action

(j) For any fastener that is found to be installed and undamaged during the inspections required by paragraph (i) of this AD, do paragraph (j)(1), (j)(2), or (j)(3) of this AD, as applicable.

(1) If no damage is found during the inspections required by paragraph (i) of this AD, and all 10 fasteners in the diagonal brace underwing fitting at the Number 1 and Number 4 engine pylons are either BACB30NX or BACB30US fasteners: No further action is required by this AD, though the restrictions of paragraph (n) of this AD, ''Parts Installation,'' apply.

(2) For any undamaged alloy steel fastener: Repeat the ultrasonic inspection specified in paragraph (i) of this AD at intervals not to exceed 18 months, until the actions in paragraph (m) of this AD are done.

(3) For any undamaged A286 fastener: Repeat the ultrasonic inspection specified in paragraph (i) of this AD at intervals not to exceed 8,000 flight cycles, until the actions in paragraph (m) of this AD are done.

Repetitive Ultrasonic Inspections and Corrective Actions

(k) For any missing or damaged fastener found during the inspections required by paragraph (i) or (j) of this AD: Before further flight, install a new, improved fastener in any location where a fastener is missing, and replace any damaged fastener with a new, improved fastener, in accordance with Part 3 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2312, Revision 1, dated April 29, 2004. Do an open-hole HFEC inspection for cracking, corrosion, or damage before installing the new fastener. If any cracking, corrosion, or damage is found: Before further flight, perform applicable corrective actions in accordance with the service bulletin, except as provided by paragraph (l) of this AD.

Repair

(l) If any damage (including but not limited to cracking or corrosion) of the bolt hole that exceeds the limits specified in Boeing Alert Service Bulletin 747–57A2312, Revision 1, dated April 29, 2004, is found during any inspection required by this AD, and the service bulletin specifies to contact Boeing for appropriate action: Before further flight, repair per a method approved by the Manager, Seattle ACO, or according to data meeting the certification basis of the airplane approved by an Authorized Representative for the Boeing Delegation Option Authorization Organization who the Manager, Seattle ACO, has authorized to make this finding. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically reference this AD.

Optional Terminating Action

(m) Replacement of all alloy steel and A286 fasteners with new, improved fasteners in accordance with Part 3 of the Accomplishment Instructions of Boeing Alert Service Bulletin 747–57A2312, Revision 1, dated April 29, 2004 (including performing an open-hole eddy current inspection for cracking of the fastener holes and repairing, as applicable), constitutes terminating action for the repetitive inspection requirements of this AD.

Parts Installation

(n) For Boeing Model 747–100, 747–200, 747–300, and 747SP series airplanes equipped with titanium diagonal brace underwing fittings, as identified in Boeing Alert Service Bulletin 747–57A2312, dated June 15, 2000: As of August 1, 2001, no person may install, on any airplane, a fastener having part number BACB30PE( ) * ( ); or any other fastener made of 4340, 8740, PH13–8 Mo, or H–11 steel; in the locations specified in this AD.

(o) Except as provided by paragraph (n) of this AD, as of the effective date of this AD no person may install, on any airplane, a fastener having part number BACB30PE( ) * ( ); or any other fastener made of 4340, 8740, PH13–8 Mo, A286, or H–11 steel; in the locations specified in this AD.

Alternative Methods of Compliance (AMOCs)

(p)(1) The Manager, Seattle ACO, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane and the approval must specifically refer to this AD.

(3) AMOCs approved previously according to AD 2001–13–06, amendment 39–12286 (66

FR 34094, June 27, 2001), are approved as AMOCs for the inspection requirements of this AD only at fastener locations where the AMOC provided for installing either BACB30NX or BACB30US fasteners.

Issued in Renton, Washington, on January 21, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1794 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–120–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–120 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This document revises an earlier proposed airworthiness directive (AD), applicable to certain EMBRAER Model EMB–120 series airplanes that would have required initial and repetitive calibration testing of potentiometers to detect noisy signals and replacement of only those with noisy signals. This new action revises the proposed AD by reducing the compliance time for the repetitive calibration testing of the potentiometers and adding the requirement for reporting results of the calibration tests of the potentiometers and the readouts of the flight data recorder (FDR) to the airplane manufacturer. The actions specified by this new proposed AD are intended to prevent the potentiometers that provide information on the positions of the primary flight controls to the FDR from transmitting noisy signals or becoming improperly calibrated, resulting in the transmission of incomplete or inaccurate data to the FDR. This lack of reliable data could hamper discovery of the unsafe condition that caused an accident or incident and prevent the FAA from developing and mandating actions to prevent additional accidents or incidents caused by that same unsafe condition. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by February 28, 2005.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–120–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain ''Docket No. 2000–NM–120–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343–CEP 12.225, Sao Jose dos Campos–SP, Brazil. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington.

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

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments, as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2000–NM–120–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–120–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add an airworthiness directive (AD), applicable to certain EMBRAER Model EMB–120 series airplanes, was published as a supplemental notice of proposed rulemaking (NPRM) in the **Federal Register** on March 19, 2003 (68 FR 13239), hereafter referred to as the ''first supplemental NPRM.'' That supplemental NPRM would have required initial and repetitive calibration testing of the potentiometers to detect noisy signals and replacement of only those with noisy signals. Potentiometers that provide information on the positions of the primary flight controls to the flight data recorder (FDR) transmitting noisy signals or becoming improperly calibrated, if not corrected, could result in the transmission of incomplete or inaccurate data to the FDR. This lack of reliable data could hamper discovery of the unsafe condition that caused an accident or incident and prevent the FAA from developing and mandating actions to prevent additional accidents or incidents caused by that same unsafe condition.

Comments Received to the First Supplemental NPRM

Due consideration has been given to the comments received in response to the first supplemental NPRM.

Request To Reduce Compliance Time

The commenter, the National Transportation Safety Board (NTSB), requests that the compliance time interval for the repetitive calibration tests of the potentiometers and the readouts of the FDR in the first supplemental NPRM be changed from 12 months back to the 6 months proposed in the original NPRM. The commenter states that it closed Safety Recommendation A–96–34 in 1998 with an acceptable status, because the original NPRM and the FAA Flight Standards Handbook Bulletin for Airworthiness 97–14 (EMBRAER EMB–120 Flight Data Recorder Test), directed potentiometer calibration testing every 6 months. Since the original NPRM was issued, the commenter points out that the FAA reversed its position on these inspections by proposing to require annual inspections in the first supplemental NPRM. The commenter states it has found sensor failures to be intermittent and believes that, because annual inspections are the typical inspection cycle for FDR systems, they may not reveal a problem and will not provide timely feedback on the effectiveness of the corrective action, possibly resulting in a failed sensor remaining in place for a full year.

The FAA agrees. Sensor failures can be intermittent; therefore, we have determined that annual inspections—the typical inspection cycle for FDR systems—may not reveal a problem in a timely manner and could possibly result in a failed sensor remaining in place for up to a year. We have revised paragraph (b) of this second supplemental NPRM to reduce the compliance time interval for the repetitive calibration tests of the potentiometers and the readouts of the FDR from 12 months back to 6 months.

Request To Include Reporting Requirement

The same commenter states that, if the AD is revised as proposed in the first supplemental NPRM, the only way to properly evaluate the effectiveness of the proposed corrective action is to require an FDR readout and evaluation every 6 months for 2 years, and to submit the results to the FAA for evaluation (as prescribed in the original NPRM). The commenter further asserts that removal of the reporting requirement will eliminate the opportunity for a fleet wide evaluation of the continuing problem.

From these statements, we infer that the commenter is requesting that we revise the first supplemental NPRM to again require operators to report results of their calibration tests of the potentiometers and the readouts of the FDR to us every 6 months for 2 years. We partially agree with the commenter's request. As we explained previously, we have reduced the compliance time for the repetitive interval for the calibration tests of the potentiometers and the readouts of the FDR from 12 months to 6 months. We also agree that the calibration testing and readout results will be valuable for determining whether the proposed corrective actions adequately address the noisy signals, loose couplers, and incorrect calibrations that are found, and for determining the extent of these in the affected fleet. Based on the results of these reports, we may determine that further corrective action is warranted. Therefore, we have revised this second supplemental NPRM to add new a paragraph (f) that would require operators to report results of the initial and repetitive calibration tests of the potentiometers and the readouts of the FDR at intervals not to exceed 6 months for 24 months, and reidentified subsequent paragraphs accordingly.

However, we do not agree that these results should be submitted to the FAA. The airplane manufacturer, EMBRAER, continually monitors the effectiveness of corrective actions and reviews both the corrective actions and their effectiveness with the Centro Technico Aeroespacial (CTA), which is a division of the airworthiness authority for Brazil, during quarterly service difficulty reviews. Therefore, we have determined that the calibration testing and readouts of the FDR should be reported directly to EMBRAER. We will work closely with EMBRAER and the CTA to monitor the effectiveness of the corrective actions specified in this second supplemental NPRM and will determine if further corrective action is warranted based on the results of these reports. No additional change to the second supplemental NPRM is necessary in this regard.

Request To Revise the Method of Compliance

The same commenter requests that the first supplemental NPRM be revised to include requirements to conduct the FDR readout and evaluation just before the airplane's scheduled maintenance, with emphasis on observing parameter performance during in-flight and ground operations. The commenter further suggests that the most direct way to detect a sensor failure or out-of-calibration condition would be for a qualified analyst to periodically evaluate the FDR data, conduct a calibration check, and make any necessary sensor replacements during scheduled maintenance. The commenter asserts that the fact that one or more flight control parameters failed in 16 of 17 Model EMB–120 FDR readouts since 1990 suggests that the problem may be systemic and may require a more robust sensor and/or installation. Further, the commenter expresses doubt that all of the failures were caused by storing the sensors for more than 12 months, which the airplane and sensor manufacturers claim caused an oxide film to form on the sensor, resulting in the noisy signals. The commenter supplied no data to support this request.

We do not agree with the commenter's request to revise the compliance method. However, as we explained previously, we have reduced the compliance time for the repetitive interval for calibration testing of the potentiometers and readout of the FDR. We find that installation problems with the sensor's compatibility with the installation environment would more likely appear as (hard) sensor failures, not signal quality problems. The commenter itself points out that noisy signals are rare and most service problems are related to poor maintenance or an improperly executed FD replacement. Therefore, because the potentiometers are sealed and require no maintenance, we still consider oxide coating inside the potentiometers a contributing factor to the source of the noisy signals—most likely a result of prolonged disuse of the sensors. Therefore, we find that these proposed corrective actions will purge any faulty sensors and that no change to the second supplemental NPRM is necessary in this regard.

Clarification of Certain Terms

We have added a new Note 1 to this second supplemental NPRM (and re-numbered subsequent notes accordingly) to clarify our use of the word ''calibration.'' For the purposes of this second supplemental NPRM, we define calibration as the adjustment of the potentiometers, including operational and functional tests of the FDR system, as specified in Section 31–30–00 of the EMBRAER EMB120 Airplane Maintenance Manual (AMM).

Paragraph (a) of this second supplemental NPRM provides procedures for a noise ''check'' to detect potentiometers with noisy signals. We have determined that certified

maintenance personnel must perform the noise check.

Explanation of Additional Changes to the Second Supplemental NPRM

We have added a new paragraph (e) to this second supplemental NPRM (and reidentified subsequent paragraphs accordingly) to state that modification of the flexible couplings done before the effective date of this AD in accordance with Change 01 of EMBRAER Service Bulletin 120–31–0038, dated October 3, 1997, is considered acceptable for compliance with the corresponding action required by paragraph (d) of this second supplemental NPRM.

We have also changed paragraphs (a) and (c) of this second supplemental NPRM to specify that the proposed actions shall be done in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA. In addition, the following sections of the EMBRAER EMB–120 AMM are identified as approved methods of compliance for accomplishing the proposed actions specified in the applicable paragraphs:

• Paragraph (a): Section 31–30–00, dated April 10, 2002.

• Paragraph (c): Section 31–30–05, dated July 17, 1998.

Additionally, we have added a new Note 2 to this second supplemental NPRM (and re-numbered subsequent notes accordingly) to clarify that Section 31–30–05 of the EMBRAER EMB120 AMM includes instructions for calibrating the potentiometers (adjusting the potentiometers, including operational and functional tests of the FDR system). The procedures for that calibration are specified in Section 31–30–00 of the EMBRAER EMB120 AMM.

Conclusion

Since some of these changes expand the scope of the first supplemental NPRM, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

Changes to 14 CFR part 39/Effect on the Proposed AD

On July 10, 2002, the FAA issued a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the FAA's airworthiness directives system. The regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance (AMOC). Because we have now included this material in part 39, only the office authorized to approve AMOCs is identified in each individual AD. Therefore, paragraph (g) has been revised and paragraph (h) and Notes 1 and 4 of the first supplemental NPRM have been removed from this supplemental NPRM.

Increase in Labor Rate

After the first supplemental NPRM was issued, we reviewed the figures we use to calculate the labor rate to do the required actions. To account for various inflationary costs in the airline industry, we find it appropriate to increase the labor rate used in these calculations from $60 per work hour to $65 per work hour. The economic impact information, below, has been revised to reflect this increase in the specified hourly labor rate.

Cost Impact

The FAA estimates that 587 airplanes of U.S. registry would be affected by this proposed AD. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Cost of parts per airplane	Cost per airplane
Calibration and FDR readout, per calibration cycle (3 potentiometers per airplane).	1 per potentiometer (for digital-type FDRs), per calibration cycle; or 25 per potentiometer (for tape-type FDRs), per calibration cycle.	$65	Negligible	$65, potentiometer (for digital-calibration type FDRs), per calibration cycle; or $1,625, per potentiometer (for tape-type FDRs), per calibration cycle.
Application of adhesive	1	65	Negligible	$65.

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

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Empresa Brasileira de Aeronautica S.A. (EMBRAER): Docket 2000–NM–120–AD.

Applicability: Model EMB–120 series airplanes), certificated in any category, that are required by 14 CFR 135 to operate with a flight data recorder (FDR).

Compliance: Required as indicated, unless accomplished previously.

To prevent the potentiometers that provide information on the positions of the primary flight controls to the FDR from transmitting noisy signals or becoming improperly calibrated, resulting in the transmission of incomplete or inaccurate data to the FDR, accomplish the following:

Initial Potentiometer Calibration Testing and FDR Readout

(a) Within 6 months after the effective date of this AD: Calibrate the potentiometers to the ailerons, elevators, and rudder; perform a noise check of the potentiometers; and obtain a readout of the FDR; in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA. Section 31–30–00, dated April 10, 2002, of the EMBRAER EMB–120 Airplane Maintenance Manual (AMM) is one approved method. The noise check must be performed by certificated maintenance personnel.

Note 1: For the purposes of this AD, calibration is defined as the adjustment of the potentiometers, including operational and functional tests of the FDR system, as specified in Section 31–30–00 of the EMBRAER EMB120 AMM.

Repetitive Potentiometer Calibration Testing and FDR Readout

(b) Repeat the calibration and noise check of the potentiometers and obtain a readout of the FDR, as required by paragraph (a) of this AD, at intervals not to exceed 6 months.

Replacement of Potentiometers

(c) If any readout of the FDR, conducted in accordance with paragraph (a) or (b) of this AD, indicates a potentiometer with a noisy signal: Within 20 days after obtaining the readout, replace the potentiometer with one that has a date of manufacture no greater than 12 months from the date of installation, in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA. Section 31–30–05, dated July 17, 1998, of the EMBRAER EMB–120 AMM is one approved method.

Note 2: Section 31–30–05 of the EMBRAER EMB120 AMM includes instructions for calibrating the potentiometers. The procedures for the calibration are specified in Section 31–30–00 of the EMB120 AMM.

Modification of Flexible Couplers

(d) Prior to further flight, after accomplishing paragraph (a) of this AD: Apply locktite adhesive over the threads of the screws of the flexible couplers that attach the shafts of the potentiometers to the shafts of the primary flight controls, in accordance with EMBRAER Service Bulletin 120–31–0038, dated February 22, 1997; or Change 02, dated June 25, 1998.

Modification Accomplished Per Previous Issue of Service Bulletin

(e) Modification of the flexible couplers done before the effective date of this AD in accordance with EMBRAER Service Bulletin 120–31–0038, Change 01, dated October 3, 1997, is considered acceptable for compliance with the corresponding action specified in paragraph (d) of this AD.

Reporting Requirement

(f) At the applicable time specified in paragraph (f)(1) or (f)(2) of this AD: Submit a report of the calibration tests of the potentiometers and the readouts of the FDR to Empresa Brasileira de Aeronautica S.A. (EMBRAER), Certification—Continued Airworthiness, Av. Brig. Faria Lima, 2170, P.C. 179, 12227–901, Sao Jose dos Campos—SP, Brazil; fax (12) 3927–1184. Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control Number 2120–0056.

(1) For calibration tests, noise checks, and FDR readouts done after the effective date of this AD: Submit the report within 30 days after performing each test, check, and readout required by paragraphs (a) and (b) of this AD.

(2) For calibration tests, noise checks, and FDR readouts done before to the effective date of this AD: Submit the report within 10 days after the effective date of this AD.

Alternative Methods of Compliance

(g) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, is authorized to approve alternative methods of compliance for this AD.

Note 3: The subject of this AD is addressed in Brazilian airworthiness directive 97–08–01, dated August 29, 1997.

Issued in Renton, Washington, on January 21, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1795 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20221; Directorate Identifier 2004–NM–173–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330, A340–200, and A340–300 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus Model A330, A340–200, and A340–300 series airplanes. This proposed AD would require inspecting to determine the part number and serial number of the left- and right-hand elevator assemblies, performing related investigative and corrective actions if necessary, and re-protecting the elevator assembly. This proposed AD is prompted by reports that areas on the top skin panel of the right-hand elevator have disbonded due to moisture penetration. We are proposing this AD to prevent disbonding of the elevator assembly, which could reduce the structural integrity of the elevator and result in reduced controllability of the airplane.

DATES: We must receive comments on this proposed AD by March 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–2005–20221; the directorate identifier for this docket is 2004–NM–173–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–2005–20221; Directorate Identifier 2004–NM–173–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 website, 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, A340–200, and A340–300 series airplanes. The DGAC advises that operators have found areas on the top skin panel of the right-hand elevator that have disbonded due to moisture penetration. The disbonded areas were adjacent to inboard actuator attach fittings. Investigation identified a serial-number range of elevators that had not been tested for water leaks in production. Disbonding of the elevator assembly, if not corrected, could reduce the structural integrity of the elevator, which could result in reduced controllability of the airplane.

Affected parts may be installed on either the left-or right-hand elevator assembly. Thus, the left-hand elevator assembly may be subject to the same unsafe condition revealed on the right-hand elevator assembly.

Relevant Service Information

Airbus has issued Service Bulletins A330–55–3032 (for Model A330 series airplanes) and A340–55–4029 (for Model A340–200 and –300 series airplanes), both dated December 22, 2003. Those service bulletins describe procedures for investigative and corrective actions related to inspecting/testing the left- and right-hand elevator assemblies for evidence of moisture penetration. The inspection procedures include:

- Performing an inspection of the inner skin of the upper and lower elevator panels using an endoscope to detect damage (such as a scratch, disbonding, or a tear) of the Tedlar film.
- Performing a tap test to detect moisture penetration in the inner side of the upper and lower elevator panels.
- Performing a thermographic inspection to detect moisture penetration in the upper and lower elevator panels.

If damage is detected, corrective actions include repeating the thermographic inspection to determine the size of the damaged area, performing a tap test around the areas where moisture is indicated, and repairing the areas affected by moisture penetration. The service bulletins specify contacting Airbus for repair instructions for certain conditions.

The service bulletins also specify procedures for re-protecting the elevator assembly, regardless of whether damage is detected. These procedures include visually inspecting the drainage holes to determine if they are clean, cleaning the drainage holes if necessary, inspecting to determine the condition of the sealant covering the static discharges contour, and reapplying sealant if necessary.

Accomplishing the actions specified in the applicable service bulletin is intended to adequately address the unsafe condition. The DGAC mandated the service information and issued French airworthiness directive F–2004–118 R1, dated October 13, 2004, to ensure the continued airworthiness of these airplanes in France.

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. Pursuant 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 inspecting to determine the part number and serial number of the left- and right-hand elevator assemblies. This proposed AD also would require, if necessary, performing the investigative/corrective actions specified in the service information described previously, except as discussed under ''Differences Among the Proposed AD, the French Airworthiness Directive, and the Service Information.''

Differences Among the Proposed AD, the French Airworthiness Directive, and the Service Information

The effectivity of the French airworthiness directive includes only airplanes that have elevator assemblies having certain part number and serial number combinations. This proposed AD would apply to all airplanes of the affected models, and would require performing an initial inspection to determine if elevator assemblies having

the part number and serial number combinations specified in the French airworthiness directive are installed. (No further action would be required if no elevator assembly having the subject part number and serial number combination is installed.) We find that it is necessary to expand the applicability to ensure that the related investigative actions that would be required by this proposed AD are performed if an elevator assembly having an affected part number and serial number combination is installed in the future. (Paragraph (i) of this proposed AD would prohibit installation of an elevator assembly having an affected part number and serial number unless the related investigative actions required by paragraph (h) of this AD are accomplished.)

French airworthiness directive F–2004–118 R1 specifies an inspection threshold of the earlier of 10 years or 12,000 flight cycles since the first flight of the airplane. However, paragraph (g) of this proposed AD specifies an inspection threshold of the earlier of 10 years after the date of issuance of the original Airworthiness Certificate or the date of issuance of the original Export Certificate of Airworthiness, or 12,000 total flight cycles. This decision is based on our determination that ''first flight of the airplane'' may be interpreted differently by different operators. We find that our proposed terminology is generally understood within the industry, and records will always exist that establish these dates with certainty.

The French airworthiness directive and the Accomplishment Instructions of the referenced service bulletins specify that you may contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require you to repair those conditions using a method that we or the DGAC (or its delegated agent) approve. In light of the type of repair that would be required to address the unsafe condition, and consistent with existing bilateral airworthiness agreements, we have determined that, for this proposed AD, a repair that we or the DGAC approve would be acceptable for compliance with this proposed AD.

The French airworthiness directive and the Accomplishment Instructions of the referenced service bulletins describe procedures for submitting certain information to the manufacturer. This proposed AD would not require that action.

Clarification of Inspection Terminology

In this proposed AD, the visual inspection of the drain holes and the inspection to determine the condition of the sealant covering the static discharges contour are referred to as ''general visual inspections.'' We have included the definition for a general visual inspection in a note in the proposed AD.

Costs of Compliance

This proposed AD would affect about 20 airplanes of U.S. registry. The proposed inspection to determine the part number and serial number of installed elevator assemblies would take about 1 work hour 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 $1,300, or $65 per airplane.

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 proposed 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–2005–20221; Directorate Identifier 2004–NM–173–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this AD action by March 3, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Airbus Model A330, A340–200, and A340–300 series airplanes; certificated in any category.

Unsafe Condition

(d) This AD was prompted by reports that areas on the top skin panel of the right-hand elevator have disbonded due to moisture penetration. We are issuing this AD to prevent disbonding of the elevator assembly, which could reduce the structural integrity of the elevator and result in reduced controllability of the airplane.

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.

Service Bulletin References

(f) The term ''service bulletin,'' as used in this AD, means the Accomplishment Instructions of Airbus Service Bulletin A330–55–3032 (for Model A330 series airplanes) or Airbus Service Bulletin A340–55–4029 (for Model A340–200 and –300 series airplanes), both dated December 22, 2003, as applicable.

(1) Where the service bulletins recommend contacting Airbus for appropriate action: Before further flight, repair the condition according to a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Direction Générale de l'Aviation Civile (or its delegated agent).

(2) Although the service bulletins specify submitting certain information to the

manufacturer, this AD does not include that requirement.

Determining Part Number, Serial Number

(g) At the later of the times specified in paragraphs (g)(1) and (g)(2) of this AD: Perform an inspection to determine the part number and serial number of the left- and right-hand elevator assemblies. If neither elevator assembly has a part number and serial number combination identified in Table 1 of this AD, no further action is required by this paragraph. If either elevator assembly has a part number and serial number combination identified in Table 1 of this AD, do paragraph (h) of this AD.

(1) Within 10 years after the date of issuance of the original Airworthiness Certificate or the date of issuance of the original Export Certificate of Airworthiness, or before the accumulation of 12,000 total flight cycles, whichever is first.

(2) Within 18 months after the effective date of this AD.

TABLE 1.—AFFECTED ELEVATOR PART NUMBERS AND SERIAL NUMBERS

Part	Affected part numbers	Affected serial numbers
Left-hand elevator assembly	F55280000000, F55280000004	CG1002 through CG1091 inclusive, CG1093, CG1094, CG2001.
Right-hand elevator assembly	F55280000001, F55280000005	CG1002 through CG1094 inclusive, CG2001.

Inspections

(h) If the left- or right-hand elevator assembly has a part number and serial number combination identified in Table 1 of this AD: Before further flight after accomplishing paragraph (g) of this AD, do the actions in paragraphs (h)(1), (h)(2), and (h)(3) of this AD, as applicable.

(1) Perform an endoscopic inspection to detect damage (such as a scratch, disbonding, or a tear), and a tap test and a thermographic inspection to detect signs of moisture penetration, to the upper and lower elevator panels on both sides of the airplane, in accordance with the service bulletins.

(2) If any damage is found, before further flight, do all applicable corrective actions (including but not limited to repeating the thermographic inspection to determine the size of the damaged area, and performing a tap test around the areas where moisture is indicated), in accordance with the service bulletin.

(3) Re-protect the elevator assembly (including performing a general visual inspection to determine if the drainage holes are clean, a general visual inspection to determine the condition of the sealant covering the static discharges contour, and applicable corrective actions), in accordance with the service bulletin.

Note 1: For the purposes of this AD, a general visual inspection is: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

Parts Installation

(i) As of the effective date of this AD, no person may install, on any airplane, an elevator assembly having a part number and serial number combination identified in Table 1 of this AD unless the actions required by paragraph (h) of this AD are accomplished.

Alternative Methods of Compliance (AMOCs)

(j) The Manager, International Branch, ANM–116, 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–2004–118 R1, dated October 13, 2004, also addresses the subject of this AD.

Issued in Renton, Washington, on January 21, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1806 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20223; Directorate Identifier 2004–NM–193–AD]

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: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain EMBRAER Model EMB–135 and –145 series airplanes. This proposed AD would require repetitive detailed inspections for surface bruising of the main landing gear (MLG) trailing arms and integrity of the MLG pivot axle sealant, and corrective actions if necessary. This proposed AD would also provide for optional terminating action for the repetitive inspections. This proposed AD is prompted by a report of a fractured axle of the trailing arm of the MLG due to corrosion of the axle. We are proposing this AD to prevent a broken trailing arm and consequent failure of the MLG, which could lead to loss of control and damage to the airplane during take-off or landing.

DATES: We must receive comments on this proposed AD by March 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 Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil.

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–2005–

20223; the directorate identifier for this docket is 2004–NM–193–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.

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–2005–20223; Directorate Identifier 2004–NM–193–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 Departmento de Aviacao Civil (DAC), which is the airworthiness authority for Brazil, notified us that an unsafe condition may exist on certain EMBRAER Model EMB–135 and –145 series airplanes. The DAC advises that it has received a report of a fractured axle of the trailing arm of the main landing gear (MLG) due to corrosion of the axle. This condition, if not corrected, could result in a broken trailing arm and consequent failure of the MLG, which could lead to loss of control and damage to the airplane during take-off or landing.

Relevant Service Information

EMBRAER has issued Service Bulletin 145–32–0091, Change 01, dated July 1, 2004. The service bulletin describes procedures for performing repeated detailed inspections for surface bruising of the main landing gear (MLG) trailing arms and integrity of the MLG pivot axle sealant; and corrective actions if necessary. Corrective actions include a detailed inspection for corrosion of the internal surface of the pivot axle; repairing the trailing arm surface; applying protective paint and corrosion inhibitors to the pivot axle or replacing the pivot axle with a new pivot axle; and replacing the MLG cardan with a new, improved cardan. Replacing the MLG cardan would eliminate the need for repeated detailed inspections.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

The DAC mandated the service information and issued Brazilian airworthiness directive 2004–08–02, dated September 3, 2004, to ensure the continued airworthiness of these airplanes in Brazil.

Service Bulletin 145–32–0091, Change 01, refers to Embraer Liebherr Equipamentos do Brasil S.A. (ELEB) Service Bulletin 2309–2002–32–04, Revision 01, dated May 24, 2004, as an additional source of service information for the inspection and repair of the MLG trailing arm components. The ELEB service bulletin is included within the EMBRAER service bulletin.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in Brazil and are type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. According to this bilateral airworthiness agreement, the DAC has kept the FAA informed of the situation described above. We have examined the DAC'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 ''Difference Between the Proposed AD and Brazilian Airworthiness Directive.''

This proposed AD would also provide for optional terminating action for the repetitive inspections.

Consistent with the findings of the DAC, the proposed AD would allow repetitive inspections to continue in lieu of the terminating action. In making this determination, we considered that long-term continued operational safety in this case will be adequately ensured by repetitive inspections to detect sealant failure or surface bruising of the MLG trailing arm before it represents a hazard to the airplane.

Difference Between the Proposed AD and Brazilian Airworthiness Directive

Brazilian airworthiness directive 2004–08–02, dated September 3, 2004, specifies a ''detailed visual inspection;'' however, this proposed AD would require a ''detailed inspection'' to eliminate any confusion about the proper type of inspection. We have included a definition of this type of inspection in Note 1 of this proposed AD.

Costs of Compliance

This proposed AD would affect about 488 airplanes of U.S. registry.

The proposed inspection of the MLG trailing arm surface and pivot axle sealant would take about 1 work hour 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 $31,720, or $65 per airplane, per inspection cycle.

The proposed replacement of the MLG cardan and inspection of the internal surface of the MLG trailing arm pivot axle would take about 1 work hour per MLG (two MLGs per airplane), at an average labor rate of $65 per work hour. Required parts would cost about $3,500 per cardan. Based on these figures, the estimated cost of the proposed AD for U.S. operators is $3,479,440, or $7,130 per airplane.

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 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):

Empresa Brasileira de Aeronautica S.A. (EMBRAER): Docket No. FAA–2005–20223; Directorate Identifier 2004–NM–193–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this AD action by March 3, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model EMB–135 and –145 series airplanes, certificated in any category; as listed in EMBRAER Service Bulletin 145–32–0091, Change 01, dated July 1, 2004.

Unsafe Condition

(d) This AD was prompted by a report of a fractured axle of the trailing arm of the main landing gear (MLG) due to corrosion of the axle. We are issuing this AD to prevent a broken trailing arm and consequent failure of the MLG, which could lead to loss of control and damage to the airplane during take-off or landing.

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.

Inspection

(f) Within 600 flight hours or 180 days after the effective date of this AD, whichever occurs first, perform a detailed inspection for surface bruising of the MLG trailing arms and integrity of the MLG pivot axle sealant; in accordance with the Accomplishment Instructions of EMBRAER Service Bulletin 145–32–0091, Change 01, dated July 1, 2004. If no sign of sealant failure or bruising of the trailing arm is found, repeat the inspection thereafter at intervals not to exceed 5,500 flight hours or 24 months, whichever occurs first, until paragraph (g)(3) of this AD has been accomplished.

Note 1: For the purposes of this AD, a detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.''

Corrective/Terminating Actions

(g) If any sign of sealant failure or bruising of either trailing arm surface is found, prior to further flight, do paragraphs (g)(1), (g)(2) and (g)(3) of this AD. Do the actions in accordance with EMBRAER Service Bulletin 145–32–0091, Change 01, dated July 1, 2004. Accomplishment of paragraphs (g)(2) and (g)(3) of this AD ends the repetitive inspections required by paragraph (f) of this AD.

(1) Repair any bruising of the trailing arm surface.

(2) Replace the MLG cardan with a new, improved cardan.

(3) Perform a detailed inspection for corrosion of the internal surface of the trailing arm pivot axle.

(i) If no corrosion is found, apply protective paint and corrosion inhibitors.

(ii) If corrosion is found, replace the pivot axle with a new pivot axle and apply corrosion inhibitors.

Note 2: EMBRAER Service Bulletin 145–32–0091, Change 01, dated July 1, 2004, refers to Embraer Liebherr Equipamentos do Brasil S.A. (ELEB) Service Bulletin 2309–2002–32–04, Revision 01, dated May 24, 2004, as an additional source of service information for the inspection and repair of the MLG components. The ELEB service bulletin is included within the EMBRAER service bulletin.

Actions Accomplished According to Previous Issue of Service Bulletin

(h) Actions accomplished before the effective date of this AD according to EMBRAER Service Bulletin 145–32–0091, dated February 19, 2004, are considered acceptable for compliance with the corresponding actions specified in this AD.

Alternative Methods of Compliance (AMOCs)

(i) 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

(j) Brazilian airworthiness directive 2004–08–02, dated September 3, 2004, also addresses the subject of this AD.

Issued in Renton, Washington, on January 21, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1807 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20222; Directorate Identifier 2004–NM–230–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Bombardier Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 airplanes. The subject of this proposed AD is the pilot's static system. This proposed AD would require

revising the airplane flight manual to include applicable procedures to follow when the flightcrew receives abnormal indications of airspeed, altitude, or vertical airspeed. This proposed AD would also require modifying the static system. This proposed AD is prompted by a report of a leak in the static pressure system, which could result in loss of the static systems and consequent erroneous data displayed on the pilot's flight instruments. We are proposing this AD to advise the flightcrew of applicable procedures in the event of abnormal indications of airspeed, altitude, or vertical airspeed; and to prevent leaks in the static system, which could result in the loss of critical flight information that could result in reduced controllability of the airplane or controlled flight into terrain.

DATES: We must receive comments on this proposed AD by March 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 Bombardier, Inc., Bombardier Regional Aircraft Division, 123 Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada.

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–2005–20222; the directorate identifier for this docket is 2004–NM–230–AD.

FOR FURTHER INFORMATION CONTACT: Ezra Sasson, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, suite 410, Westbury, New York 11590; telephone (516) 228–7320; fax (516) 794–5531.

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–2005–20222; Directorate Identifier 2004–NM–230–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

Transport Canada Civil Aviation (TCCA), which is the airworthiness authority for Canada, notified the FAA that an unsafe condition may exist on certain Bombardier Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 airplanes. TCCA advises that an investigation of an incident involving erroneous data displayed on the pilot's flight instruments has revealed that a leak in the pilot's side static pressure system, downstream of the alternate selector valve, could result in the loss of both the pilot's normal and alternate static systems. This condition, if not corrected, could result in the display of abnormal indications of airspeed, altitude, or vertical airspeed due to leaks in the static system and prolonged loss of critical flight information that could result in reduced controllability of the airplane or controlled flight into terrain.

Relevant Service Information

Bombardier has issued Service Bulletin 8–34–221, Revision 'A,' dated September 15, 2003. The service bulletin describes procedures to modify the pilot's side static system to prevent leaks in the system. For certain airplanes the modification provides increased independence of the static pressure source for the pilot's primary and standby flight instruments, and for certain other airplanes the modification corrects the length of the static system hose.

TCCA mandated the service bulletin and issued Canadian airworthiness directive CF–2003–25, dated October 10, 2003, to ensure the continued airworthiness of these airplanes in Canada.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in Canada and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, TCCA has kept the FAA informed of the situation described above. We have examined TCCA'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 issuing this AD to provide procedures to the flightcrew in the event of abnormal indications of airspeed, altitude, or vertical airspeed; and to prevent leaks in the static system, which could result in the loss of critical flight information that could result in reduced controllability of the airplane or controlled flight into terrain. This AD requires accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and Canadian Airworthiness Directive.''

Differences Between the Proposed AD and Canadian Airworthiness Directive

This proposed AD advises revising the applicable de Havilland Dash 8 airplane flight manual to incorporate the text specified in paragraph (f) of this

proposed AD. The Canadian AD does not include such a requirement. In Canada, operators are mandated to use the latest flight manual and therefore, TCCA is not required to issue an AD to require flight manual revisions.

Costs of Compliance

The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Revise AFM	1	$65	None	$65	181	$11,765
Modify static system	2	65	100–200	230–330	181	41,630–59,730

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, 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 proposed 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):

Bombardier, Inc. (Formerly de Havilland, Inc.): Docket No. FAA–2005–20222; Directorate Identifier 2004–NM–230–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this AD action by March 3, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 airplanes, certificated in any category; serial numbers 003 through 598 inclusive.

Unsafe Condition

(d) This AD was prompted by a report of a leak in the static pressure system, which could result in loss of the static systems and consequent erroneous data displayed on the pilot's flight instruments. The subject of this AD is the pilot's static system. We are issuing this AD to advise the flightcrew of applicable procedures in the event of abnormal indications of airspeed, altitude, or vertical airspeed; and to prevent leaks in the static system, which could result in the loss of critical flight information that could result in reduced controllability of the airplane or controlled flight into terrain.

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.

Revision to Airplane Flight Manual

(f) Within 10 days after the effective date of this AD, revise the Normal and Abnormal Procedures sections of the applicable de Havilland Dash 8 flight manual to include the following statement in paragraph 4.11.1 of 4.11 Pitot—Static and Stall Warning System Failures. This may be done by inserting a copy of this AD in the applicable flight manual.

''4.11.1 ABNORMAL INDICATIONS OF AIRSPEED, ALTITUDE AND VERTICAL AIRSPEED.

''1. Appropriate STATIC SOURCE selector—ALTERNATE. If switching the STATIC SOURCE selector to ALTERNATE does not correct the abnormal indications:

''2. Rely on the flight instruments on the opposite side and land as soon as practicable.''

Note 1: When a statement identical to that in paragraph (f) of this AD has been included in the general revisions of the applicable flight manual, the general revisions may be inserted into the flight manual, and the copy of this AD may be removed from the flight manual.

Modification of the Static System

(g) For airplanes having serial numbers 003 through 590 inclusive: Within 24 months after the effective date of this AD, modify the static system in accordance with Part A and Part C of the Accomplishment Instructions of Bombardier Service Bulletin 8–34–221, Revision 'A,' dated September 15, 2003.

(h) For airplanes having serial numbers 591 through 598 inclusive: Within 24 months after the effective date of this AD, modify the static system in accordance with Part B and Part C of the Accomplishment Instructions of Bombardier Service Bulletin 8–34–221, Revision 'A,' dated September 15, 2003.

Modifications Done According to Previous Issue of Service Bulletin

(i) Modifications done before the effective date of this AD in accordance with Bombardier Service Bulletin 8–34–221, dated May 27, 2003, are acceptable for compliance with the applicable modifications specified in paragraphs (g) and (h) of this AD.

Alternative Methods of Compliance (AMOCs)

(j) The Manager, New York Aircraft Certification Office, 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) Canadian airworthiness directive CF–2003–25, dated October 10, 2003, also addresses the subject of this AD.

Issued in Renton, Washington, on January 21, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1808 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20220; Directorate Identifier 2004–NM–152–AD]

RIN 2120–AA64

Airworthiness Directives; Aerospatiale Model ATR42–200, –300, and –320 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Aerospatiale Model ATR42–200, –300, and –320 series airplanes. This proposed AD would require doing repetitive inspections of the upper arms of the MLG side braces for missing or inadequately bonded identification plates; replacing the upper arm if necessary; and replacing the side brace assembly with a modified part. This proposed AD is prompted by an operator who reported experiencing an unlock warning for the MLG on the right side of the airplane. We are proposing this AD to prevent cracking of the upper arms of the side braces of the MLG, which could result in failure of the MLG during landing and possible damage to the airplane and injury to the flightcrew and passengers.

DATES: We must receive comments on this proposed AD by March 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 Messier-Dowty, BP 10, 78142 Velizy 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–2005–20220; the directorate identifier for this docket is 2004–NM–152–AD.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1137; 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–2005–20220; Directorate Identifier 2004–NM–152–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 certain Aerospatiale Model ATR42–200, –300, and –320 series airplanes. The DGAC advises that an operator reported experiencing, during taxiing, an unlock warning for the MLG on the right side of the airplane. Investigation found that the upper side brace of the right MLG was cracked due to accidental damage caused by the location of certain identification plates and possible corrosion introduced during production. Cracking of the upper arms of the side braces of the MLG, if not corrected, could result in failure of the MLG during landing and possible damage to the airplane and injury to the flightcrew and passengers.

Relevant Service Information

Messier-Dowty has issued Special Inspection Service Bulletin 631–32–175, dated January 7, 2004; and Service Bulletin 631–32–176, Revision 1, dated June 2, 2004. Special Inspection Service Bulletin 631–32–175 describes procedures for doing repetitive general visual inspections of the upper arms of the MLG side braces for missing or inadequately bonded identification plates having P/Ns D61565–1, D61566–1, D61567–1, and D61568–1; and replacing any upper arm having a missing or inadequately-bonded identification plate with a serviceable upper arm having the same part number. Service Bulletin 631–32–176 describes procedures for removing the side brace assembly and replacing it with a modified part. Modification of the side brace assembly includes the following actions:

• Removing and discarding identification plates with P/Ns D61565–1, D61566–1, D61567–1, and D61568–1;

• Inspecting and restoring the side brace assembly;

• Installing identification plates, with P/Ns D61565–1, D61566–1, D61567–1, and D61568–1, in a new location; and

• Reidentifying the modified side brace assembly.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The DGAC mandated the service information and issued French airworthiness directive F–2004–006, dated January 7, 2004, to ensure the continued airworthiness of these airplanes in France.

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 § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC 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 ''Difference Between the Proposed AD and French Airworthiness Directive.''

Difference Between the Proposed AD and French Airworthiness Directive

Operators should note that, although the French airworthiness directive recommends accomplishing the replacement of the side brace assemblies at the next overhaul, we have determined that a specific compliance time is needed to ensure that the identified unsafe condition is addressed in a timely manner. In developing an appropriate compliance time for this proposed AD, we considered not only the manufacturer's recommendation, but also the degree of urgency associated with addressing the subject unsafe condition, and the average utilization of the affected fleet. Considering these factors, this proposed AD requires replacement before the accumulation of 15,000 total flight cycles on a side brace assembly or 96 months on a side brace assembly since new, whichever occurs first. We find that this compliance time is warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

Costs of Compliance

The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Inspection, per inspection cycle.	1	$65	None	$65	7	$455, per inspection cycle.
Replacement of side brace assemblies.	2	65	0	130	7	$910.

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, 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 proposed 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):

Aerospatiale: Docket No. FAA–2005–20220; Directorate Identifier 2004–NM–152–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this AD action by March 3, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Aerospatiale Model ATR42–200, –300, and –320 series airplanes

with main landing gear (MLG) side brace assemblies, part number (P/N) D22710000–7, equipped with upper arms having P/N D56778–10, serial numbers MN 566 through MN 581 inclusive; certificated in any category.

Unsafe Condition

(d) This AD was prompted by an operator who reported experiencing an unlock warning for the MLG on the right side of the airplane. We are issuing this AD to prevent cracking of the upper arms of the side braces of the MLG, which could result in failure of the MLG during landing and possible damage to the airplane and injury to the flightcrew and passengers.

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.

Service Bulletin References

(f) The term ''service bulletin,'' as used in this AD, means the Accomplishment Instructions of the following service bulletins, as applicable:

(1) For the repetitive inspections and replacements specified in paragraphs (g) and (h) of this AD, respectively: Messier-Dowty Special Inspection Service Bulletin 631–32–175, dated January 7, 2004; and

(2) For the replacements specified in paragraph (i) of this AD: Messier-Dowty Service Bulletin 631–32–176, Revision 1, dated June 2, 2004.

Repetitive Inspections of Identification Plates

(g) Within 2 months or 500 flight hours after the effective date of this AD, whichever occurs first: Do a general visual inspection of the upper arms of the MLG side braces for missing or inadequately bonded identification plates having P/Ns D61565–1, D61566–1, D61567–1, and D61568–1, in accordance with the service bulletin. Thereafter at intervals not to exceed 2 months or 500 flight hours, whichever occurs first: Repeat the inspection of the upper arm of the MLG side brace for any side brace assembly that has not been replaced as required by paragraph (i) of this AD.

Note 1: For the purposes of this AD, a general visual inspection is: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

Replacement of Upper Arms, If Necessary

(h) If any identification plate, P/N D61565–1, D61566–1, D61567–1, or D61568–1, is found missing or inadequately bonded during any inspection required by paragraph (g) of this AD: Within 25 flight hours since the most recent inspection, replace any upper arm having a missing or inadequately bonded identification plate with a serviceable upper arm having the same part number, in accordance with the service bulletin.

Replacement With Modified Side Brace Assemblies

(i) Before the accumulation of 15,000 total flight cycles on a side brace assembly or 96 months on a side brace assembly since new, whichever occurs first: Remove the side brace assembly and replace it with a part modified by doing all of the actions in the service bulletin. Replacement of a side brace assembly with a modified part terminates the repetitive inspections required by paragraph (g) of this AD for that modified side brace assembly only. If both side brace assemblies of the MLG are replaced with modified parts, no more work is required by paragraph (g) of this AD.

Credit for Previous Service Bulletin

(j) Replacements done before the effective date of this AD in accordance with Messier-Dowty Service Bulletin 631–32–176, dated February 26, 2004, is acceptable for compliance with the corresponding requirements of paragraph (i) of this AD.

Alternative Methods of Compliance (AMOCs)

(k) 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

(l) French airworthiness directive F–2004–006, dated January 7, 2004, also addresses the subject of this AD.

Issued in Renton, Washington, on January 21, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–1809 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP San Juan 05–002]

RIN 1625–AA87

Moving and Fixed Security Zone: Port of Fredericksted, Saint Croix, U.S. Virgin Islands

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a moving and fixed security zone around cruise ships entering, departing, mooring or anchoring at the Port of Fredericksted in Saint Croix, U.S. Virgin Islands. These proposed regulations are designed to protect cruise ships at this port. All vessels, with the exception of cruise ships, would be prohibited from entering a moving and fixed security zone around each cruise ship without the express permission of the Captain of the Port San Juan or designated representative.

DATES: Comments and related material must reach the Coast Guard on or before March 3, 2005.

ADDRESSES: You may mail comments and related material to Coast Guard Sector San Juan, Prevention Command Office, San Juan, #5 La Puntilla Final, Old San Juan, PR 00901–1800. Prevention Command Office maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at Prevention Command Office, San Juan, #5 La Puntilla Final, Old San Juan, PR 00901–1800, between 7 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Junior Grade Katiuska Pabon, Prevention Command San Juan at (787) 289–0739.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking, COTP San Juan 05–002, indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to Sector San Juan, Prevention Command Office, at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time

and place announced by a later notice in the **Federal Register**.

Background and Purpose

Based on the September 11, 2001, terrorist attacks on the World Trade Center buildings in New York and the Pentagon in Arlington, Virginia, there is an increased risk that subversive activity could be launched from vessels in close proximity to cruise ships entering, departing, mooring or anchoring at any port of call. Following these attacks, national security and intelligence officials have warned that future terrorists attacks are likely and may include maritime interests such as cruise ships. The Captain of the Port San Juan proposes to reduce this risk by preventing unauthorized vessels from entering a moving and fixed security zone around each cruise ship entering, departing, anchoring or mooring at the Port of Fredericksted without the authorization of the Captain of the Port San Juan or designated representative. A temporary final rule, COTP San Juan 05–005, in effect from 5 a.m. on January 23, 2005, until July 23, 2005, contains temporary regulations that provide security measures for cruise ships at the Port of Fredericksted.

Captain of the Port San Juan can be contacted on VHF Marine Band Radio, Channel 16 (156.8 Mhz), or by telephone number (787) 289–0739. The United States Coast Guard Communications Center would notify the public via Broadcast Notice to Mariners VHF Marine Band Radio, Channel 22, when a moving and fixed security zone is activated around a cruise ship at Fredericksted.

Discussion of Proposed Rule

This proposed rule would provide security measures to protect cruise ships entering, departing, mooring or anchoring at the Port of Fredericksted, St. Croix, U.S. Virgin Islands. A moving and fixed security zone surrounding a cruise ship would be activated when an arriving cruise ship is within one nautical mile of the west end of the Fredericksted Pier and then deactivated when a departing cruise ship is beyond one nautical mile from the west end of the Fredericksted Pier. All vessels would be prohibited from entering the fixed and moving security zone extending in a 50-yard radius around a cruise ship, from surface to bottom, without the express permission of the Captain of the Port San Juan when the zone is activated.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this security zone to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Entry into the security zone would be prohibited for a limited time. Additionally, vessels may be allowed to enter the security zone with the express permission of the Captain of the Port San Juan or designated representative.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic effect upon a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor at the Port of Fredericksted, St. Croix, U.S. Virgin Islands, when a fixed or moving security zone around a cruise ship is in effect. However, a moving and fixed security zone around a cruise ship would only be in effect for a limited time. Additionally, vessels may be allowed to enter the security zone with the express permission of the Captain of the Port San Juan or a designated representative. Finally, we would issue maritime advisories that would be widely available when we expect a security zone to go into effect.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule calls for no new collection of information requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, 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.

Energy Effects

We have analyzed this proposed 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. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design or operation; test methods; sampling procedures; and related management system practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation.

Under figure 2–1, paragraph (34)(g), of the Instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' (CED) are not required for this rule.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.763 to read as follows:

§ 165.763 Moving and Fixed Security Zone, Port of Fredericksted, Saint Croix, U.S. Virgin Islands.

(a) *Location.* A moving and fixed security zone is established that surrounds all cruise ships entering, departing, mooring or anchoring in the Port of Fredericksted, Saint Croix, U.S. Virgin Islands. The security zone extends from the cruise ship outward and forms a 50-yard radius around the vessel, from surface to bottom. The security zone for a cruise ship entering port is activated when the vessel is within one nautical mile west of the Fredericksted Pier lights. The security zone for a vessel is deactivated when the cruise ship is beyond one nautical mile west of the Fredericksted Pier lights. The Fredericksted Pier lights are at the following coordinates: 17°42′55″ N, 64°42′55″ W. All coordinates are North American Datum 1983 (NAD 1983).

(b) *Regulations.* (1) Under general regulations in § 165.33 of this part, entering, anchoring, mooring, or transiting in these zones is prohibited unless authorized by the Coast Guard Captain of the Port San Juan or designated representative.

(2) Persons desiring to transit through a security zone may contact the Captain of the Port San Juan who can be reached on VHF Marine Band Radio, Channel 16 (156.8 Mhz) or by calling (787) 289–0739, 24 hours a day, 7 days a week. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or designated representative.

(3) Sector San Juan will attempt to notify the maritime community of periods during which these security zones will be in effect by providing advance notice of scheduled arrivals and departures of cruise ships via a broadcast notice to mariners.

(c) *Definition.* As used in this section, *cruise ship* means a passenger vessel greater than 100 feet in length that is authorized to carry more than 150 passengers for hire, except for a ferry.

(d) *Authority.* In addition to 33 U.S.C. 1231 and 50 U.S.C. 191, the authority for this section includes 33 U.S.C. 1226.

Dated: January 24, 2005.

D. P. Rudolph,

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

[FR Doc. 05–1754 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R10–OAR–2004–WA–0001; FRL–7866–6]

Approval and Promulgation of Implementation Plans; Wallula, Washington PM_{10} Nonattainment Area; Serious Area Plan for Attainment of the Annual and 24-Hour PM_{10} Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve Washington's State Implementation Plan for the Wallula, Washington serious nonattainment area for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}). Initially Wallula was classified as a moderate nonattainment area for PM_{10} pursuant to the Clean Air Act Amendments of 1990. In 2001, it was reclassified as a serious nonattainment area for PM_{10}. As a result, Washington was required to submit a serious area plan for bringing the area into attainment. This action

proposes to approve the Wallula serious area plan dated November 15, 2004 and submitted to EPA on November 30, 2004.

DATES: Comments must be received on or before March 3, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. R10–OAR–2004–WA–0001, 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: r10.aircom@epa.gov.*
4. *Mail:* Office of Air Quality, Attn: Environmental Protection Agency, Attn: Donna Deneen, Mailcode: OAQ–107, 1200 Sixth Avenue, Seattle, WA 98101.
5. *Hand Delivery:* Environmental Protection Agency Region 10, Attn: Donna Deneen (AWT–107), 1200 Sixth Ave., Seattle, WA 98101, 9th floor. Such deliveries are only accepted during EPA's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. R10–OAR–2004–WA–0001. EPA's policy is that all comments received will be included in the public docket without change, 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 regulations.gov or e-mail. The EPA EDOCKET and the Federal regulations.gov Web site are an ''anonymous access'' system, 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.

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 may not be publicly available, such as 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 EPA Region 10, Office of Air Quality, 1200 Sixth Avenue, Seattle, Washington, from 8 a.m. to 4:30 p.m. Monday through Friday, excluding legal holidays. Please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection.

FOR FURTHER INFORMATION CONTACT: Donna Deneen, Office of Air Quality, Region 10, AWT–107, Environmental Protection Agency, 1200 Sixth Ave., Seattle, WA 98101; phone: (206) 553–6706; fax number: (206) 553–0110; e-mail address: *deneen.donna@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. What Action Are We Taking?
II. What Is the Background for This Action?
A. Description of the Wallula PM_{10} Serious Nonattainment Area
B. Nonattainment History of Wallula
C. Wallula Monitoring Network
D. Monitored PM_{10} Air Quality in the Wallula Nonattainment Area
III. What Are the Clean Air Act's Planning Requirements for Serious Nonattainment Areas?
A. Moderate Area Requirements Under Section 189(a)
B. Serious Area Requirements Under Section 189(b)
IV. How Does the Wallula Serious Area Plan Meet Clean Air Act Planning Requirements?
A. Plan Overview
B. Emissions Inventory
C. Implementation of Best Available Control Measures
D. Major Source Definition
E. Attainment Demonstration
F. Implementation of Best Available Control Measures on Major Stationary Sources of PM_{10} Precursors
G. Contingency Measures
H. Reasonable Further Progress (RFP) and Quantitative Milestones
I. Transportation Conformity

I. What Action Are We Taking?

On November 30, 2004, the State of Washington, Department of Ecology (Ecology) submitted a State Implementation Plan revision entitled ''A Plan for Attaining Particulate Matter (PM_{10}) Ambient Air Quality Standards in the Wallula Serious Nonattainment Area'' (Wallula serious area plan or Plan). This plan was submitted to meet Clean Air Act (CAA or Act) planning requirements for a PM_{10} serious nonattainment area. We have completed a review of the technical and administrative adequacy of this plan and presented the results in a Technical Support Document (TSD). The TSD provides the basis for our approval of the plan and discusses in more detail the air quality planning requirements for serious and moderate PM_{10} nonattainment areas in subparts 1 and 4 of title I of the CAA. We are proposing to approve the Wallula serious area plan based on a determination that the plan complies with the CAA requirements for serious PM_{10} nonattainment area plans.

This preamble describes our proposed action on the Wallula serious area plan and provides a summary of our evaluation of the Plan.

II. What Is the Background for This Action?

A. Description of the Wallula PM_{10} Serious Nonattainment Area

The Wallula nonattainment area lies in eastern Washington just north of the Oregon border in the southern portion of the Columbia Plateau. The nonattainment area includes parts of Walla Walla and Benton Counties and a small portion of Sacajawea State Park in Franklin County.

The Wallula area is located in the lowest and driest section of eastern Washington, receiving as little as seven to nine inches of precipitation each year. Summer precipitation is usually associated with thunderstorms and it is not unusual for four to six weeks to pass without measurable rainfall in the summer. The Columbia Plateau is also known for prolonged periods of strong winds which carry dust particles for hundreds of miles downwind. Wind erosion is a particular problem in the area because of the natural dustiness of the region due to its dry environments, scant vegetation, unpredictable high winds, and soils which contain substantial quantities of PM_{10}. See ''Farming with the Wind: Best Management practices for Controlling Wind Erosion and Air Quality on Columbia Plateau Croplands'' (1998).

The Wallula nonattainment area is generally rural and agricultural. Prominent land uses include dryland and irrigated cropland, industrial sites and natural vegetation. There is only one major stationary source in the

nonattainment area, a large pulp and paper mill and its associated compost facility and landfill. There is also a large beef cattle feedlot, a beef processing plant, a natural gas compressor station, grain storage silos and a few other minor sources. The population of the area is approximately 4800. Two-thirds of the population live in the northwest portion of the nonattainment area in the unincorporated town of Burbank.

B. Nonattainment History of Wallula

The Wallula area was designated nonattainment for PM_{10} and classified as moderate under sections 107(d)(4)(B) and 188(a) of the CAA upon enactment of the Clean Air Act Amendments of 1990.[1] *See* 40 CFR 81.348 (PM_{10} Initial Nonattainment Areas); *see also* 56 FR 56694 (November 6, 1991). Under subsections 188(a) and (c)(1) of the CAA, all initial moderate PM_{10} nonattainment areas had the same applicable attainment date of December 31, 1994.

States containing initial moderate PM_{10} nonattainment areas were required to develop and submit to EPA by November 15, 1991, a state implementation plan (SIP) revision providing for, among other things, implementation of reasonably available control measures (RACM), including reasonably available control technology (RACT), and a demonstration of attainment of the PM_{10} NAAQS by December 31, 1994. *See* section 189(a) of the CAA.[2] In response to this submission requirement, Ecology submitted a SIP revision for Wallula on November 15, 1991. Subsequently, Ecology submitted additional information indicating that nonanthropogenic sources may be significant in the Wallula nonattainment area during windblown dust events. Based on our review of the State's submissions, we deferred action on several elements in the Wallula SIP, approved the control measures in the SIP as meeting RACM/RACT, and, under section 188(f) of the CAA, granted a temporary waiver to extend the attainment date for Wallula to December 31, 1997. *See* 60 FR 63109 (December 6, 1995)(proposed action); 62 FR 3800 (January 27, 1997) (final action). The temporary waiver was intended to provide Ecology time to evaluate further the Wallula nonattainment area and to determine the significance of the anthropogenic and nonanthropogenic sources impacting the area. Once these activities were complete or the temporary waiver expired, EPA was to make a decision on whether the area was eligible for a permanent waiver under section 188(f) of the CAA or whether the area had attained the standard by the extended attainment date. *See* 62 FR at 3802.

On February 9, 2001, EPA published a **Federal Register** notice making a final determination that the Wallula area had not attained the PM_{10} standard by the attainment date of December 31, 1997. *See* 66 FR 9663 (February 9, 2001) (final action); (65 FR 69275 (November 16, 2000) (proposed action). EPA made this determination based on air quality data for calendar years 1995, 1996, and 1997. As a result of that finding, the Wallula PM_{10} nonattainment area was reclassified by operation of law as a serious PM_{10} nonattainment area effective March 12, 2001 with an attainment date of December 31, 2001. *See* 188(b)(2)(A) and 188(c)(2). On October 22, 2002, EPA found that the Wallula nonattainment area attained the NAAQS for PM_{10} as of December 31, 2001. EPA's finding was based on EPA's review of monitored air quality data reported for the years 1999 through 2001. EPA's finding included a determination that exceedances that occurred in the area on June 21, 1997, July 10, 1998, June 23, 1999, and August 10, 2000 were due to high winds and, consistent with EPA policy, not considered in determining the area's air quality status. *See* Memorandum from EPA's Assistant Administrator for Air and Radiation to EPA Regional Air Directors entitled ''Areas Affected by Natural Events,'' dated May 30, 1996 (EPA's Natural Events Policy). EPA has stated that it will treat ambient PM_{10} exceedances caused by dust raised by unusually high winds as due to uncontrollable natural events (and thus excludable from attainment determinations) if either (1) the dust originated from nonanthropogenic sources or (2) the dust originated from anthropogenic sources controlled with best available control measures (BACM). *See* EPA's Natural Events Policy, pp. 4–5.

After EPA made its finding of attainment, Ecology continued to investigate the one remaining exceedance on July 3, 1997 that led to the area's reclassification to serious. Meteorological information indicated that this exceedance was not due to high winds. Ecology concluded that the exceedance was likely attributable to a one time non-recurring activity involving the transportation of 130 truckloads of finished compost near the monitor on July 1–3, 1997. Although this activity was non recurring and EPA subsequently determined that the area attained the standards as of December 31, 2001, the Wallula area remains classified as a serious nonattainment area. As a result, a second nonattainment serious SIP revision—in addition to the moderate area SIP revision required under section 189(a)—is required under section 189(b).

C. Wallula Monitoring Network

For most of the period since 1986, Ecology's monitoring network for the Wallula nonattainment area has consisted of a single monitoring site. This site is referred to in EPA's Air Quality System (AQS) database as the Nedrow Farm/Wallula Junction monitoring site (site id no: 53–071–1001). This monitoring site was discontinued pursuant to an agreement with the landowner to stop using the monitoring location by October 31, 2003.

In anticipation of the closure of the Nedrow Farm/Wallula Junction monitoring site, Ecology provided EPA Region 10 with an analysis of the two potential replacement sites and a recommendation of Burbank for the replacement site on the grounds that the monitor at the Burbank site measured the same air mass as the Wallula monitoring site. Based on EPA's determination that there was a strong correlation in data measured at the two sites, EPA agreed that the Burbank monitor was an appropriate replacement site to the original Wallula monitoring site. Ecology discontinued the Wallula Port monitoring site in April 2004. The Burbank monitor is now the sole PM_{10} monitoring location in the nonattainment area, with a sampling frequency of once every three days.

D. Monitored PM_{10} Air Quality in the Wallula Nonattainment Area

There are two separate NAAQS for PM_{10}: an annual standard of 50 ug/m3 and a 24-hour standard of 150 ug/m3. The area has never violated the annual PM_{10} NAAQS but it has violated the 24-hour PM_{10} NAAQS. Currently the area is in compliance with both PM_{10} NAAQS. A thorough discussion of the area's compliance with the 24-hour PM_{10} standard as of December 31, 2001 is contained in EPA's attainment determination. *See* 67 FR at 64816. In short, the area had one exceedance that resulted in a violation of the 24-hour PM_{10} NAAQS in 1997. All other exceedances that occurred from 1995 through 2001 were determined to be due

[1] The 1990 Amendments to the CAA made significant changes. *See* Public Law No. 101–549, 104 Stat. 2399. References herein are to the CAA as amended in 1990. The Clean Air Act is codified, as amended, in the United States Code at 42 U.S.C. 7401, *et seq.*

[2] The moderate area SIP requirements are set forth in section 189(a) of the CAA.

to uncontrollable high wind natural events and, consistent with EPA's Natural Events Policy, not considered in determining the air quality status of the area.

Since December 31, 2001, additional exceedances of the 24-hour standard have occurred on September 29, 2002, October 30, 2003, November 11, 2003, and April 27, 2004. All were flagged by Ecology as due to high wind events under EPA's Natural Events Policy. Based on the information provided by Ecology about these events, other information provided by Ecology regarding control measures being implemented at the time of the events, and the area's soil and climate characteristics, we conclude that the exceedances that occurred on September 29, 2002, October 30, 2003, November 11, 2003, and April 27, 2004 were due to high wind natural events and that, on those dates, anthropogenic sources contributing to the exceedances were controlled with Best Available Control Measures. Therefore, EPA proposes to exclude the exceedances on all four dates from consideration in determining whether the Wallula PM_{10} nonattainment area is currently attaining the standards. Excluding these exceedances, the Wallula PM_{10} nonattainment area is attaining both the 24-hour and annual average PM_{10} NAAQS.

III. What are the Clean Air Act's Planning Requirements for Serious Nonattainment Areas?

Wallula is a PM_{10} nonattainment area that was reclassified to serious because it failed to attain the 24-hour PM_{10} NAAQS by the moderate area attainment date of December 31, 1997. Such an area must submit revisions to its implementation plan that address requirements for serious PM_{10} nonattainment areas under CAA section 189(b). In addition, the area must satisfy requirements for initial moderate PM_{10} nonattainment areas under section 189(a).

A. Moderate Area Requirements Under Section 189(a)

Under section 189(b)(1) of the CAA, the Wallula serious area plan must meet requirements for a moderate area plan in addition to requirements for a serious area plan. EPA approved some but not all of the SIP revision Ecology submitted initially on November 15, 1991 to meet these moderate area planning requirements. *See* 62 FR 3800 (January 27, 1997). The approved elements included those pertaining to RACM, the monitoring network, consultation and public notification, provisions for revising the plan, prohibiting sources from impacting other states, adequacy of personnel, funding and authority, enforceability of control measures, and the control of precursors. In addition, EPA approved a permitting program for the permitting of new major sources in nonattainment areas. *See* 60 FR 28726 (June 2, 1995). EPA has not previously approved the emissions inventory, the attainment demonstration, contingency measures, and quantitative milestones. These remaining requirements must be met for both an approvable moderate and serious area plan. EPA believes all of the remaining requirements for a moderate area plan are covered by the serious area plan requirements, which are discussed more fully below.

B. Serious Area Requirements Under Section 189(b)

The Wallula nonattainment areas is required to meet the following requirements that apply to serious PM_{10} nonattainment areas:

- A comprehensive, accurate, and current inventory of actual emissions from all sources of PM_{10} (CAA section 172(c)(3)).
- A demonstration (including air quality modeling) that the plan will provide for attainment as expeditiously as practicable by no later than December 31, 2001 or, where the State is seeking an extension of the attainment date under section 188(e), a demonstration that attainment by December 31, 2001 is impracticable and that the plan provides for attainment by the most expeditious alternative date practicable (CAA sections 188(c)(2) and 189(b)(1)(A)).
- Assurances that the BACM, including best available control technology (BACT) for stationary sources, for the control of PM_{10} shall be implemented no later than 4 years after the area is reclassified (CAA section 189(b)(1)(B)).
- A requirement, under section 189(b)(3) , that the terms ''major source'' and ''major stationary source,'' used in implementing a new source permitting program under section 173 and control of PM_{10} precursors under section 189(e), include any stationary source or group of stationary sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 70 tons per year of PM_{10}.
- Assurances that BACT on major stationary sources of PM_{10} precursors shall be implemented no later than 4 years after the area is reclassified except where EPA has determined that such sources do not contribute significantly to exceedences of the PM_{10} standards (CAA section 189(e)).
- Quantitative milestones which are to be achieved every 3 years and which demonstrate reasonable further progress (RFP) toward attainment by the applicable attainment date (CAA sections 172(c)(2) and 189(c)).
- Contingency measures to be implemented if the area fails to make RFP or attain by its attainment deadline. These contingency measures are to take effect without further action by the State or EPA. CAA section 172(c)(9).

Furthermore, PM_{10} serious area plans must meet the general requirements applicable to all SIPs including reasonable notice and public hearing under section 110(l), necessary assurances that the implementing agencies have adequate personnel, funding and authority under section 110(a)(2)(E)(i) and 40 CFR 51.280, and a description of enforcement methods as required by 40 CFR 51.111.

We have issued a General Preamble [3] and Addendum to the General Preamble [4] describing our preliminary views on how EPA intends to review SIPs submitted to meet the CAA's requirements for PM_{10} plans. The General Preamble mainly addresses the requirements for moderate areas and the Addendum, the requirements for serious areas.

IV. How Does the Wallula Serious Area Plan Meet Clean Air Act Planning Requirements?

A. Plan Overview

The Wallula serious area plan describes the efforts to determine the cause of PM_{10} exceedances in Wallula and concludes that all of the PM_{10} exceedances have been due to fugitive dust. Analysis of the filters from the PM_{10} monitors, on high and low wind days and when high and low levels of PM_{10} are recorded, reveals that dust is the primary material on the monitors. The emissions inventory identifies agricultural dust as the predominant source of PM_{10} emissions in the area.

Ecology has presented information showing that all but one of the exceedances since January 1, 1995 were caused by dust due to unusually high winds and that, to the extent the dust was attributable to anthropogenic (man-made) sources, such sources are

[3] ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992).

[4] ''State Implementation Plans for Serious PM_{10} Nonattanment Areas, and Attainment Date Waivers for PM_{10} Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 59 FR 41998 (August 16, 1994).

controlled with best available control measures. As discussed above, EPA agrees with the information presented by Ecology with respect to these exceedances and therefore believes such exceedances are appropriately excluded in determining whether the area is attaining the PM_{10} standards.

As also discussed above, meteorological information indicated that the exceedance that occurred on July 3, 1997 was not due to high winds. In its investigation Ecology determined that dust was the predominant material found on the monitor that day. After analyzing the PM_{10} filter, the meteorology, the results of dispersion modeling, the emissions inventory, and chemical mass balance modeling for that day, as well as for other days, Ecology concluded that the most likely primary cause of the exceedance was dust raised by the transport of 130 truck loads of compost on unpaved roads from the compost facility to a nearby fiber farm from July 1–3, 1997, an unusual and nonrecurring activity.

The Wallula serious area plan demonstrates attainment with the PM_{10} standards by showing that agricultural activities in the area are employing best management practices to reduce PM_{10} emissions, and that the feedlot, compost facility and other sources of fugitive PM_{10} emissions are employing best available control measures. This includes measures to ensure the fugitive dust impacts of unusual or extraordinary activities are considered and minimized so as to prevent a recurrence of the type of exceedance that occurred on July 3, 1997.

The following sections present a discussion of how the Wallula serious area plan meets the CAA requirements for serious PM_{10} nonattainment areas.

B. Emissions Inventory

CAA section 172(c)(3) of the CAA requires that nonattainment area plans include a comprehensive, accurate, and current inventory of actual emissions from all sources in the nonattainment area in the designated base year and a future attainment year. Ecology chose 1997 as the base year because the area's redesignation to serious was based on a recorded exceedance of the 24-hour PM_{10} standard that occurred in 1997. The inventory focused on emissions for a typical day during the summer, the time of year when PM_{10} emissions tend to be highest. Ecology excluded emissions associated with the recorded exceedance on July 3, 1997 (involving the one-time transport of 130 truckloads of finished compost near the monitor) because those emissions were the result of a nonrecurring activity and therefore not appropriately included in a baseline inventory. It also excluded anthropogenic and nonanthropogenic emissions associated with high wind days because the exceedances associated with such events are addressed under EPA's Natural Events Policy and Ecology's Natural Events Action Plan. The 1997 baseline emissions inventory represents not only baseline emissions but current emissions as well. This is because the nature of the emissions and the small number of sources in this rural, agricultural nonattainment area have changed little since 1997.

Based on our review of the Wallula serious area plan, we believe that the emissions estimates for all of the identified sources and source categories are based on emissions factors and methodologies recommended by EPA, or are derived from a specific study or data collected from a source category in the area (*e.g.*, vacant lots). We therefore propose to find that the methodologies and calculations used by Ecology to develop the emissions inventory rely upon reasonable assumptions and provide a sufficient basis upon which to assess the impact of control measures on future PM_{10} emissions in the Wallula area. EPA is therefore proposing to approve the emissions inventory in the Wallula serious area plan as meeting the requirements of CAA section 172(c)(3).

C. Implementation of Best Available Control Measures

CAA section 189(b)(1)(B) requires that a PM_{10} serious area plan provide for the implementation of BACM within four years of reclassification to serious. The CAA does not define what level of control constitutes a BACM-level of control. In guidance, we have defined it to be, among other things, the maximum degree of emission reduction achievable from a source or source category which is determined on a case-by-case basis, considering energy, economic and environmental impacts. Addendum at 42010.

Under our applicable guidance, BACM is applied to each significant (i.e., non-de minimis) source category. EPA has established a presumption that a ''significant'' source category is one that contributes 5 ug/m^3 or more of PM_{10} to a location of 24-hour violation and 1 ug/m^3 or more for the annual standard. Addendum at 42011. EPA follows a four-step process for evaluating BACM in PM_{10} serious area plans. Addendum at 42010–42014. The steps are:

1. Develop a detailed emissions inventory of PM_{10} sources and source categories;
2. Model to evaluate the impact on PM_{10} concentrations over the standards of the various sources and source categories to determine which are significant;
3. Identify potential BACM for significant source categories and evaluate their reasonableness, considering technological feasibility, costs, and energy and environmental impacts; and
4. Provide for the implementation of the BACM or provide a reasoned justification for rejecting any potential BACM.

When the process is complete, the individual measures should then be converted into a legally enforceable vehicle (*e.g.*, a regulation or permit process). CAA sections 172(6) and 110(a)(2)(A). Also, the regulations or other measures should meet EPA's criteria regarding the enforceability of SIPs and SIP revisions. General Preamble at 13541.

The development of the emissions inventory is discussed in the preceding section. EPA believes that the base-year emissions inventory contains a sufficient level of detail to enable appropriate evaluation of the control measures for BACM purposes in the Wallula serious area plan. Using a combination of chemical analysis, source apportionment, and its base emissions inventory, the plan identifies the following source categories as being significant contributors to violations of the 24-hour PM_{10} standard in the Wallula area: [5]

1. Agricultural tilling.
2. Boise Paper Solutions—Composting Facility and Landfill.
3. Unpaved road dust.
4. Tyson Fresh Meats (formerly IBP, Inc.), a beef processing facility.
5. Simplot Feeders Limited Partnership, a beef cattle feedlot (Simplot feedlot).

Based on EPA's review of the modeling and other analyses described in the plan, we believe Ecology appropriately evaluated the impact of various PM_{10} sources and source categories on PM_{10} levels in the area and derived a comprehensive list of significant sources and source categories for the area. Ecology included sources of fugitive emissions, and not sources of combustion, in its list of source categories to be evaluated because no significant contribution from combustion products was detected on sampling filters. The following

[5] The Wallula serious area plan does not identify significant source contributors to violations of the PM_{10} annual standard because, as discussed above, the area has never violated the annual standard.

discussion contains a summary of the results of the BACM analysis for Wallula and the control measures adopted by Ecology.

1. Agricultural tilling. In finding that the Wallula area attained the 24-hour PM_{10} standards by the applicable attainment date of December 31, 2001, EPA determined that sources of agricultural windblown dust in the Wallula area were implementing BACM. *See* 67 FR 64815 (October 22, 2002). The BACM demonstration for the area relied on best management practices (BMPs) identified in ''Farming with the Wind: Best Management Practices for Controlling Wind Erosion and Air Quality on Columbia Plateau Croplands,'' (1998), the Columbia Plateau Natural Events Action Plan (1998) (Columbia Plateau NEAP), and data collected by the Natural Resources Conservation Service (NRCS). In the same action, we noted that identification and application of BACM for agricultural lands is evolving and that we expect Ecology to continue efforts in identifying and implementing BACM on sources of agricultural windblown dust in the Wallula area in order for future exceedances caused by high winds to be characterized as ''natural events'' and excluded in attainment determinations.

Since our attainment determination, both ''Farming with the Wind'' and the Columbia Plateau NEAP have been revised to include updated information on the best management practices, their effectiveness, and special projects being implemented in the area to reduce emissions from agricultural sources. In its 2003 Columbia Plateau NEAP, Ecology defines BACM for agricultural fields to be conservation programs and practices that reduce or minimize wind erosion, and specifically, USDA Conservation Title Programs supplemented by incentive-based implementation of wind-erosion conservation practices or best management practices (BMPs). 2003 Columbia Plateau NEAP, pgs. 18 and 19. In its 2003 annual status report on agricultural BACM implementation, Ecology reports that BMP use has increased in the Columbia Plateau. The document also identifies several ongoing projects specific to the Wallula area to reduce agricultural dust emissions in the Wallula area. This increase in BMPs in the Columbia Plateau, in combination with the ongoing emission reduction projects specific to the Wallula area, indicate an overall upward trend in the widespread use of BMPs in the Wallula area.

In light of the progress in identifying new BMPs and refining existing ones, better information about their associated effectiveness, a continued upward trend in the widespread use of BMPs, Ecology's commitment in its 2003 Columbia Plateau NEAP to continue activities supporting the increased use of BMPs, and the area's soil and climate characteristics, EPA concludes that the BACM requirement for agricultural sources is being met. Note, however, that identification and application of BACM for agricultural lands is still evolving and we expect Ecology to continue efforts in identifying and implementing BACM on sources of agricultural windblown dust and to revise periodically its Columbia Plateau NEAP, which covers the Wallula area.

2. Boise Paper Solution—Composting Facility and Landfill. This source category includes emissions from vehicular traffic, windrow turning, materials handling and conveyance, and wind associated with the Boise Paper Solutions composting and landfill. Ecology has issued a title V Air Operating Permit (No. 000369–7) containing a fugitive dust control plan incorporating the measures that were determined as BACM for this facility. The plan requires road watering, rubber drapes on the windrow turning machine, compost row watering, no windrow turning on high wind days, minimization of active face of the landfill, and a prohibition on the placement of materials in the landfill during high wind days. In light of Ecology's evaluation of BACM and its issuance of an Air Operating Permit containing a dust control plan for the facility, EPA concludes that the BACM requirement for this facility is being met.

3. Unpaved roads: Although emissions from unpaved roads contributed only 2.2% to the baseline inventory, quantitative analyses found that dust on the Wallula filters could be attributed to unpaved roads or agricultural fields. Analysis was unable to distinguish between the two sources. Therefore, both unpaved roads and agricultural fields were evaluated for BACM in the Wallula serious area plan. Based on criteria in EPA's *Fugitive Dust Background Document and Technical Information Document for Best Available Control Measures* (1992), unpaved roads with a length less than 0.5 mile or with less than 20 vehicle trips per day did not receive further consideration for BACM and were not included in the inventory. Ecology put most focus on unpaved roads near the monitor. The focus on these roads recognizes that the truck transport activity associated with the exceedance on July 3, 1997, which led to a violation, took place near the monitor.

Normal traffic on these roads has consisted of staff traveling to service the monitoring site and meteorological station and Ecology staff visiting the monitoring site. The owner of land surrounding these roads has taken steps to limit access to these roads, and the monitoring site has been moved to a site in Burbank, both reducing the amount of travel on the roads. Ecology concluded that no additional controls to reduce PM_{10} on unpaved roads in the Wallula nonattainment area are required. Based on Ecology's evaluation and in light of the nature and limited use of unpaved roads in the area, EPA believes that no further controls on unpaved roads are needed to meet BACM requirements.

4. Tyson Fresh Meats (formerly IBP, Inc.). On December 6, 2002, Ecology issued Administrative Order No. 02AQER–5074 to reduce IBP, Inc.'s potential to emit below the 70 tons per year threshold for major sources in serious PM_{10} nonattainment areas. The permit includes hourly and annual limits on throughput and hours of operation to achieve this reduction. In the Order, Ecology determined that the control equipment at IBP constitutes BACT. Based on Ecology's evaluation of BACM/BACT at the facility and the Order limiting the facility's potential to emit, EPA concludes that the BACM/BACT requirement for this facility is being met.

5. Simplot feedlot. WAC 173–400–040 requires air pollution sources to take ''reasonable precautions'' to prevent the release of fugitive emissions. To clarify what constitutes ''reasonable precautions'' for fugitive dust emissions from feedlots, Ecology developed a guidelines document entitled ''Fugitive Dust Control Guidelines for Beef Cattle Feedlots and Best Management Practices'' (Feedlot Guideline Document). These guidelines are intended to be used in conjunction with WAC 173–400–040 and are implemented through flexible, site-specific fugitive dust control plans developed by each feedlot and approved by Ecology or the appropriate local air authority. Simplot submitted a revised Feedlot Dust Control Plan to Ecology in December 2003. The revised plan reflects the outcome of Ecology's BACM evaluation, which looked at control measures such as increased water application, valve adjustment, addition of sprinklers to improve coverage, irrigation scheduling changes, water trucks to control roadway dust and manure management as potential emissions reduction methods. Ecology

approved Simplot's Feedlot Dust Control Plan on December 18, 2003, finding that the plan meets the requirements in the Feedlot Guideline Document and constitutes BACM for this source. Based on Ecology's evaluation of BACM, the Feedlot Guideline Document, the provisions in WAC 173–400–040, and Ecology's approval of Simplot's Feedlot Dust Control Plan, EPA concludes that the BACM requirement for this facility is being met.

Based on the demonstration of BACM submitted by Ecology for sources in the Wallula area and our discussion above, EPA believes the serious area plan provides for implementation of both RACM and BACM for all source categories that contribute significantly to PM_{10} standard violations in the Wallula nonattainment area. EPA therefore proposes to approve the plan as meeting the RACM and BACM requirements.

D. Major Source Definition

CAA section 189(b)(3) requires that the terms ''major source'' and ''major stationary source'' used in implementing the major new source permitting program in serious PM_{10} nonattainment areas under section 173 and for the control of PM_{10} precursors under section 189(e) must include any stationary source or group of stationary sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 70 tons per year of PM_{10}. To meet this requirement, Ecology revised the definition of ''major stationary source'' in WAC 173–400–112. Specifically WAC 173–400–112(1)(b)(i)(A) lowers the PM_{10} threshold in nonattainment areas from 100 to 70 tons per year. EPA is proposing to approve this change because it meets the requirements of CAA section 189(b)(3).

E. Attainment Demonstration

CAA section 189(b)(1)(A) requires a demonstration that the area will attain the NAAQS by December 31, 2001. As discussed above, EPA has already determined that the Wallula nonattainment area attained the PM_{10} NAAQS by December 31, 2001 (67 FR 64815, November 22, 2002). As discussed below, the Wallula serious area plan provides further documentation in support of that finding.

To demonstrate attainment, Ecology focused on the 24-hour PM_{10} exceedance of 210 ug/m^3 that occurred at the Nedrow Farm/Wallula Junction monitor on July 3, 1997. Although there have been other exceedances recorded in Wallula after July 3, 1997, EPA concluded in 2002 that all subsequent exceedances through December 31, 2001, qualified as natural events under EPA's Natural Events Policy. As discussed above and in our finding of attainment, these natural event exceedances are not considered in determining the area's air quality status. Since December 31, 2001, there have been four additional exceedances of the 24-hour PM_{10} standard. As also discussed above, however, we are proposing in this notice that these exceedances should also qualify as natural events under EPA's Natural Events Policy. Hence, it is reasonable for Ecology to focus on July 3, 1997 since it is the last time an exceedance not attributed to a natural event has occurred in the area and it is this exceedance that led to the area's reclassification to serious.

1. Investigation of the July 3, 1997 Exceedance

To determine the cause of the exceedance on July 3, 1997, Ecology relied on a combination of filter analyses, chemical mass balance modeling, dispersion modeling, and analysis of meteorological and air quality monitoring data. After Ecology's initial analysis, it was not immediately apparent what caused the exceedance. Therefore, Ecology conducted an investigation into whether there were any unusual activities in the area on July 3, 1997, that could have contributed significantly to the measured concentration. This effort led to information that 130 truckloads of finished compost had been transported over unpaved roads near the monitor from July 1–3, 1997. The trucks were loaded at the Boise Paper Solutions-Wallula Mill composting facility and the material was transported over unpaved roads to a fiber farm for use in enhancing cottonwood production. Based on the results of this investigation, Ecology determined that this was an unusual and nonrecurring activity and that it would have resulted in additional PM_{10} emissions in the area. This determination, combined with the results of technical analyses, led Ecology to conclude that unpaved road dust caused by truck transport was the primary cause of the July 3, 1997 exceedance. A summary of evidence supporting this conclusion is presented in the TSD.

2. Prevention of Future Exceedances

The transport of finished compost from the compost facility to the fiber farm was a unique event that has not been repeated. The expected benefit for cottonwood production did not materialize and Boise Paper Solutions-Wallula Mill is now putting all finished compost in the compost cell of the landfill at the facility. To ensure that similar events do not occur in the future, Boise Paper Solutions—Wallula Mill developed a dust control plan that is part of its title V air operation permit. The plan covers normal and customary composting operation and also contains a provision specifying that dust effects must be considered in the event of any extraordinary activities outside of normal operations. This provision would have applied to the truck transport of finished compost to the fiber farm on July 1–3, 1997.

3. Attainment Demonstration

Based on the information provided by Ecology, EPA believes that Ecology has thoroughly investigated the exceedance on July 3, 1997. EPA further believes that based on the results of the investigation, which included filter analysis, chemical mass balance and dispersion modeling, it is reasonable to conclude that the truck transport of compost on unpaved roads near the monitor caused the exceedance on July 3, 1997. The truck transport activity was a one-time event that is not expected to recur. Other control measures are now in place to prevent both customary and unusual activities from causing a similar exceedance in the future.

In light of the results of Ecology's investigation, the control measures addressing the July 3, 1997 exceedance, the control measures discussed in section IV.B. above that address air quality in Wallula generally, the application of EPA's Natural Event Policy, including implementation of BACM on agricultural sources to minimize the impacts of windblown dust during natural event exceedances, the attainment determination already made for the area through January 31, 2001, and more recent monitoring data showing continuing attainment, EPA proposes to approve the submitted attainment demonstration for the Wallula serious nonattainment area.

F. Implementation of Best Available Control Measures on Major Stationary Sources of PM_{10} Precursors

CAA section 189(e) requires BACT to be applied to major stationary sources of PM_{10} precursors if these sources contribute significantly to PM_{10} exceedances in the area. Analysis of the PM_{10} filters on two days with exceedances, two days with elevated concentrations, and two days with low concentrations revealed that dust was the primary material on the PM_{10} filters.

Based on this information, EPA does not believe major stationary sources of PM_{10} precursors contribute significantly to PM_{10} levels in excess of the NAAQS in the nonattainment area.

G. Contingency Measures

Section 172(c)(9) of the Clean Air Act requires that implementation plans provide for the implementation of specific measures to be undertaken if the area fails to make RFP or attain by its attainment deadline. These contingency measures are to take effect without further action by the State or EPA. 67 FR at 64816.

The contingency measures in the serious area plan focus on mitigation of the impacts of windblown dust. The focus is on windblown dust rather than on the circumstances of the July 3, 1997 exceedance because, as discussed above, the circumstances of the July 3, 1997 exceedance were determined to be unusual and unlikely to recur. In contrast, windblown dust events occur regularly in the Columbia Plateau and are the most likely cause of future exceedances. Because of the likelihood of future wind blown exceedances, the plan does not include a PM_{10} trigger level for implementing the contingency measures. Rather, the measures are to be implemented on a regular basis regardless of the PM_{10} levels measured.

The plan's contingency measures include improvements to Ecology's process for identifying source contributors when high wind events are occurring, certain PM_{10} reduction projects included in Ecology's 2003 NEAP, and Ecology's BACM demonstration and our accompanying review every time a windblown dust exceedance occurs. In light of these measures to mitigate the impacts of high wind events and increase BMP implementation, along with regular evaluation of these measures during review of natural event claims and during attainment determinations, we believe the plan meets the contingency requirements of section 172(c)(9) of the Clean Air Act.

H. Reasonable Further Progress (RFP) and Quantitative Milestones

CAA section 172(c)(2) requires nonattainment plans to provide for reasonable further progress (RFP). Section 171(1) of the CAA defines RFP as ''such annual incremental reductions in emissions of the relevant air pollutant as are required by this part (part D of title I) or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.'' CAA section 189(c) also requires PM_{10} plans demonstrating attainment to contain quantitative milestones which are to be achieved every 3 years until the area is redesignated attainment and which demonstrate RFP. These quantitative milestones should consist of elements that allow progress to be quantified or measured. Addendum at 42016.

As discussed above, in 2002, EPA determined that Wallula nonattainment area was meeting the 24-hour and annual PM_{10} standards as of December 31, 2001. Since then, monitoring data show that Wallula is continuing to meet the standards. Because the area is already in attainment of the standards, the emissions inventory is believed to have changed little since 1997, and control measures are being implemented as a part of the Wallula serious area plan to ensure the Wallula area maintains the standards, EPA believes no further showing of RFP or quantitative milestones are necessary. For these reasons, we propose to find that the plan meets the RFP and milestone requirement in CAA section 189(c)(1).

I. Transportation Conformity

CAA section 176(c) requires that federally-funded or approved transportation plans, programs, and projects in nonattainment areas ''conform'' to the area's air quality implementation plans. Conformity ensures that federal transportation actions do not worsen an area's air quality or interfere with its meeting the air quality standards. We have issued a conformity rule that establishes the criteria and procedures for determining whether or not transportation plans, programs, and projects conform to a SIP. *See* 40 CFR part 93, subpart A.

One of the primary tests for conformity is to show transportation plans and improvement programs will not cause motor vehicle emissions higher than the levels needed to make progress toward and meet the air quality standards. The motor vehicle emissions levels needed to make progress toward and meet the air quality standards are set in an area's attainment and/or RFP plans and are known as the ''motor vehicle emissions budget.'' Emissions budgets are established for specific years and specific pollutants. *See* 40 CFR 93.118(a).

Ecology's analysis shows that mobile sources are an insignificant source of PM_{10} emissions in the Wallula nonattainment area. As a result, a motor vehicle emissions budget is not required as part of the Wallula serious area plan and transportation conformity does not apply in this area. *See* 40 CFR 93.109(k).

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This proposed action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, 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 by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the

absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Particulate matter, and Reporting and recordkeeping requirements.

Dated: January 21, 2005.

Ronald A. Kreizenbeck,

Acting Regional Administrator, EPA Region 10.

[FR Doc. 05–1867 Filed 1–31–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[OW–2003–0063; FRL–7866–5]

RIN 2040–AE72

Application of Pesticides to Waters of the United States in Compliance With FIFRA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rulemaking and notice of interpretive statement.

SUMMARY: On August 13, 2003, the Environmental Protection Agency (EPA) published a notice in the **Federal Register** soliciting public comment on an Interim Statement and Guidance to address issues pertaining to coverage under the Clean Water Act (CWA) of pesticides regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that are applied to or over waters of the United States. The interpretation addressed two sets of circumstances for which EPA has determined that the application of a pesticide to waters of the United States consistent with all relevant requirements of FIFRA does not constitute the discharge of a pollutant that requires a National Pollutant Discharge Elimination System (NPDES) permit under the CWA. EPA is announcing today the interpretive statement developed after consideration of public comments. In this notice, EPA is also proposing to revise the NPDES permit program regulations to incorporate the substance of the interpretive statement.

DATES: Comments on this action must be received or postmarked on or before midnight April 4, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OW–2003–0063, 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: *ow-docket@epa.gov,* Attention Docket ID No. OW–2003–0063.

(4) Mail: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mailcode 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OW–2003–0063.

(5) Hand Delivery: Deliver your comments to: EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. OW–2003–0063. Such deliveries are only accepted during the Docket's normal hours of operation.

Instructions: Direct your comments to Docket ID No. OW–2003–0063. 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). For additional instructions on submitting comments, go to section B.1. 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 Water Docket in the EPA Docket Center, 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 Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: For additional information contact Louis Eby, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–6599, e-mail address: *eby.louis@epa.gov;* or William Jordan, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 305–1049, e-mail address: *jordan.william@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be potentially affected by this action if you apply pesticides to or

over, including near, water. Potentially affected entities may include, but are not limited to:

Category	NAICS	Examples of potentially affected entities
Agriculture parties—General agricultural interests, farmers/producers, forestry, and irrigation.	111 Crop Production	Producers of crops mainly for food and fiber including farms, orchards, groves, greenhouses, and nurseries.
	112511 Finfish Farming and Fisher Hatcheries.	Producers of farm raised finfish (*e.g.*, catfish, trout, goldfish, tropical fish, minnows) and/or hatching fish of any kind.
	112519 Other Animal Aquaculture.	Producers engaged in farm raising animal aquaculture (except finfish and shellfish). Alligator, frog, or turtle production is included in this industry.
	113110 Timber Tract Operations.	The operation of timber tracts for the purpose of selling standing timber.
	113210 Forest Nurseries Gathering of Forest Products.	Growing trees for reforestation and/or gathering forest products, such as gums, barks, balsam needles, rhizomes, fibers, Spanish moss, ginseng, and truffles.
	221310 Water Supply for Irrigation.	Operating irrigation systems.
Pesticide parties (includes pesticide manufacturers, other pesticide users/interests, and consultants).	325320 Pesticide and Other Agricultural Chemical Manufacturing.	Formulation and preparation of agricultural pest control chemicals.
Public health parties (includes mosquito or other vector control districts and commercial applicators that service these).	923120 Administration of Public Health Programs.	Government establishments primarily engaged in the planning, administration, and coordination of public health programs and services, including environmental health activities.
Resource management parties (includes state departments of fish and wildlife, state departments of pesticide regulation, state environmental agencies, and universities).	924110 Administration of Air and Water Resource and Solid Waste Management Programs.	Government establishments primarily engaged in the administration, regulation, and enforcement of air and water resource programs; the administration and regulation of water and air pollution control and prevention programs; the administration and regulation of flood control programs; the administration and regulation of drainage development and water resource consumption programs; and coordination of these activities at intergovernmental levels.
	924120 Administration of Conservation Programs.	Government establishments primarily engaged in the administration, regulation, supervision and control of land use, including recreational areas; conservation and preservation of natural resources; erosion control; geological survey program administration; weather forecasting program administration; and the administration and protection of publicly and privately owned forest lands. Government establishments responsible for planning, management, regulation and conservation of game, fish, and wildlife populations, including wildlife management areas and field stations; and other administrative matters relating to the protection of fish, game, and wildlife are included in this industry.
Utility parties (includes utilities)	221 Utilities	Provide electric power, natural gas, steam supply, water supply, and sewage removal through a permanent infrastructure of lines, mains, and pipes.
Other Parties	713910 Golf courses and country clubs.	Golf course operators who have ponds for irrigation.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed could also be affected. Other stakeholders and members of the public concerned about the application of pesticides to and over, including near, waters of the U.S. may also have an interest in this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. 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.

II. Background and Public Comments

EPA issued an Interim Statement and Guidance addressing two circumstances in which the Agency interprets the CWA as not requiring NPDES permits for the application of pesticides to and over waters of the United States, because such materials are not ''pollutants'' as that term is defined in the CWA. The first situation addressed in the Interim Statement and Guidance was the application of pesticides directly to waters of the United States in order to control pests (for example, mosquito larvae or aquatic weeds that are present in the water). The second situation was the application of pesticides to control pests that are present over waters of the United States that results in a portion of the pesticide being deposited to waters of the United States (for example, when pesticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when insecticides are applied for control of adult mosquitos). Although the Interim Statement and Guidance was effective when issued, EPA provided public notice and solicited public comment. 68 FR 48385; August 13, 2003.

EPA received many comments on the Interim Statement and Guidance, including comments supporting EPA's interpretation as well as comments opposing it. In general, most commenters who supported EPA's interpretation agreed that it was the best interpretation of the CWA's definition of ''pollutant,'' and that the issuance of the Interim Statement and Guidance would facilitate application of pesticides in a manner consistent with relevant FIFRA requirements to serve important public health purposes. The comments opposing EPA's interpretation disagreed with the Agency's interpretation of the Act and expressed concerns about the environmental effects of pesticides applied to and over waters of the United States. EPA has considered the comments received on the Interim Statement and will continue to do so in the context of today's proposed rulemaking. The Agency will formally respond to all public comments received on the Interim Statement and during the public comment period for today's proposed rule. Therefore, it is not necessary to resubmit comments that were previously submitted on the Interim Statement and Guidance.

While EPA will formally address all the comments when it promulgates a final regulation, the Agency addresses here two issues raised by public comments. Some commenters expressed concern that the Agency was not adopting this interpretation through a rulemaking proceeding; a subset of these comments argued that failure to go through rulemaking violated the Administrative Procedure Act (APA); other commenters urged EPA to undergo rulemaking in order to provide greater legal certainty to pesticide applicators. EPA disagrees with those commenters who contended that the APA rulemaking requirements apply to today's Interpretive Statement. The Interpretive Statement, like the Interim Statement and Guidance, is an ''interpretative'' rule under 5 U.S.C. 553(b) since it interprets the meaning of the term ''pollutant'' in section 502(6) of the CWA as applied to certain pesticide applications. Therefore, it is exempt from notice and comment rulemaking requirements under the APA. Consistent with its status, the document is entitled an ''Interpretive Statement.''

EPA agrees, however, with those commenters who emphasized the importance of providing clarity and greater legal certainty to parties who apply pesticides under the circumstances addressed by the Interim Statement and Guidance. Therefore, EPA is proposing to codify the substance of today's Interpretive Statement into EPA's NPDES regulations.

Second, several other commenters argued that EPA's interpretation in the Interim Statement and Guidance is a significant departure from previous statements in amicus briefs the Agency filed in *Headwaters, Inc.*, v. *Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), and in *Altman* v. *Town of Amherst*, 47 Fed. Appx. 62 (2d Cir. 2002). EPA believes that, in some respects, these commenters have incorrectly characterized past government positions in these cases, consequently overstating the differences between the Interpretive Statement and the positions in those cases. Neither the CWA itself nor EPA's regulations address the question of whether pesticides are ''chemical wastes'' or ''biological materials'' under section 502(6) of the Act when used for their intended purpose and in conformity with relevant requirements of FIFRA. Moreover, EPA does not have a longstanding interpretation of the statute or its regulations that resolves this issue. Nonetheless, EPA's position on these issues has evolved since the briefs were filed in these cases. EPA believes that its revised thinking best accords with Congressional intent reflected in the language, structure and purposes of the CWA. A more detailed explanation is contained in a January 24, 2005, memorandum from EPA's General Counsel titled ''Analysis of Previous Federal Government Statements on Application of Pesticides to Waters of the United States in Compliance with FIFRA,'' which is available in the docket for this rule at *http://www.epa.gov/edocket*.

III. Summary of Revisions to Interpretive Statement

EPA is issuing an Interpretive Statement that is substantially similar to the Interim Statement and Guidance. The Interpretive Statement contains the following changes from the Interim Statement and Guidance:

- EPA has modified the description of the first circumstance addressed in the statement to include other pests in addition to mosquito larvae and aquatic weeds, since pesticide applications directly to waters of the United States may target organisms other than the two identified in the Interim Statement and Guidance;
- EPA has modified the description of the second circumstance addressed in the statement to refer to pesticides (rather than insecticides) that are applied over water, and to refer to other pests in addition to mosquitos, since pesticide applications to control pests present over waters of the United States may target organisms other than mosquitos;
- EPA has modified the second circumstance to clarify that the reference to pests ''over water'' includes pests near water, since organisms targeted by pesticides covered by the Interpretive Statement are often found near as well as in, on or above waters;
- EPA has clarified that ''relevant requirements'' under FIFRA for purposes of this document refers to requirements relevant to protection of water quality; and
- Today's statement only specifically analyzes the applicability of NPDES permitting requirements to pesticide applications in the two circumstances identified therein. The Interpretive Statement now references, however, several other interpretive statements previously issued by the Agency and also notes that it has been and will continue to be the operating approach of the Agency that the application of agricultural and other pesticides in accordance with relevant FIFRA

requirements is not subject to NPDES permitting requirements.

The full text of the Interpretive Statement is included below in section VI.

IV. Summary of Proposed Rule

EPA is also proposing to revise the NPDES permit program regulations to incorporate the substance of the Interpretive Statement. The proposed revision would add a paragraph to 40 CFR 122.3's list of discharges that are excluded from NPDES permit requirements. The new paragraph would exclude applications of pesticides to waters of the United States consistent with all relevant requirements under FIFRA in the two circumstances described in the Interpretive Statement. As is explained in the Interpretive Statement, the pesticides are not pollutants under these circumstances and, therefore, are not discharges of pollutants subject to NPDES permitting requirements.

EPA is soliciting public comment today on the proposed regulatory language. The Agency will formally respond to all public comments received on the Interim Statement during the comment period on today's proposed rule. Therefore, it is not necessary to resubmit comments that were previously submitted on the Interim Statement and Guidance.

V. 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 Office of Management and Budget (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, therefore, is not subject to OMB review.

B. Paperwork Reduction Act

This proposed action would not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* If promulgated, it would merely identify two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act.

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.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (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 based on Small Business Administration (SBA) size standards; (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. Because EPA proposes to identify two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act, this proposed action will not impose any burden on any small entity. 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 to change an NPDES deadline would 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. The proposed rule would not impose any additional costs to these entities. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reason, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's proposed rule is not subject to the requirements of section 203 of UMRA.

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. If promulgated, it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this 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 9, 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.''

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. Thus, Executive Order 13175 does not apply to this rule.

EPA specifically solicits additional comment on this proposed 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 E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This regulation is not subject to Executive Order 13045 because it is not economically significant as defined under E.O. 12866, and because the Agency does not have reason to believe the environmental health and safety risks addressed by this action present a disproportionate risk to children. The proposed rule only interprets the legal scope of NPDES permits requirement under the CWA and does not change how pesticide applications are addressed under FIFRA.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule would not be 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. The only effect of this proposed rule would be is to identify two circumstances in which the application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Pub. L. 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 standard 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 rulemaking does not involve technical standards.

VI. Today's Interpretive Statement

The text of the final Interpretive Statement follows:

Memorandum

Subject: Interpretive Statement on Application of Pesticides to Waters of the United States in Compliance with FIFRA.

From: Benjamin H. Grumbles (signed and dated January 25, 2005). Assistant Administrator for Water (4101).

Susan Hazen (signed and dated January 25, 2005). Acting Assistant Administrator for Prevention, Pesticides and Toxic Substances (7101).

To: Regional Administrators, Regions I–X.

The Environmental Protection Agency (EPA) is issuing this interpretation of the Clean Water Act (CWA) to address issues regarding coverage under the CWA of pesticides regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) that are applied to or over, including near, waters of the United States. This Memorandum is issued to address the question of whether National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the CWA are required for the applications of pesticides described below that comply with relevant requirements of FIFRA. EPA provided public notice of and solicited public comment on its interpretation of the CWA with regard to

this question. *See* 68 FR 48385 (Aug. 13, 2003). After considering the comments received in response to that notice, EPA is issuing this Interpretive Statement.

The application of a pesticide to or over, including near, waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the Clean Water Act in the following two circumstances:

(1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds or other pests that are present in the waters of the United States.

(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, that results in a portion of the pesticides being deposited to waters of the United States; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over, including near, water for control of adult mosquitos or other pests.

It is the Agency's position that these types of applications do not require NPDES permits under the Clean Water Act if the pesticides are applied consistent with all relevant requirements under FIFRA (*i.e.*, those relevant to protecting water quality).[1] Applications of pesticides in violation of the relevant requirements under FIFRA would be subject to enforcement under any and all appropriate statutes including, but not limited to FIFRA and the Clean Water Act.

EPA will continue to review the variety of other circumstances beyond the two described above in which questions have been raised about whether applications of pesticides that enter waters of the U.S. are regulated under the CWA, including other applications over land areas that may drift over and into waters of the U.S.

Through a proposed rule in the **Federal Register**, EPA will solicit comment on incorporating the substance of this Interpretive Statement in the NPDES permit program regulations in 40 CFR part 122. Notwithstanding that action, however, the application of pesticides in compliance with relevant FIFRA requirements is not subject to NPDES permitting requirements, as described in this Interpretive Statement.

Background and Rationale

In this Interpretive Statement, the Agency construes the Clean Water Act in a manner consistent with how the statute has been administered for more than 30 years. EPA does not issue NPDES permits solely for the direct application of a pesticide to target a pest that is present in or over a water of the United States, nor has it ever stated in any general policy or guidance that an NPDES permit is required for such applications.

It has been and will continue to be the operating approach of the Agency that the application of agricultural and other pesticides in accordance with label directions is not subject to NPDES permitting requirements.

In *Headwaters, Inc.* v. *Talent Irrigation District,* the U.S. Court of Appeals for the Ninth Circuit held that an applicator of herbicides was required to obtain an NPDES permit under the circumstances before the court. 243 F.3rd 526 (9th Cir. 2001).[2] The *Talent* decision caused public health authorities, natural resource managers and others who rely on pesticides great concern and confusion about whether they have a legal obligation to obtain an NPDES permit when applying a pesticide consistent with FIFRA and, if so, the potential impact such a requirement could have on accomplishing their own mission of protecting human health and the environment. Since *Talent,* only a few states have issued NPDES permits for the application of pesticides. Most state NPDES permit authorities have opted not to require applicators of pesticides to obtain an NPDES permit. In addition, state officials have continued to apply pesticides for public health and resource management purposes without obtaining an NPDES permit. These varying practices reflect the substantial uncertainty among regulators, the regulated community and the public regarding how the Clean Water Act applies to the use of pesticides.

There has been continued litigation and uncertainty following the *Talent* decision. One such case is *Altman* v. *Town of Amherst* (Altman), which was brought against the Town of Amherst for not having obtained an NPDES permit for its application of pesticides to wetlands as part of a mosquito control program. EPA filed an *amicus* brief in that case setting forth the agency's views in the context of that particular case. In September 2002, the Second Circuit remanded the *Altman* case for further consideration and issued a Summary Order that stated, ''Until the EPA articulates a clear interpretation of current law among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for an NPDES permit [or a state-issued permit in the case before the court] the question of whether properly used pesticides can become pollutants that violate the Clean Water Act will remain open.'' 46 Fed. Appx. 62, 67 (2d Cir. 2002).

This Memorandum provides EPA's interpretation of how the CWA currently applies to the two specific circumstances listed above. Under those circumstances, EPA has concluded that the CWA does not require NPDES permits for a pesticide applied

[1] As described in this Interpretive Statement, pesticides designed and registered for application to or over, including near, water are not considered to be pollutants requiring an NPDES permit under the CWA, regardless of whether the pesticides targets are in the water itself or over, including near, the water. If applied in accordance with all relevant requirements under FIFRA, EPA considers these pesticides to be products that are applied to perform their intended purpose of controlling target organisms and, therefore, are neither ''chemical wastes'' nor ''biological materials'' within the meaning of section 502(6) of the CWA. This includes any residual product that is an inherent, inextricable element of the pesticide application. For purposes of this Interpretive Statement, EPA considers the portion of a pesticide application that does not reach a target organism and any pesticide remaining in the water after the application is complete to be residual product, and not a pollutant requiring an NPDES permit, only if the product had been applied in accordance with all relevant requirements under FIFRA. However, the Agency continues to review whether and under what unique circumstances the material might later become a waste and, therefore, a pollutant. See also n.5, infra. If such residuals were to present a water quality problem, they could be addressed through nonregulatory planning and grant processes under the CWA.

The Agency's interpretation is not inconsistent with the result in the Ninth Circuit's decision in *Headwaters, Inc.* v. *Talent Irrigation District,* 243 F. 3d 526 (9th Cir. 2001), because in the factual situation described by the district court, in EPA's view, the application did not comply with relevant FIFRA requirements and, therefore, was not the type of activity addressed by this Interpretive Statement.

[2] In an *amicus* brief filed by the United States in the *Talent* case, the Agency did not address EPA's interpretation of the circumstances in which pesticides applied to or over water are ''pollutants'' under the CWA's definition of that term. Rather, the *Talent* brief accepted the District Court's factual findings that a ''person'' had discharged a ''pollutant'' from a ''point source'' into ''navigable waters'' but then disputed the District'' Court's legal determination that, even in these circumstances, the discharge did not require a CWA permit because the FIFRA label for the particular pesticide did not reference the NPDES permitting requirement. In contrast, this Interpretive Statement addresses the specific and distinct legal question of whether pesticides applied in the two specific circumstances discussed above are pollutants to begin with, and concludes they are not, provided the use of the pesticide complies with all relevant FIFRA requirements.

consistent with all relevant requirements under FIFRA.[3]

Many of the pesticide applications covered by this memorandum are applied either to address public health concerns such as controlling mosquitos or to address natural resource needs such as controlling non-native species or plant matter growth that upsets a sustainable ecosystem or blocks the flow of water in irrigation systems. Under FIFRA, EPA is charged to consider the effects of pesticides on the environment by determining, among other things, whether a pesticide ''will perform its intended function without unreasonable adverse effects on the environment,'' and whether ''when used in accordance with widespread and commonly recognized practice [the pesticide] will not generally cause unreasonable adverse effects on the environment.'' FIFRA section 3(c)(5).

The application of a pesticide to waters of the U.S. would require an NPDES permit only if it constitutes the ''discharge of a pollutant'' within the meaning of the Clean Water Act.[4] The term ''pollutant'' is defined in section 502(6) of the CWA as follows:

> The term ''pollutant'' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

EPA has evaluated whether pesticides applied consistent with FIFRA fall within any of the terms in section 506(2), in particular whether they are ''chemical wastes'' or ''biological materials.'' EPA has concluded that they do not fall within either term. First, EPA does not believe that pesticides applied consistent with FIFRA are ''chemical wastes.'' The term ''waste'' ordinarily means that which is ''eliminated or discarded as no longer useful or required after the completion of a process.'' *The New Oxford American Dictionary* 1905 (Elizabeth J. Jewell & Frank Abate eds., 2001); *see also The American Heritage Dictionary of the English Language* 1942 (Joseph P. Pickett ed., 4th ed. 2000) (defining waste as ''[a]n unusable or unwanted substance or material, such as a waste product''). Pesticides applied consistent with FIFRA are not such wastes; on the contrary, they are EPA-evaluated products designed, purchased and applied to perform their intended purpose of controlling target organisms in the environment.[5] Therefore, EPA concludes that ''chemical wastes'' do not include pesticides applied consistent with FIFRA.

EPA also interprets the term ''biological materials'' not to include pesticides applied consistent with FIFRA. We think it unlikely that Congress intended EPA and the States to issue permits for the discharge into water of any and all material with biological content.[6] With specific regard to biological pesticides, moreover, we think it far more likely that Congress intended not to include biological pesticides within the definition of ''pollutant.'' This interpretation is supported by multiple factors.

EPA's interpretation of ''biological materials'' as not including biological pesticides avoids the nonsensical result of treating biological pesticides as pollutants even though chemical pesticides are not. Since all pesticides applied in a manner consistent with the relevant requirements under FIFRA are EPA-evaluated products that are intended to perform essentially similar functions, disparate treatment would, in EPA's view, not be warranted, and an intention to incorporate such disparate treatment into the statute ought not to be imputed to Congress.[7] Moreover, at the time the Act was adopted in 1972, chemical pesticides were the predominant type of pesticide in use. In light of this fact, it is not surprising that Congress failed to discuss whether biological pesticides were covered by the Act. The fact that more biological pesticides have been developed since passage of the 1972 Act does not, in EPA's view, justify expanding the Act's reach to include such pesticides when there is no evidence that Congress intended them to be covered by the statute in a manner different from chemical pesticides. Finally, many of the biological pesticides in use today are reduced-risk products that produce a more narrow range of potential adverse environmental effects than many chemical pesticides. As a matter of policy, it makes little sense and would be inconsistent with the environmental purposes of the CWA to discourage the use of these products by treating them as subject to CWA permitting requirements when chemical pesticides are not. Caselaw also supports this interpretation. *Ass'n to Protect Hammersley, Eld, and Totten Inlets* v. *Taylor Resources*, 299 F.3d 1007, 1016 (9th Cir. 2002) (application of the *esjudem generis* canon of statutory interpretation supports the view that the CWA ''supports an understanding of * * * ''biological materials,'' as waste material of a human or industrial process'').[8]

Under EPA's interpretation, whether a pesticide is a pollutant under the CWA turns on whether or not it is a chemical waste or biological material within the meaning of the statute, and this can only be determined by considering the manner in which the pesticide is used. Where a pesticide is used for its intended purpose and its use complies

[3] EPA discusses the positions taken in *Talent* and *Altman* in greater detail in a Memorandum issued by EPA's General Counsel on January 24, 2005, titled ''Analysis of Previous Federal Government Statements on Application of Pesticides to Waters of the United States in Compliance with FIFRA.''

[4] This Interpretive Statement addresses circumstances when a pesticide is not a ''pollutant'' that would be subject to NPDES permit requirements when discharged into a water of the United States. It does not address the threshold question of whether these or other types of pesticide applications constitute ''point source'' discharges to waters of the United States. On March 29, 2002, EPA issued a Memorandum titled ''Interpretive Statement and Regional Guidance on the Clean Water Act's Exemption for Return Flows from Irrigated Agriculture.'' This statement clarified that the application of an aquatic herbicide consistent with the FIFRA label to ensure the passage of irrigation return flow is a nonpoint source activity not subject to NPDES permit requirements under the CWA. Additionally, on September 13, 2003, EPA's General Counsel issued a Memorandum titled ''Interpretive Statement and Guidance Addressing Effect of Ninth Circuit Decision in *League of Wilderness Defenders* v. *Forsgren* on Application of Pesticides and Fire Retardants.'' That Memorandum reaffirmed EPA's long-standing interpretation of its regulations that silvicultural activities such as pest and fire control are nonpoint source activities that do not require NPDES permits. Both these documents remain in effect and are available at *http://www.epa.gov/npdes/agriculture.*

[5] Where, however, pesticides are a waste, for example when contained in stormwater regulated under section 402(p) of the CWA or other industrial or municipal discharges, they are pollutants and their discharge by a point source to a water of the U.S. may be controlled in an NPDES permit.

[6] Taken to its literal extreme, such an interpretation could arguably mean that activities such as fishing with bait would constitute the addition of a pollutant.

[7] Further, some pesticide products may elude classification as strictly ''chemical'' or ''biological.''

[8] EPA's interpretation of section 502(6) with regard to biological pesticides should not be taken to mean that EPA reads the CWA generally to regulate only wastes. EPA notes that other terms in section 502(6) may or may not be limited in whole or in part to wastes, depending on how the substances potentially addressed by those terms are created or used. For example, ''sand'' and ''rock'' can either be discharged as waste or as fill material to create structures in waters of the U.S., and Congress created in section 404 of the Act a specific regulatory program to address such discharges. See 67 FR 31129 (May 9, 2002) (subjecting to the section 404 program discharges that have the effect of filling waters of the U.S., including fills constructed for beneficial purposes). The question in any particular case is whether a discharge falls within one of the terms in section 502(6), in light of the factors relevant to the interpretation of that particular term. As discussed above, the factors critical to EPA's interpretation concerning biological pesticides are consistency with section 502(6)'s treatment of chemical pesticides and chemical wastes, and how the general term ''biological materials'' fits within the constellation of other, more specific terms in section 502(6), which to a great extent focuses on wastes.

with all relevant requirements under FIFRA, EPA has determined that it is not a chemical waste or biological material and, therefore, is not a pollutant subject to NPDES permitting requirements. That coverage under the Act turns on the particular circumstances of its use is not remarkable. Indeed, when asked on the Senate floor whether a particular discharge would be regulated, the primary sponsor of the CWA, Senator Muskie (whose views regarding the interpretation of the CWA have been accorded substantial weight over the last four decades), stated:

> I do not get into the business of defining or applying these definitions to particular kinds of pollutants. That is an administrative decision to be made by the Administrator. Sometimes a particular kind of matter is a pollutant in one circumstance, and not in another. Senate Debate on S. 2770, Nov. 2, 1971 (117 Cong. Rec. 38,838).

Here, to determine whether a pesticide is a pollutant under the CWA, EPA believes it is appropriate to consider the circumstances of how a pesticide is applied, specifically whether it is applied consistent with relevant requirements under FIFRA. Rather than interpret the statutes so as to impose overlapping and potentially confusing regulatory regimes on the use of pesticides, this interpretation seeks to harmonize the CWA and FIFRA.[9] Under this interpretation, a pesticide applicator is assured that complying with relevant requirements under FIFRA will mean that the activity is not also subject to the distinct NPDES permitting requirements of the CWA. However, like an unpermitted discharge of a pollutant, application of a pesticide in violation of relevant FIFRA requirements would be subject to enforcement under any and all appropriate statutes including, but not limited to, FIFRA and the CWA.

Please feel free to call us to discuss this memorandum. Your staff may call Louis Eby in the Office of Wastewater Management at (202) 564–6599 or William Jordan in the Office of Pesticide Programs at (703) 305–1049.

[9] EPA's *Talent* brief suggested that compliance with FIFRA does not necessarily mean compliance with the CWA, and pointed out one difference between CWA and FIFRA regulation, *i.e.*, individual NPDES permits could address local water quality concerns that might not be specifically addressed through FIFRA's national registration process. The position EPA is articulating in this memo would not preclude states from further limiting the use of a particular pesticide in accord with their authorities under 7 U.S.C. 136v(a) and *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 613–614 (1991), to the extent otherwise authorized by Federal and state law. Furthermore, under section 510 of the CWA, States and other governmental entities are not precluded from adopting more stringent requirements to address local water quality concerns.

List of Subjects in 40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Dated: January 26, 2005.

Stephen L. Johnson,

Deputy Administrator.

For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

Subpart A—[Amended]

2. Section 122.3 is amended by adding paragraph (h) to read as follows:

§ 122.3 Exclusions.

* * * * *

(h) The application of pesticides to waters of the United States consistent with all relevant requirements under FIFRA (*i.e.*, those relevant to protecting water quality), in the following two circumstances:

(1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds or other pests that are present in the waters of the United States.

(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, that results in a portion of the pesticides being deposited to waters of the United States; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over, including near, water for control of adult mosquitos or other pests.

[FR Doc. 05–1868 Filed 1–31–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 442

[OW–2004–11; FRL–7866–8]

RIN 2040–AE65

Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards for the Transportation Equipment Cleaning Point Source Category

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to amend the Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards for the Transportation Equipment Cleaning Point Source Category. This action proposes to correct a typographical error in the regulatory language of the Pretreatment Standards for New Sources in the existing regulation which refers to ''any existing source'' when it should say ''any new source.''

In the ''Rules and Regulations'' section of the **Federal Register**, we are amending the regulatory language of the Pretreatment Standards for New Sources in the existing regulation as a direct final rule without prior proposal because we view this as a noncontroversial revision and anticipate no adverse comment. We have explained our reasons for this revision in the preamble to the direct final rule. If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final rule and it will not take effect. We will address all public comments in a subsequent final rule based on this proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

The regulatory text for the proposal is identical to that for the direct final rule published in the Rules and Regulations section of this **Federal Register**. For further supplementary information, see the direct final rule.

DATES: Written comments must be received by April 4, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OW–2004–11, 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.

• Mail: Water Docket, Environmental Protection Agency, Mailcode: 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

• Hand Delivery: Water Docket, 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. OW–2004–11. 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.

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 Water Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 to 4:30, Monday through Friday, excluding legal holidays. 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 Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: Mr. Jesse W. Pritts, Engineering and Analysis Division, Office of Water (4303T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 566–1038; fax number: (202) 566–1053; e-mail address: *pritts.jesse@epa.gov.*

SUPPLEMENTARY INFORMATION:

What Entities Are Potentially Affected by This Final Rule?

Entities potentially affected by this action include facilities that discharge wastewater from transportation equipment cleaning activities and include the following types:

Category	Examples of regulated entities	Examples of common North American Industry Classification System (NAICS) codes
Industry	Facilities that generate wastewater from cleaning the interior of tank trucks, rail tank cars, intermodal tank containers, tank barges, or ocean/sea tankers used to transport materials or cargos that come into direct contact with tank or container interior, except where such tank cleanings are performed in conjunction with other industrial, commercial, or POTW operations.	311613, 311711, 311712, 311222, 311223, 311225, 484121, 484122, 484210, 484230, 488390, 488490.

EPA does not intend the preceding table to be exhaustive, but rather it provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the applicability criteria listed at 40 CFR 442.1. If you still have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Statutory and Executive Order Reviews

For the various statutes and executive orders that require findings for rulemaking, EPA incorporates the findings from the direct final rulemaking into this companion notice for the purpose of providing public notice and opportunity for comment.

List of Subjects in 40 CFR Part 442

Environmental protection, Barge cleaning, Rail tank cleaning, Tank cleaning, Transportation equipment cleaning, Waste treatment and disposal, Water pollution control.

Dated: January 26, 2005.

Stephen L. Johnson,

Deputy Administrator.

[FR Doc. 05–1861 Filed 1–31–05; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AE59

Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for the Salt Creek Tiger Beetle (*Cicindela nevadica lincolniana*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the Salt Creek tiger beetle (*Cicindela nevadica lincolniana*) as endangered under the authority of the Endangered Species Act of 1973, as amended (Act). The Salt Creek tiger beetle, a member of

the family Cicindelidae, is endemic to the saline wetlands of eastern Nebraska and associated streams in the northern third of Lancaster County and southern margin of Saunders County in Nebraska, where it is found in barren salt flat and saline stream edge habitats. Of six known populations in 1991, three are now extirpated and the remaining three are small and highly threatened by further habitat destruction, degradation, and fragmentation. These three small populations of Salt Creek tiger beetles are vulnerable to local extirpations from random natural events and human-induced activities. This proposal, if made final, would extend Federal protection and recovery provisions of the Act to the Salt Creek tiger beetle.

DATES: We will consider all comments on this proposed rule received by the close of business on April 4, 2005. Requests for a public hearing must be received by March 18, 2005.

ADDRESSES: If you wish to comment, you may submit your comments and materials concerning this proposal by one of several methods:

1. You may submit written comments to Field Supervisor, U.S. Fish and Wildlife Service, Nebraska Ecological Services Field Office, 203 West Second Street, Federal Building, Second Floor, Grand Island, Nebraska 68801.

2. You may hand deliver comments to our office at the address given above or send via fax (facsimile: 308/384–8835).

3. You may send comments via electronic mail (e-mail) to: *fw6_sctbeetle@fws.gov.* See the Public Comments Solicited section below for file format and other information about electronic filing.

The complete file for this proposed rule is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Nebraska Ecological Services Field Office, 203 West Second Street, Federal Building, Second Floor, Grand Island, Nebraska 68801.

FOR FURTHER INFORMATION CONTACT: Mr. Steve Anschutz, Field Supervisor, at the address listed above (telephone: 308/382–6468, extension 12; facsimile: 308/384–8835).

SUPPLEMENTARY INFORMATION:

Background

The Salt Creek tiger beetle is an active, ground-dwelling, predatory insect that captures smaller or similar-sized arthropods in a ''tiger-like'' manner by grasping prey with its mandibles (mouthparts). Salt Creek tiger beetle larvae live in permanent burrows in the ground and are voracious predators, fastening themselves by means of abdominal hooks to the tops of their burrows and rapidly extending outward to seize passing prey. Eighty-five species and more than 200 subspecies of tiger beetles of the genus *Cicindela* are known from the United States (Boyd *et al.* 1982). The Salt Creek tiger beetle is 1 of 32 species and subspecies of tiger beetles that have been recorded in Nebraska.

Tiger beetle species occur in many different habitats, including riparian habitats, beaches, dunes, woodlands, grasslands, and other open areas (Pearson 1988; Knisley and Hill 1992). Individual tiger beetle species are generally highly habitat-specific because of oviposition and larval sensitivity to soil moisture, composition, and temperature (Pearson 1988; Pearson and Cassola 1992). A common component of tiger beetle habitat appears to be open sunny areas for hunting and thermoregulation (an adaptive behavior to use sunlight or shade to regulate body temperature) (Knisley *et al.* 1990; Knisley and Hill 1992). Although tiger beetles have been well studied as a taxonomic group, the Salt Creek tiger beetle, an inhabitant of an extremely limited habitat type (*i.e.*, barren salt flats and saline stream edges of the saline wetlands and associated streams of eastern Nebraska) has, until recently, received very little ecological study.

Originally, the Salt Creek tiger beetle was described by Casey (1916) as a separate species of *C. lincolniana.* Willis (1967) identified *C. n. lincolniana* as a subspecies of *C. nevadica* which evolved from *C. n. knausi*; this is the currently accepted taxonomic classification. The evolution of *C. n. lincolniana* is a result of its isolation from the gene pool sometime after the Kansan, but possibly during the Yarmouth glaciation. There also are spatial separations between *C. n. knausi* and *C. n. lincolniana. C. n. knausi* has been collected in Sheridan and Garden Counties in the Nebraska Sandhills, a distance of several hundred miles from the saline wetlands and associated streams of eastern Nebraska that provide habitat for the Salt Creek tiger beetle.

The Salt Creek tiger beetle is metallic brown to dark olive green above, with a metallic dark green underside, and measures 1.3 centimeters (cm) (0.5 inch (in)) in total length. It is distinguished from other tiger beetles by its distinctive form and the color pattern on its dorsal and ventral surfaces. The elytra (wing covers) are metallic brown or dark olive green, and the head and pronotum (body segment behind the head) are dark brown (Carter 1989).

Leon Higley (L. Higley, University of Nebraska-Lincoln (UNL), pers. comm. 2002) believes the Salt Creek tiger beetle has a 2-year life cycle, not uncommon for tiger beetles. Adults are first observed as early as the end of May or as late as mid-June, and disappear by mid to late July. Their numbers peak about 2 weeks after the first individuals appear and begin to feed and mate. After mating, the male rides atop the female, presumably preventing her from re-mating, a phenomenon known as mate-guarding. Females lay their eggs along sloping banks of creeks in areas where the salt layer is exposed in the soil horizon, in barren salt flats of saline wetlands, and along saline stream edges that are found in close association with water, near a seep or stream. Researchers from UNL speculate that, during the night, female Salt Creek tiger beetles lay about 50 eggs (Farrar 2003).

Spomer and Higley (2001) describe the life cycle of the Salt Creek tiger beetle in detail through egg, larval, and adult stages, as follows. After the egg hatches, the young larva digs a burrow and uses its head to scoop out soil. The larva takes these small mud clods to the burrow entrance and flips them outside the hole. Larval burrows occur within a few inches of the water's edge. The small larva waits at the top of its burrow and ambushes prey that passes too near the burrow entrance. Once it has captured its prey, the larva pulls it into the burrow with the aid of three hooks on the dorsum of the fifth abdominal segment. These hooks also function to prevent the larva from being pulled from its burrow by larger prey or predators. The larva will plug its burrow and retreat inside during periods of high water, very hot weather, or very dry conditions. As the larva grows, it molts to a larger instar (a life stage between molts), enlarging and lengthening its burrow. For the most part, a Salt Creek tiger beetle larva will remain active until cold weather, and then it plugs its burrow and hibernates. The Salt Creek tiger beetle has three instars. It probably overwinters as a third instar, pupates in May, and emerges as an adult. Before pupation, the larva seals its burrow entrance and digs a side chamber about 5 to 8 cm (2 to 3 in) below the soil surface. After the adult emerges from the pupa, it remains in the chamber until its cuticle hardens. Steve Spomer (S. Spomer, UNL, pers. comm. 2002) postulates that adult Salt Creek tiger beetles live for approximately 6 weeks.

Distribution and Status

The Salt Creek tiger beetle occurs in saline wetlands—on exposed saline mud flats and along mud banks of streams and seeps that contain salt deposits (Carter 1989; Spomer and

Higley 1993; LaGrange 1997; Nebraska Game and Parks Commission (NGPC) 1999). Adults are confined to moist, muddy areas within a few yards of wetland and stream edges. Salt Creek tiger beetles require these open barren areas for construction of larval burrows, thermoregulation, and foraging (S. Spomer, pers. comm. 2002; L. Higley, pers. comm. 2002). The density of larval burrows decreases as vegetative cover increases (S. Spomer, pers. comm. 2002; R. Harms, U.S. Fish and Wildlife Service, pers. obs. 2001). The Salt Creek tiger beetle is adapted to brief periods of high water inundation and highly saline conditions (Spomer and Higley 1993).

Saline wetlands in eastern Nebraska occur in swales and depressions within the floodplain of Salt Creek and its tributaries in northern Lancaster and southern Saunders Counties. LaGrange (1997) suggests that the saline wetlands of eastern Nebraska receive their salinity from groundwater passing through an underground rock formation containing salts deposited by an ancient sea that once covered Nebraska. Saline wetlands of eastern Nebraska are characterized by saline soils and halophytes (plants adapted to saline conditions). Saline wetlands usually have a central area that is devoid of vegetation, and when dry, exhibit salt encrusted mudflats (barren salt flats) (LaGrange 1997). This is the area used by the Salt Creek tiger beetle and numerous other saline-adapted insects. Although Murphy (1992) indicated that historically there were approximately 7,300 ha (18,000 ac) of saline wetlands in eastern Nebraska, the distribution of the Salt Creek tiger beetle was limited to specific habitats within those wetlands. These habitats included barren salt flats (devoid of vegetation) and moist, unvegetated saline streambanks of Salt Creek and its tributaries in the northern third of Lancaster County and southern margin of Saunders County.

We examined the insect collection at the UNL State Museum to assess the historical distribution of the Salt Creek tiger beetle. From 1900 through 1918, 11 collectors collected 134 Salt Creek tiger beetles (B. Ratcliffe, State Museum, UNL, pers. comm. 2003). Of these 134 Salt Creek tiger beetles, 81 beetles (60 percent) were collected from an area identified as Salt Basin; the remaining 53 Salt Creek tiger beetles were collected in other unidentified areas in Lincoln, Nebraska. Salt Basin, also referred to as Salt Lake, is now called Capital Beach Lake (Cunningham 1985; Farrar and Gersib 1991). We also reviewed files from the NGPC's Natural Heritage Program and found records of Salt Creek tiger beetles in the Snow Entomological Collection of the Natural History Museum at the University of Kansas, and a private collection by Walter Johnson (M. Fritz, Nebraska Natural Heritage Program, NGPC, pers. comm. 2003). Significant collections of the Salt Creek tiger beetle from Salt Lake (Capital Beach) in 1964, 1965, 1970, and 1972 are housed at the Snow Entomological Collection. Additional queries of various museums around the country found Salt Creek tiger beetles in the Natural History Museum of Los Angeles, California (B. Harris, Natural History Museum of Los Angeles, pers. comm. 2003) and the Orma J. Smith Museum of Natural History, Caldwell, Idaho (J. Wood, Orma J. Smith Museum of Natural History, pers. comm. 2003). Based on our examination of collections and the review of records, all known Salt Creek tiger beetle specimens were collected in areas identified as either Salt Basin or Salt Lake (and now known as Capital Beach) or the City of Lincoln, Nebraska.

The insect collections provide some information about the historical distribution of the Salt Creek tiger beetle. More importantly, this information documents the presence of the Salt Creek tiger beetle at Capital Beach from the date of the first collection there in 1900 to the last in 1972. Thus, we have concluded that between 1900 and 1972, Salt Creek tiger beetles were present in numbers large enough to sustain a population at Capital Beach. The size of this population is not known. In 1984, Mark Carter, a graduate student in entomology at UNL and Steve Spomer, associate entomology professor at UNL, conducted visual searches for the Salt Creek tiger beetle at Capital Beach and other sites that appeared to provide suitable habitat (Spomer and Higley 2001). They found a low number of adults at Capital Beach, but provided no information on population numbers, and noted that the habitat had been degraded at Capital Beach (Spomer and Higley 1993). By 1998, surveyors did not observe any Salt Creek tiger beetles at Capital Beach, and the species has not been found there since, despite surveys being conducted annually through 2002 (Spomer *et al.* 2002).

The Salt Creek tiger beetle has one of the most restricted ranges of any insect in the United States (Spomer and Higley 1993) only occurring along limited segments of Little Salt Creek and adjacent remnant salt marshes in Lancaster County, Nebraska. Intensive visual surveys conducted by UNL entomologists from 1991 through 2004 found Salt Creek tiger beetles at a total of 13 sites in northern Lancaster and southern Saunders Counties, although beetles were not found, nor were surveys conducted, at all 13 sites in all 14 years (Spomer *et al.* 2002 and 2004). The 13 survey sites are identified by: (1) Locality (street or road name); (2) local name; or (3) land owner name. Visual counts of adults were made by researchers walking across the barren salt flats and along the edges of saline streams on sunny days during mid to late June when the population of emerged adults is and at its greatest abundance (S. Spomer, pers. comm. 2001; Allgeier *et al.* 2003). Evening counts also were conducted using a black light (ultraviolet), because the Salt Creek tiger beetle is highly attracted to this type of light source. Visual surveys during the day and night were conducted using the same techniques for all years and all sites surveyed (S. Spomer, pers. comm. 2002), and the surveys in all 14 years were conducted by the same researcher, which would reduce surveyor bias and ensure consistency among survey years.

Pearson and Cassola (1992) found that tiger beetle population size can be accurately estimated through visual counting due to the relative ease of observing and counting individuals, and because of their specialized habitat requirements. Visual counts, although having limitations (Horn 1976), can provide relative estimates and, if conducted in a similar manner every year, a good estimate of the health and stability of populations (Allgeier *et al.* 2003). Furthermore, harm to the insect is limited using visual survey techniques because experienced researchers are able to identify the insect without handling it.

In addition to the visual surveys, researchers undertook a mark/recapture study for the first time in 2002. Prior to 2002, researchers were unable to find a permanent marker that could be used to distinguish marked and unmarked beetles (a prerequisite for mark/recapture studies) (Spomer and Higley 1993; S. Spomer, pers. comm. 2001). In 2002, UNL entomologists discovered a paint marker that would adhere to the beetles' elytra (Allgeier *et al.* 2003). This allowed researchers to conduct a mark/recapture study using Salt Creek tiger beetle adults captured at Little Salt Creek across from Arbor Lake, north of the Interstate 80 and North 27th Street Interchange in Lincoln, Nebraska. The Little Salt Creek site was used because visual surveys revealed that this site harbored the highest number of adult beetles.

Although its use for estimating the true population size for the Salt Creek tiger beetle is somewhat limited by a

small sample size, the mark/recapture study did establish that Salt Creek tiger beetles marked at the Little Salt Creek site traveled to other nearby survey sites. Allgeier *et al.* (2003) found two marked adult Salt Creek tiger beetles at Arbor Lake, a saline wetland separated from Little Salt Creek by a 2-lane gravel road. They had moved a distance of 460 and 365 meters (m) (1,509 and 1,198 feet (ft)), respectively, from where they were originally marked. Based on results of the 2002 mark/recapture study, we have concluded that Salt Creek tiger beetle adults are mobile and can move to nearby suitable habitats.

We examined data from the 1991 to 2004 survey sites and determined that some of these sites could be combined to identify different populations of Salt Creek tiger beetles based on the following criteria: (1) Close proximity of sites (*i.e.,* nearby, contiguous, or neighboring) to each other; (2) distances of less than 805 m (2,640 ft) separating sites; and (3) the combination of survey sites satisfying criteria 1 and 2, and providing both suitable saline wetland (*i.e.,* barren salt flats) and stream (saline edges) habitats forming a saline wetland/stream complex. The distance used in criterion 2 above (805 m (2,640 ft)) are based on the 2002 mark/recapture study by Allgeier *et al.* (2003), which established that Salt Creek tiger beetles can move among nearby suitable habitats, as well as the distance at which Salt Creek tiger beetles may be attracted to artificial sources of light.

On the basis of the above criteria, our evaluation of the 13 survey sites resulted in the delineation of six different populations of Salt Creek tiger beetles, half of which have been extirpated since annual surveys began in 1991 (a population is considered extirpated after 2 consecutive years of negative survey results). The six Salt Creek tiger beetle populations, including the three that have been extirpated, are described below in order of abundance based on visual surveys conducted from 1991 to 2004: (1) Little Salt Creek-Arbor Lake; (2) Little Salt Creek-Roper; (3) Upper Little Salt Creek-North; (4) Upper Little Salt Creek-South; (5) Jack Sinn Wildlife Management Area (WMA); and (6) Capital Beach.

Little Salt Creek-Arbor Lake Population

The Little Salt Creek-Arbor Lake population contains the largest number of Salt Creek tiger beetles. The abundance of Salt Creek tiger beetles there is expected, given the large, relatively intact saline wetland complex within which the population occurs. The Little Salt Creek-Arbor Lake population is located approximately 1.6 km (1 mi) north of the Interstate 80 and North 27th Street Interchange on the northern city limits of Lincoln, Nebraska. It exists along the saline stream edge of Little Salt Creek and on the barren salt flats of an adjacent saline wetland. This population was monitored at up to three survey sites from 1991 to 2004. The population averaged 329 individuals per year over that 14-year period. Visual surveys for the entire Little Salt Creek-Arbor Lake Population in 1991–2004 found 171, 94, 62, 376, 459, 437, 406, 254, 208, 225, 434, 511, 583, and 392 adult individuals, respectively (Spomer and Higley 1993; Spomer *et al.* 1997, 1999, 2001, 2002, and 2004; and Allgeier *et al.* 2003). In addition, a mark/recapture study conducted in 2002 estimated that the population size was approximately 970 adult Salt Creek tiger beetles, with 95 percent confidence (an estimate of precision) that the true population is between 704 and 1,606 adults (Allgeier *et al.* 2003). Both visual surveys and the mark/recapture study show that this population is very small when compared to known populations of other tiger beetle species, even including the federally listed threatened Northeastern beach tiger beetle (*C. dorsalis dorsalis*) and Puritan tiger beetle (*C. puritana*). A comparison of population sizes of Salt Creek tiger beetles, Northeastern beach tiger beetles, and Puritan tiger beetles is discussed below.

Little Salt Creek-Roper Population

The Little Salt Creek-Roper population is the second largest remaining population of Salt Creek tiger beetles, based on visual surveys conducted from 1994 to 2004. This population is located immediately south of the Interstate 80 and North 27th Street Interchange, and approximately 1.6 km (1 mi) downstream of the Little Salt Creek-Arbor Lake population. Similar to the Little Salt Creek-Arbor Lake population, this population is associated with a saline wetland and stream complex located along Little Salt Creek. Visual surveys were conducted on up to three survey sites from 1994 to 2004, but only one site was surveyed from 1994 to 1997. A second site was added in 1998, after the Lower Platte South Natural Resource District was deeded a restored saline wetland as part of a mitigation requirement for a Department of the Army permit issued by the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act (CWA). However, researchers from UNL found only one Salt Creek tiger beetle at the restored wetland in 1998 and none since then (Spomer *et al.* 1999, 2001, 2002, and 2004; Allgeier *et al.* 2003). In 2001, UNL researchers found 28 Salt Creek tiger beetles on a privately owned saline wetland adjacent to Little Salt Creek and across the stream from the restored mitigation wetland, after the landowner granted permission to conduct visual surveys (Spomer *et al.* 2001, 2002, and 2004; Allgeier *et al.* 2003). We consider this private saline wetland as the third site of the Little Salt Creek-Roper population because of its location and close proximity to the two other sites. A fourth site was also surveyed in 2004, resulting in the observation of three Salt Creek tiger beetles. The number of adult individuals of the Little Salt Creek-Roper Population found at all 4 sites in 1994–2004 was 54, 161, 151, 144, 45, 55, 80, 85, 258, 162, and 154, respectively (Spomer *et al.* 1997, 1999, 2001, 2002, and 2004; Allgeier *et al.* 2003). A mark/recapture study was not conducted on this population of Salt Creek tiger beetles due to the small population size and a limited window of opportunity.

Upper Little Salt Creek-North Population

The Upper Little Salt Creek-North population is the third and last extant population of Salt Creek tiger beetles. This population is located approximately 7.2 km (4.5 mi) upstream from the Little Salt Creek-Arbor Lake population, and exists only on the saline stream edges of Little Salt Creek. Although former saline wetlands (*i.e.,* barren salt flats) exist adjacent to this population, these wetlands are degraded (drained because of the incisement of Little Salt Creek) and no longer provide suitable habitat for the Salt Creek tiger beetle. This population is comprised of four sites along Little Salt Creek that were surveyed from 1991 to 2004. Over the course of the 14-year survey period, 2 of the survey sites that comprise this population were surveyed at least 10 times. A third site was surveyed in 1994, 1998, 2002, and 2003. The survey of a new and fourth site in 2002 by UNL researchers resulted in the observation of one Salt Creek tiger beetle (Spomer *et al.* 2002; Allgeier *et al.* 2003). From 1991 to 1996, the number of adult beetles found in the Upper Little Salt Creek-North Population averaged 32 individuals per year (Spomer and Higley 1993; Spomer *et al.* 1997). Since then, the number of adult beetles surveyed in the population has averaged five individuals per year. The number of adult individuals found during visual surveys in 1991–2004 was 24, 32, 48, 35, 14, 41, 0, 4, 8, 4, 0, 8, 0, and 12, respectively (Spomer and Higley 1993;

Spomer *et al.* 1997, 1999, 2001, 2002, and 2004; Allgeier *et al.* 2003). L. Higley and S. Spomer (pers. comm. 2002) presumed that this population would be extirpated because of the low and decreasing number of adults found during surveys. A mark/recapture study was not done for this population due to the small population and a limited window of opportunity.

Upper Little Salt Creek-South Population

The Upper Little Salt Creek-South population was located approximately 5 km (3 mi) upstream from the Little Salt Creek-Arbor Lake Population. Degraded and non-functioning saline wetlands exist adjacent to Little Salt Creek, and although once devoid of vegetation, saline stream edge habitats are now vegetated at this site. This population's only known site was surveyed in 1991–2004 revealing 7, 5, 4, 8, 3, 0, 0, 0, 0, 0, 0, 0, 0, and 0 adult individuals, respectively (Spomer and Higley 1993; Spomer *et al.* 1997, 1999, 2001, 2002, and 2004; Allgeier *et al.* 2003). The Upper Little Salt Creek-South Population is considered to be extirpated because no Salt Creek tiger beetles have been found there since 1995.

Jack Sinn Wildlife Management Area Population

Salt Creek tiger beetles from sites comprising the Jack Sinn WMA population have not been found since 1998 (Spomer *et al.* 1999, 2001, 2002, and 2004; Allgeier *et al.* 2003). This population was made up of one survey site located on Rock Creek in southern Saunders and northern Lancaster Counties, approximately 20 km (10 mi) northeast of the Little Salt Creek-Arbor Lake population. This population of Salt Creek tiger beetles was on property owned by NGPC. Surveys for the Salt Creek tiger beetle in 1991, 1992, 1993, 1994, 1995, 1996, 1998, 1999, 2001, 2002, 2003, and 2004, found 15, 11, 1, 0, 0, 1, 1, 0, 0, 0, 0, and 0 adult individuals, respectively (Spomer and Higley 1993; Spomer *et al.* 1997, 1999, 2001, 2002, and 2004; Allgeier *et al.* 2003). The Jack Sinn WMA Population is considered to be extirpated because no Salt Creek tiger beetles have been found there since 1998. Loss and fragmentation of barren salt flat and stream habitats likely resulted in the loss of this population.

Capital Beach Population

Capital Beach was once one of the largest saline wetland tracts in eastern Nebraska, with a size of approximately 162 ha (400 ac) (Cunningham 1985). Although we do not have any information on the number of Salt Creek tiger beetles that existed historically at Capital Beach, we have concluded, based on the number of museum and private collection specimens collected at Capital Beach (*i.e.,* Salt Basin) since the early 1900s, that a sustainable population of Salt Creek tiger beetles once was present there. All that remains of suitable habitat at Capital Beach now is a 10- to 20-m (40- to 50-ft) wide ditch that parallels Interstate 80 for approximately 0.8 km (0.5 mi), located west of the Interstate 80 and North 27th Street Interchange. Visual surveys for Salt Creek tiger beetles from this population were conducted in 1991, 1992, 1995, 1998, 1999, 2001, 2002, 2003, and 2004 with 12, 8, 0, 4, 0, 0, 0, 0, and 0 adult individuals found, respectively (Spomer and Higley 1993; Spomer *et al.* 1997, 1999, 2001, 2002, and 2004; Allgeier *et al.* 2003). No individuals have been found at Capital Beach since 1998 (Spomer *et al.* 2002 and 2004; Allgeier *et al.* 2003), leading us to conclude that this population is now extirpated.

Conclusion of Salt Creek Tiger Beetle Population Review

The Salt Creek tiger beetle, highly specialized in habitat use, has probably always been rather localized in distribution. Information from surveys conducted from 1991 through 2004 and from museum collections show that the number of known populations has declined from six to three. Salt Creek tiger beetles were last found in the Upper Little Salt Creek-South population in 1995, and no individuals have been found in either the Jack Sinn WMA or the Capital Beach populations since 1998. Thus, we have determined that three known populations of Salt Creek tiger beetles have been extirpated in the last 9 years.

Surveys conducted over a 14-year period establish that the Salt Creek tiger beetle is an extremely rare insect, numbering only in the hundreds and confined to an extremely small range. Visual surveys conducted in 1991–2004 show substantial annual fluctuations with 229, 150, 115, 473, 637, 631, 550, 308, 271, 309, 519, 777, 745, and 558 adult tiger beetles found each year, respectively, although not all sites were surveyed in all years (Spomer and Higley 1993; Spomer *et al.* 1997, 1999, 2001, 2002, and 2004; Allgeier *et al.* 2003). In addition, in 2002, a mark/recapture study undertaken to calculate a total population estimate for the largest Salt Creek tiger beetle population, the Little Salt Creek-Arbor Lake population, resulted in an estimate of 970 adult beetles with a 95 percent confidence interval of 704 to 1,606 beetles (Allgeier *et al.* 2003).

Survey and mark-recapture results indicate that the number of Salt Creek tiger beetles, as well as the number of populations, is extremely small, even when compared to other federally-listed tiger beetle taxa. From 1989 to 1992, the number of Northeastern beach tiger beetles found during annual surveys at 65 sites in Maryland and Virginia ranged from 9,846 to more than 17,480 beetles (U.S. Fish and Wildlife Service 1994). Surveys of Puritan tiger beetles in Maryland in 1989, 1991, 1992, and 1993 found an average of 6,389 beetles at 15 sites annually (U.S. Fish and Wildlife Service 1993). Both the Northeastern beach tiger beetle and Puritan tiger beetle are well-studied insects and were listed as threatened under the Act in 1989 (55 FR 32088).

Based on our analysis of private and public insect collections, NGPC's Heritage database records, surveys conducted over the past 14 years, and professional opinions of UNL entomologists who have studied or are studying the Salt Creek tiger beetle, we conclude that the number of Salt Creek tiger beetle populations is declining and that the three remaining populations are immediately threatened with extinction.

Previous Federal Action

On November 15, 1994, we published in the **Federal Register** (59 FR 58982), an Animal Notice of Review which included the Salt Creek tiger beetle as a Category 2 candidate species for possible future listing as either a threatened or endangered species. Category 2 candidates were those taxa for which information contained in the Service's files indicated that listing may be appropriate, but for which additional data were needed to support a listing proposal. In the subsequent February 28, 1996, Candidate Notice of Review published in the **Federal Register** (61 FR 7596), we indicated that the Category 2 candidate species list was being discontinued, and that henceforth the term ''candidate species'' would be applied only to those taxa that would have earlier fit the definition of the former Category 1 candidate taxa, that is, those species for which we had on hand sufficient information to support a listing proposal. In 2000, based on an assessment of imminent threats, the Salt Creek tiger beetle became a candidate species for listing and was assigned a listing priority number of 6. On October 30, 2001, the Salt Creek tiger beetle was upgraded to a priority 3 candidate for Federal listing, based on a review of the status, distribution, threats, and

imminence of such threats (66 FR 54808). A priority 3 is the highest priority ranking in the Candidate Notice of Review that can be assigned to a subspecies. A priority 3 candidate faces an imminent, high-magnitude threat.

In 1995, we entered into a cooperative agreement with the UNL to conduct 2 years of Salt Creek tiger beetle surveys in saline wetlands of eastern Nebraska and associated saline streams to assess and quantify changes in the species' populations that were apparent from earlier surveys. Results of the 1995 and 1996 surveys were discussed above in the Distribution and Status section of this rule. Further, the UNL researchers agreed to determine oviposition sites and larval habitats of the Salt Creek tiger beetle, initiate studies of genetic diversity within the *C. nevadica* complex, and increase public awareness of the Salt Creek tiger beetle through education and outreach. In 2001, we entered into a new and expanded cooperative agreement with the UNL to: (1) Conduct surveys to determine Salt Creek tiger beetle abundance and distribution in the Salt Creek watershed; (2) initiate procedures for rearing Salt Creek tiger beetles in captivity for possible reintroduction into previously occupied and unoccupied suitable habitats; (3) determine the physiological basis for habitat preferences of female Salt Creek tiger beetles for ovipositing, both in field and laboratory settings; (4) determine egg and larval survivorship of the Salt Creek tiger beetle; and (5) determine whether Salt Creek tiger beetles are attracted to specific artificial light sources and the distance at which such light sources would attract beetles. In addition, the Service also provided the NGPC with funding in both 2001 through 2004 through section 6 of the Act for research on the Salt Creek tiger beetle.

On October 7, 2002, as part of an agreement regarding other species, the U.S. Department of the Interior reached an out-of-court settlement with several conservation organizations and agreed to make a final determination for listing the Salt Creek tiger beetle by no later than September 30, 2005.

Summary of Factors Affecting the Species

After thorough review and consideration of all available information, we have determined that the Salt Creek tiger beetle warrants listing as an endangered species. Section 4 of the Act (16 U.S.C. 1533) and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act set forth procedures for determining a species or subspecies to be endangered or threatened due to one or more of the five factors described in section 4(a)(1) of the Act. These factors and their application to the Salt Creek tiger beetle are as follows:

A. Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range

Background

The greatest threat to the Salt Creek tiger beetle is habitat destruction (Ratcliffe and Spomer 2002). Like many insects, the Salt Creek tiger beetle's close association with specific habitats—salt barrens and stream edges—leaves it particularly vulnerable to habitat destruction and alteration through direct and indirect means (*see* Pyle *et al.* 1981). The effects of habitat destruction and modification on tiger beetle species have been documented by Knisley and Hill (1992) and Nagano (1982). The saline wetlands of eastern Nebraska and associated saline streams used by the Salt Creek tiger beetle have undergone extensive degradation and alteration for commercial, residential, transportation, and agricultural development since the late 1800s, and are the most restricted and imperiled natural habitat type in the State (Gersib and Steinauer 1991).

In order to comprehend the complexity and immediacy of threats to the Salt Creek tiger beetle, it is necessary to understand when and how the destruction and degradation of the beetle's saline wetland and associated stream habitats took place. Cunningham (1985) reported that Salt Lake or Salt Basin (now known as Capital Beach) was once approximately 162 ha (400 ac) in size, and one of the largest saline wetlands in the area. The growing City of Lincoln (Lincoln) ditched, drained, and filled the saline wetlands and associated streams (Murphy 1992). In 1895, Salt Lake was diked and Oak Creek was diverted to create a permanent lake for recreational purposes. In 1906, the lake was renamed Capital Beach. From the 1930s to the 1950s, saline wetlands continued to be destroyed for the development of Lincoln (Farrar and Gersib 1991). In the 1960s, the construction of Interstate 80, through the heart of the remaining Salt Creek tiger beetle habitat, resulted in additional filling, dredging, diking, draining, and diversion (Farrar and Gersib 1991). All of these commercial and residential developments and road construction activities resulted in the loss or degradation of barren salt flat and saline stream edge habitat for the Salt Creek tiger beetle. The best available information indicates that these activities may have caused the extirpation of the Capital Beach population, possibly the largest historical population of Salt Creek tiger beetles.

The three remaining Salt Creek tiger beetle populations are being surrounded by commercial and residential development (Ratcliffe and Spomer 2002). During the 1990s, new housing, industrial, and commercial developments and infrastructure work degraded or destroyed many more acres of saline wetlands (Farrar 2003). Although the construction of buildings, homes, roads, schools, and parking lots is not occurring directly on salt flats and saline stream edges, these projects are occurring adjacent to these important habitats. Such projects have resulted in the creation of impervious surfaces (rooftops, access roads, storm sewers, and parking lots) that do not allow precipitation to seep into the ground. Instead, frequent high-volume freshwater runoff flows into saline wetlands, and associated streams, diluting salinity and altering their hydrology. In addition, runoff originating from other nearby, but not necessarily adjacent, residential and commercial developments and associated roads, flows through constructed drainages and storm sewers, and tributaries and contributes to an increase of freshwater inflow into downslope saline wetlands and their associated streams.

Reduced salinity concentrations on barren salt flats and along saline stream edges have allowed the invasion of vegetation such as *Typha angustifolia* (cattail) and *Phalaris arundinacea* (reed canary grass) into habitats used by the Salt Creek tiger beetle. These plants, ordinarily unable to tolerate high salinity, are aggressive invaders that convert sunny, barren salt flats into habitat that is dominated by a herbaceous overstory, rendering it unsuitable for use by the Salt Creek tiger beetle. This overstory shades out open sunny areas required by the Salt Creek tiger beetle to thermoregulate, forage, and oviposit (M. Fritz, NGPC, pers. comm. 2001). Increased vegetative encroachment is the primary factor attributed to the extirpation of several populations of other *Cicindela* species (*e.g., C. abdominals* and *C. debilis*) (Knisley and Hill 1992), and is one of the main threats to *C. ohlone* (66 FR 50340).

Reduced salinity concentrations on barren salt flats and along saline stream edges have also resulted in other direct impacts. Based on field and laboratory studies using *C. circumpicta* and *C.*

togata, two tiger beetle species that are co-inhabitants of salt flats with the Salt Creek tiger beetle, Hoback *et al.* (2000) found that salt is required for ovipositing. Neither species oviposited in greenhouse soil without it. Allgeier *et al.* (2004) concluded that species-specific preferences for salt and soil moisture regimes is important to habitat partitioning and reduction in competition between the Salt Creek tiger beetle and other tiger beetles. Hoback *et al.* (2000) discovered that changes in salinity and hydrology may alter the abundance of prey and cause the loss of suitable larval habitat for saline wetland-dependent species of tiger beetles, including the Salt Creek tiger beetle. After urban development occurs near and around saline wetlands and associated streams and alters the hydrologic regimes of these habitats, restoration and recovery of these habitat types will be difficult. This is especially true for the specialized barren salt flats and saline stream edges that are needed by the Salt Creek tiger beetle (J. Cochnar, U.S. Fish and Wildlife Service, pers. obs. 2002).

Past and Present Habitat Quality and Quantity

A number of studies have attempted to quantify the amount and rate of habitat loss for the saline wetlands of eastern Nebraska. All of these studies confirm the extensive loss of saline wetlands, but vary in terms of their estimates for the total acres lost due to differences in data and methods of analysis. In 1991, Farrar and Gersib found that only about 490 ha (1,200 ac) of saline wetlands of eastern Nebraska remained, compared to 7,300 ha (18,000 ac) in the late 1800s (Murphy 1992). In 1993 and 1994, a team of biologists from various Federal and State agencies completed an intensive assessment, inventory, and categorization of the saline wetlands of eastern Nebraska (Gilbert and Stutheit 1994). This assessment identified 98 sites that could be categorized as Category 1 saline wetlands comprising approximately 1,346 ha (3,327 ac) (Gilbert and Stutheit 1994). Category 1 saline wetlands provide saline wetland functions of high value or have the potential to provide high value following restoration or enhancement (Gilbert and Stutheit 1994). Category 2 saline wetlands are contaminated and degraded with limited potential for restoration. Category 3 and 4 wetlands are defined as freshwater wetlands and freshwater vegetation on saline and nonsaline hydric soils, respectively (Gilbert and Stutheit 1994). LaGrange (2003) further examined the analysis completed by Gilbert and Stutheit (1994) and divided Category 1 saline wetlands into three sub-classes: (1) Not highly degraded and still functioning—totaling 85 ha (210 ac) (6 percent); (2) degraded, but still functioning as a saline wetland and restorable to full function—totaling 1,249 ha (3,087 ac) (93 percent); and (3) degraded, not functioning as a saline wetland, but restorable to full function—totaling 12 ha (30 ac) (1 percent).

Although it is important to discuss the overall loss of saline wetlands, the impact of that loss on the Salt Creek tiger beetle can only be fully assessed by considering the loss of barren salt flat and saline stream edge habitats that occur within the confines of Category 1 saline wetlands. We expanded on the analyses completed by LaGrange (2003) and Gilbert and Stutheit (1994) to complete such an assessment. Using a Geographic Information System (GIS), we did a habitat assessment of the remaining barren salt flat and saline stream edge habitats existing within the remaining Category 1 saline wetlands. Using National Hydrography Dataset information (*http://nhd.usgs.gov*) and all known locations of Salt Creek tiger beetles, we delineated saline stream edge habitat (J. Runge, U.S. Fish and Wildlife Service, pers. comm. 2003). Next, we delineated barren salt flat habitat through the use of a feature-extraction process that would select areas containing similar spectral signatures of known barren salt flats. Finally, we did a qualitative evaluation of our GIS analysis by ground-truthing select polygons within the barren salt flat GIS layer.

Results from our assessment indicate that the total remaining areas of barren salt flat and saline stream edge habitat that exist within the saline wetlands of the Little Salt Creek, Rock Creek watersheds, and the remnant Salt Basin (i.e., Capital Beach) are approximately 15, 33, and 1 ha (38, 81, and 3 ac) respectively, totaling 49 ha (122 ac). These 49 ha (122 ac) represent all the barren salt flat and saline stream edge habitats that currently remain. In consideration of the analysis completed by LaGrange (2003), we then conducted a spatial analysis to determine the amount of habitat currently available for the Salt Creek tiger beetle that is not highly degraded. The analysis separated coded barren salt flats into Category 1 subclasses identified by LaGrange (2003). Our analysis reveals that only approximately 6 ha (15 ac) out of the total 49 ha (122 ac) of coded salt barrens are not highly degraded. It is these remaining 6 ha (15 ac) of not highly degraded barren salt flats and saline stream edges that provide habitat for the Salt Creek tiger beetle.

As the quality of saline habitat continues to decline through reduction in size, encroachment of herbaceous species, and modification to hydrology, so too does the likelihood that the Salt Creek tiger beetle can survive and avoid extinction. Most of the habitat delineated in our analysis was composed of extremely small habitat complexes (*i.e.,* less than 0.04 ha (0.09 ac)), that are unlikely to provide all of the necessary life history requirements that the Salt Creek tiger beetle needs to survive. Further, these small habitats are in clusters resembling mosaics, separated by herbaceous overstory. This spatial dispersion of herbaceous overstory precludes the use of these small areas by the Salt Creek tiger beetle, a species confined to specific habitats, and not known to travel distances greater than 805 m (2,640 ft) (Allgeier *et al.* 2003) in search of other suitable habitat. S. Spomer (pers. comm. 2002) confirmed that no Salt Creek tiger beetles were found in these small habitats in the 13 years that surveys were conducted. Carter (1989), the Nebraska Game and Parks Commission (1999), Ratcliffe and Spomer (2002), Spomer and Higley (1993 and 2001), Spomer *et al.* (1997), and Allgeier *et al.* (2003) all concluded that the declining number of populations of Salt Creek tiger beetles is due to the loss of suitable saline wetland and stream habitat.

Urban Development and Road Construction

Commercial and residential urban development and road construction are the greatest threats to the saline wetlands of eastern Nebraska and the plant and animal species that depend upon these habitats (Gilbert and Stutheit 1994; Ratcliffe and Spomer 2002). Urban expansion of Lincoln and Lancaster County has contributed to the decline of the saline wetlands of eastern Nebraska and associated streams, and potential extinction of the endemic species that use these areas, such as the Salt Creek tiger beetle. From 1970 to 2000, the Lincoln's human population grew by 50 percent, with a corresponding 50 percent increase in the area of the City (U.S. Department of Transportation 2002a). For the period of 1990 to 2000, Lincoln and Lancaster County experienced a 17.2 percent growth in population and a 20.2 percent growth in housing (U.S. Census Bureau 1990 and 2000). The anticipated future population growth rate of Lincoln and Lancaster County is 1.5 percent annually (City of Lincoln and Lancaster County 2002). The population of

Lincoln is expected to grow by approximately 47 percent by 2025 (U.S. Department of Transportation 2002a). This accelerated population growth rate has become evident in the last year, as illustrated by urban and infrastructure developments (discussed below) that threaten the continued existence of the Salt Creek tiger beetle and its limited remaining habitat.

All three extant populations of Salt Creek tiger beetles may be threatened with extirpation caused by the expansion of urban development and road construction in Lincoln and Lancaster County. A review of 1989 and 2002 aerial photographs reveals that over 50 percent of the area surrounding the Little Salt Creek-Roper population (a 1,300-ha (3,200-ac) area bounded by Interstate 80 to the North, Salt Creek to the South, North 27th Street to the West, and Highway 77 to the East) has been developed within the last 5 years. We reviewed the 2002 City of Lincoln and Lancaster County Comprehensive Plan and found that an additional 30 to 40 percent of the area surrounding the Little Salt Creek-Roper population is planned for residential and commercial development over the next 25 years. However, given the current rate of growth and development surrounding this population, this additional area is likely to be developed in less time than that. In some cases, the local municipal development permits for this expansion have already been acquired (including some floodplain permits from Lincoln) (R. Harms, pers. obs. 2002 and 2003).

Development with the potential to adversely impact all three populations is underway in areas adjacent to the remaining segments of habitat. Recent developments have already changed the drainage patterns in some areas, resulting in the introduction of excess freshwater, sediment, and contaminated urban runoff to saline habitats occupied by the Salt Creek tiger beetle. There are also planned highway projects which could also adversely impact the species due to freshwater runoff increase, vegetative encroachment, risks of toxic spills and alteration of drainage patterns.

Increased vehicle traffic due to road improvements can increase the amount of chemically-contaminated runoff from vehicles and roadway surfaces flowing into Little Salt Creek. Highway runoff contains a variety of chemical constituents, many of which can be harmful to the environment when washed from roads by rain and snowmelt into adjacent surface waters, groundwater, and ecosystems (Bricker 1999). Contaminated runoff could impact the Salt Creek tiger beetle, as it can have toxic effects on the beetle and its prey base. For the expansion of Interstate 80, the Federal Highway Administration (FHWA) and Nebraska Department of Roads (NDOR) have identified measures that reduce concentrations of hazardous and toxic contaminants in highway runoff, and a contingency plan for accidental spills that would threaten two populations of Salt Creek tiger beetles (FHWA 2003). However, other non-Federal road and street projects that will be constructed after the Interstate 80 expansion do not currently address impacts to the Salt Creek tiger beetle from exposure to runoff.

Agriculture

Agricultural practices in the area may also threaten the limited Salt Creek tiger beetle habitat and the Upper Little Salt Creek-North and Little Salt Creek-Arbor Lake populations. Livestock grazing can destroy or substantially degrade habitats for adult and larval forms of the Salt Creek tiger beetle, through trampling, and thus, destroy Salt Creek tiger beetle larvae burrows and the larvae that inhabit them. Cattle grazing also can compact soil and modify soil hydrology, gradually drying out a site and making it unsuitable for adults and larvae (which prefer moist, muddy sites with encrusted salt on soil surfaces). The Upper Little Salt Creek-North population occurs along a segment of Little Salt Creek that flows through a pasture, and one of these population survey sites may have been negatively impacted by cattle grazing (S. Spomer, pers. comm. 2002).

Cultivation also poses a threat to the largest remaining population of Salt Creek tiger beetles, the Little Salt Creek-Arbor Lake population. Cultivation can increase erosion of sediment and result in introduction of pesticides into adjacent saline wetlands. This population currently is at risk because there is no vegetative buffer between occupied Salt Creek tiger beetle habitat and row cropped areas. Adverse impacts to the beetles in this population are likely to occur as precipitation events and periodic winter and spring thaws wash sediment from the cultivated land and either cover over larval burrows with a thick layer of sediment or encourage vegetative encroachment of saline stream edges through its accumulation. Future use of the impacted area by the Salt Creek tiger beetle may not occur because it may be unsuitable as ovipositing, larval, and foraging habitat. When an area of larval habitat becomes degraded then disappears, so does the species it supports (Dunn 1998). Historic and anticipated impacts related to flooding are discussed later in Factor E of the Summary of Factors Affecting the Species section of this rule.

Stream Channelization, Bank Stabilization, and Incisement

In Nebraska, many river and stream systems, including Salt Creek and its tributaries, have undergone extensive channelization for flood control to protect both agricultural and urban developments. Channelization of Salt Creek from Lincoln to Ashland, Nebraska, was done a section at a time from 1917 to 1942 by the Corps (Farrar and Gersib 1991; Murphy 1992). In the 1950s, the Corps and U.S. Department of Agriculture further modified the area when they developed and implemented a flood control plan that involved the construction of levees, reservoirs, and additional channelization of Salt Creek (Murphy 1992). Farrar and Gersib (1991) found that the greatest alteration of saline wetlands in the Little Salt Creek and Rock Creek drainages resulted from the channelization of Salt Creek. Channelization of Salt Creek encouraged tributary streams (Little Salt Creek, Oak Creek, Rock Creek, and Middle Creek) to head-cut, carving deeper into their beds to adjust to a change in stream bed gradients. Straightening stream channels leads to a state of disequilibrium or instability, often causing stream entrenchment and corresponding changes in morphology and stability (Rosgen 1996). The lowering of tributary streambeds resulted in the degradation and loss of saline wetlands by draining and lowering the water table and diluting the salt concentrations with freshwater leading to vegetative encroachment (Wingfield *et al.* 1992).

In 1992, the largest population of the Salt Creek tiger beetle, the Little Salt Creek-Arbor Lake population, was significantly impacted by a stream channelization and bank stabilization project along Little Salt Creek (Spomer and Higley 1993; Farrar 2003). In an attempt to control erosion and bank sloughing and to prepare for the widening of North 27th Street, a portion of Little Salt Creek was straightened, and its banks were armored with rock riprap. These actions destroyed about one-half of the remaining prime habitat for the Salt Creek tiger beetle along Little Salt Creek (Spomer and Higley 1993; Farrar 2003). Based on surveys conducted in 1991 and 1992, the Little Salt Creek-Arbor Lake population showed a corresponding 55 percent decline (from 171 to 94) after the project was completed (Spomer and Higley 1993). In this circumstance, stabilization of about half of the bank resulted in the

loss of over half of the population of Salt Creek tiger beetles. Had the entire bank been stabilized, instead of just half, the population of Salt Creek tiger beetles there likely would have been extirpated, or nearly so. It is unclear why the population at the site was able to recover following such a devastating event. It is possible that favorable weather conditions, suitable habitat within travel distance (distances of less than 805 m (2,640 ft)), or other unknown factors could have contributed to their survival.

The lower portion of Little Salt Creek, where the two largest remaining populations of Salt Creek tiger beetles exist, has been deeply incised by human activities, resulting in the creation of vertical stream banks measuring approximately 6 to 9 m (20 to 30 ft) in height (J. Cochnar, U.S. Fish and Wildlife Service, pers. obs. 2002; R. Harms, pers. obs. 2002). We observed that bank sloughing is covering saline stream edges and reducing the amount of suitable habitat for the two largest populations of Salt Creek tiger beetles. We presume that the Little Salt Creek-Arbor Lake and Little Salt Creek-Roper populations of the Salt Creek tiger beetle have been able to survive because these two populations exist in areas where there is still a functioning saline wetland and saline stream complex. However, if these two areas evolve into stable, vegetated, incised stream systems and the wetland habitats continue to receive freshwater runoff from surrounding urban development, the existing suitable habitats for the Salt Creek tiger beetle would no longer support these two populations and the Salt Creek tiger beetle might become extinct.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Tiger beetles (genus *Cicindela*) are one of the most sought-after genera of beetles by amateur collectors because of their unique metallic colors and patterns and fascinating habits (Nebraska Game and Parks Commission 1999; 66 FR 50340). Interest in the genus Cicindela is reflected in a journal entitled Cicindela, which has been published quarterly since 1969 and is exclusively devoted to this genus. Even limited collection pressure on small populations of species, such as the Salt Creek tiger beetle, can have adverse impacts on viability because of the loss of genetic variability it causes (Spomer and Higley 1993). At present, we do not know if the collection of adult Salt Creek tiger beetles is a factor contributing to its decline.

The Service and NGPC are funding studies of the Salt Creek tiger beetle to improve the understanding of its biology and habitat requirements. This research will ultimately contribute to the conservation of the species. Transplanting larvae of other species of rare tiger beetles has been conducted elsewhere by removing larvae from one site and introducing them to another unoccupied site. For example, the federally threatened C. dorsalis dorsalis has been successfully reintroduced on the sandy beaches of the Sandy Hook National Seashore in New Jersey using this technique (B. Knisley, Randolph-Macon College, pers. comm. 2003; A. Scherer, U.S. Fish and Wildlife Service, pers. comm. 2003). Leon Higley (pers. comm. 2001) states that Salt Creek tiger beetles will need to be introduced into unoccupied suitable habitats through the rearing and translocation of captive larvae. Captive rearing of Salt Creek tiger beetle larvae for introduction into suitable saline habitats is under way through Service- and NGPC-funded UNL studies (Allgeier *et al.* 2003). Development of these procedures requires the capture and removal of a small number of adult Salt Creek tiger beetles from their habitat and placement in a laboratory setting. The removal of a small number of adults will slightly reduce a population, but if successful, such a program will preserve and enhance the genetic variability of the species.

C. Disease or Predation

Insufficient information is available to determine if the Salt Creek tiger beetle is susceptible to diseases that could threaten its survival. However, the Salt Creek tiger beetle is affected by several predacious and parasitic species that are commonly observed in its habitat. Spiders (*Salticidae* and *Lycosidae*), predatory bugs (*Reduviidae*), beetles (*Histeridae* and *Cantharidae*), birds, shrews (*Soricidae*), raccoons (*Procyon lotor*), lizards (*Lacertilia* sp.), toads (*Bufonidae*), robber flies (*Asilidae*), ants (*Formicidae*), and dragonflies (*Anisoptera* sp.) all prey on the Salt Creek tiger beetle (Lavigne 1972; Nagano 1982; Pearson 1988). A robber fly was observed preying on a Salt Creek tiger beetle it had caught in flight and pulled to the ground (Spomer and Higley 2001). Ants can overwhelm, kill, and devour larvae confined to their burrows (Spomer and Higley 2001). Larger species of tiger beetles (*C. circumpicta*) have been known to prey on smaller-sized tiger beetles (*C. togata*), especially those species that occupy similar habitats (Hoback *et al.* 2001). Both *C. togata* and *C. circumpicta* are found in the same habitats as the Salt Creek tiger beetle and both may prey upon it (S. Spomer, pers. comm. 2002). Parasitic wasps (*Chalcididae* and *Tiphiidae*) can sting the larvae, resulting in paralysis, then lay eggs which hatch and feed on the larvae (Spomer and Higley 2001). Bee flies (*Bombylidae*) hover over larval burrows and flip eggs into the entrances (S. Spomer, pers. comm. 2002). After the eggs hatch, the bee fly maggots attach themselves to the Salt Creek tiger beetle larvae and feed on them.

Predators and parasites play important roles in the natural dynamics of populations and ecosystems. Predators and parasitoids of the Salt Creek tiger beetle evolved in conjunction with the beetle and would not normally pose a severe threat to its survival. However, predation and parasitism of adults and larvae may account for significant mortality of the Salt Creek tiger beetle because of the small size of the remaining populations, limited distribution, reduced habitat, and close proximity of the two largest populations (L. Higley, pers. comm. 2002). Hoback *et al.* (2001) indicated that reduced saline habitats, coupled with a limited prey source, may result in predation by *C. circumpicta* and *C. togata* on the Salt Creek tiger beetle. Such predation by other tiger beetles may be a threat to the Salt Creek tiger beetle. However, at this time it is unknown whether the magnitude of predation and parasitism on the Salt Creek tiger beetle is a threat to its survival.

D. Inadequacy of Existing Regulatory Mechanisms

Overview

Federal, State, and local laws, regulations, and policies have not been sufficient to prevent past and ongoing losses of Salt Creek tiger beetle habitat. Existing regulatory mechanisms that provide some, but not adequate, protection for the Salt Creek tiger beetle include—Federally implemented regulatory mechanisms such as the National Environmental Policy Act (NEPA) and section 404 of the CWA; State implemented regulatory mechanisms such as the Nebraska State Water Quality Standards (as required by section 401 of the CWA) and the Nebraska Nongame and Endangered Species Conservation Act (NESCA); and local conservation planning efforts such as the City of Lincoln and Lancaster County Comprehensive Plan, the Little Salt Creek Valley Planning Cooperative Agreement cosponsored by the Nature Conservancy (TNC) and NGPC, and a local conservation plan for the

protection of the Salt Creek tiger beetle proposed by Lincoln (but not yet developed).

Federally Implemented Regulatory Mechanisms

While NEPA and CWA are important environmental protection statutes, neither provides specific protection to candidate species. NEPA is a procedural statute that requires full consideration and disclosure of the environmental impacts of a project. It does not require protection of particular species or its habitat, nor does it require the selection of a particular course of action.

Under section 404 of the CWA, the Corps does not regulate wetland drainages that do not result in a discharge of dredged or fill material into waters of the United States or sediment inputs originating from upland sources. The effects of such activities could have substantial adverse impacts on saline wetlands and associated streams used by larval and adult forms of the Salt Creek tiger beetle. Additionally, the Corps' Regulatory Program in Nebraska has limited regulatory authority over road and urban development projects that have destroyed or further degraded habitats for the Salt Creek tiger beetle. Since the late 1800s, over 90 percent of the historical saline wetlands of eastern Nebraska have been lost or highly degraded due to such projects (Murphy 1992), which have led to corresponding losses of Salt Creek tiger beetle habitat, including barren salt flats, saline stream edges, and seeps.

Below is a discussion of permitted activities and prescribed mitigation authorized by the Corps under section 404 of the CWA. In 1990, Lincoln purchased 23 ha (58 ac) of a portion of the saline wetland known as Arbor Lake and turned over its management to NGPC. This acquisition and protection in perpetuity served as mitigation for a Department of the Army permit that authorized the destruction of 7 ha (17 ac) of saline wetlands for the expansion of two streets. This mitigation resulted in the acquisition of a portion of the habitat that harbors the Little Salt Creek-Arbor Lake Population of Salt Creek tiger beetles. Since 1995, permits have been authorized for projects that impacted approximately 11 ha (27 ac) of eastern Nebraska Category 1 saline wetlands (U.S. Department of Transportation 2002a and b). As required by these permits, project proponents offered to mitigate (restore and preserve) approximately 108 ha (266 ac) of Category 1 saline wetlands (U.S. Department of Transportation 2002a and b). Although mitigation did not specifically target the 49 ha (122 ac) of Salt Creek tiger beetle habitat (*i.e.*, barren salt flats and saline stream edges), one such mitigation project had the potential to benefit the beetle in this area. However, the project, known as the Whitehead Mitigation Site, has provided minimal benefit to Salt Creek tiger beetle. Since its completion over 8 years ago, this site has been surveyed annually for Salt Creek tiger beetles. One individual Salt Creek tiger beetle was found during the first year of monitoring, but none have been found in the last 7 years (Spomer *et al.* 1999, 2001, 2002, and 2004; and Allgeier *et al.* 2003). The area is unlikely to provide habitat for the Salt Creek tiger beetle in the near future as site observations show signs of vegetative encroachment, and the site appears too wet for beetle use. However, benefits may be realized through associated functions of the area (*i.e.*, water purification and retention of excess stormwater). Thus, aside from the Arbor Lake area acquisition, preservation and restoration of Category 1 saline wetlands have provided minimal habitat benefits to the Salt Creek tiger beetle.

A Supreme Court ruling in 2001 limited Federal authority under the CWA to regulate certain isolated wetlands (*Solid Waste Agency of Northern Cook County* vs. *U.S. Army Corps of Engineers*, 531 U.S. 159) (SWANCC). In particular, SWANCC eliminated CWA jurisdiction over ''isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations'' (68 FR 1996). As described in a Joint Memorandum issued on January 15, 2003 (68 FR 1995), the Corps and Environmental Protection Agency (EPA) will not assert jurisdiction over such isolated waters, if the sole basis for jurisdiction is any of the factors listed in the ''Migratory Bird Rule'' (51 FR 41217). Additionally, the Joint Memorandum stated that Corps and EPA field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over these waters on other grounds. Some of the wetland habitats occupied by the Salt Creek tiger beetle are now considered to be isolated and not subject to protection under the CWA. In a February 9, 2001, letter addressed to a potential applicant for a Department of the Army permit, the Corps explained that their property was determined to be an isolated wetland and, thus, the Corps could not assert jurisdiction over it due to the Supreme Court ruling. In Nebraska, the Corps will not regulate any wetland that is determined to be isolated unless it can be proven that there is some kind of commerce use (*e.g.*, a public boat ramp on the wetland) aside from migratory bird use or a surface connection. The property of interest to the potential applicant contained a Category 1 saline wetland with a barren salt flat, and historically, the area was part of the Salt Basin wetland. The property owner constructed an apartment complex, which destroyed the saline wetland and barren salt flats. Although a survey of this saline wetland revealed that no Salt Creek tiger beetles were present prior to construction, this saline wetland once had the potential as a possible recolonization site for the Salt Creek tiger beetle.

Stream channelization and certain bank stabilization projects are regulated by the Corps under section 404 of the CWA, but this regulatory mechanism has proven ineffective in preventing impacts to stream habitats used by the Salt Creek tiger beetle. As described above in Factor A, in 1992, along Little Salt Creek, about half of the remaining habitat for the largest population of the Salt Creek tiger beetle was lost after the completion of a Corps-permitted stream bank stabilization and channelization project. This authorization resulted in activities that destroyed about one-half of the remaining prime habitat for the Salt Creek tiger beetle along Little Salt Creek (Spomer and Higley 1993; Farrar 2003).

Many of the saline wetlands that provide habitat for the Salt Creek tiger beetle are associated with the floodplain of adjacent streams. Stream channelization and bank stabilization projects conducted for flood control have caused channel incision and have necessitated additional bank stabilization projects further downstream or in feeder tributaries. Since the Salt Creek tiger beetle was listed as endangered by the State in 2000, the Corps has considered it in its public interest evaluation for permits (M. Rabbe, U.S. Army Corps of Engineers, pers. comm. 2001). However, the Corps' evaluation has resulted in only limited benefits to the Salt Creek tiger beetle because construction activities in upland areas surrounding aquatic habitats are not within the Corps' jurisdiction. Many projects qualify for a general permit (*i.e.*, Nationwide Permit 13 (bank stabilization)) that does not need to be individually reviewed by the Corps. Further, some landowners, in an attempt to avoid obtaining an Army permit and the Federal oversight that goes with it, windrow piles of concrete riprap along the high bank of the stream

in anticipation that once the streambank erodes far enough landward, the riprap will fall in on its own and stabilize the bank. In such cases, the Corps cannot exercise regulatory jurisdiction over windrowed riprap until there is a discharge below the ordinary high water mark, and even then, only if that discharge threatens the navigability of a stream or is prohibited for use as a fill material (U.S. Army Corps of Engineers Regulatory Guidance Letter MRO 96–11, June 17, 1997). Both regulated and unregulated bank stabilization activities occur on Little Salt Creek and have adversely affected Salt Creek tiger beetle habitat.

State Implemented Regulatory Mechanisms

Under section 401 of the CWA, NDEQ issues a Water Quality Certification (WQC) whenever a Department of the Army permit is authorized by the Corps. Issuance of a Nebraska WQC for a Department of the Army permit also is necessary to meet Nebraska State Water Quality Standards. Such standards are not aligned with quantitative biological criteria, and thus projects may still have negative impacts on saline wetlands of eastern Nebraska and associated streams that provide habitats needed to meet life requirements of both larval and adult Salt Creek tiger beetles. Nebraska Water Quality Standards do recognize all wetlands in the State as ''waters of the State,'' including isolated wetlands that are no longer under Federal jurisdiction as a result of *SWANCC* vs. *U.S. Army Corps of Engineers*. As the State does not have a permit program for authorizing activities in wetlands, only after an impact to a non-Federal isolated wetland has occurred can the NDEQ take action (*i.e.*, an enforcement action). After-the-fact enforcement actions under the State's Water Quality Standards are unlikely to offset adverse impacts that have already occurred to the Salt Creek tiger beetle in isolated saline wetlands, given their highly specific habitat requirements and low numbers.

On March 17, 2000, the Salt Creek tiger beetle was listed as endangered under the NESCA by NGPC. The NESCA prohibits the ''take'' of listed species. ''Take'' is defined as a means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in such conduct. The NESCA also protects the Salt Creek tiger beetle by authorizing State agencies to carry out programs for the conservation of endangered and threatened species and by taking such actions necessary to ensure that actions authorized, funded, or carried out by the State do not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat for such species (NESCA section 37–807 (3)). The NESCA requires all State agencies to consult with NGPC to ensure that jeopardy is avoided. However, the NESCA does not authorize NGPC to review Federal actions or to consult with Federal agencies for impacts that may affect State-listed species such as the Salt Creek tiger beetle. In addition, although NESCA allows NGPC to identify critical habitat for State-listed species, implementing regulations that would allow such designations were never developed.

Local Conservation Planning

In a joint effort to plan long term for the development of the Lincoln and Lancaster County, officials have approved the Lincoln and Lancaster County Comprehensive Plan. The approved Comprehensive Plan proposes that development not occur along Little Salt Creek and north of Lincoln's city limits. As part of the Comprehensive Plan, Lincoln also has placed a 150-m (500-ft) wide buffer around Little Salt Creek and its adjacent saline wetlands until a determination can be made through research whether the buffer is needed to protect the Salt Creek tiger beetle. However, for development projects within the City limits, the buffer does not apply, including areas around the Little Salt Creek-Arbor Lake and Little Salt Creek-Roper populations.

In addition, comments by representatives of Lincoln during an April 30, 2002, meeting with the Service indicated that the Comprehensive Plan is a guide for the growth and development of Lincoln and Lancaster County and can provide no assurances beyond the elected terms of those officials instrumental in its development. The Comprehensive Plan is the first step in developing city and county ordinances, but it is not a regulatory mechanism that can be relied upon to provide regulatory assurances.

In 2000, the TNC and NGPC organized the Little Salt Creek Valley Planning Cooperative. In acknowledgment of the importance of private interests in the Cooperative, the purpose of this effort was to organize stakeholders, mainly private landowners, in the Little Salt Creek watershed into a coalition to preserve and protect eastern Nebraska saline wetlands and associated watershed streams in the northern third of Lancaster County. After 18 months of unsuccessful negotiations, this conservation effort was dissolved.

In 2003, Lincoln, Lancaster County, Lower Platte South Natural Resources District, TNC, and NGPC formed the Saline Wetland Conservation Partnership (SWCP). The SWCP has developed a plan that focuses on the conservation of saline wetlands in Lancaster and Saunders Counties. Although not specifically focused on the protection and management of the Salt Creek tiger beetle, the SWCP's efforts will benefit the species. One of the strategies of the SWCP's plan is to protect saline wetlands using existing Federal, State, and local laws. Another strategy is to use existing grant programs to acquire saline wetlands either through simple fee title or conservation easements. To date, the SWCP has acquired 5 parcels of land containing saline wetlands. Due to the high value of land, and shortage of Federal, State, and local government agency funds, protection of Salt Creek tiger beetle habitat through acquisition is expected to be limited.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Overview

Because the Salt Creek tiger beetle occurs at only three known locations and in such small numbers, the remaining populations of Salt Creek tiger beetles are highly susceptible to extinction as a result of naturally occurring stochastic environmental or demographic events. Such events may include heavy rain storms and severe flooding which flood out and scour larvae away, dilute salinity, and result in sediment deposition; accidental spillage of hazardous materials due to a nearby, up-slope traffic accident; or runoff containing a recently applied insecticide flowing into habitats occupied by the Salt Creek tiger beetle along Little Salt Creek. Gilpin (1987) recognized a direct association between increased extinction rates of a species and reduced habitat areas, distances between populations, and small population size. Further, random demographic effects and loss of genetic variability may result in individuals and populations being less able to cope with environmental change, which could result in the loss of one or both of the two largest populations of Salt Creek tiger beetles.

In addition, populations of wetland-dependent species that are isolated and small in size are vulnerable to extinction by chance demographic events, disease, inbreeding, or natural events such as changing water levels, succession of wetland vegetation, and habitat destruction (Gibbs 1993). Based on 2004 population surveys and a review of USGS topographic maps

showing population distributions, 99 percent of the remaining Salt Creek tiger beetles are located within a 1.6-km (1-mi) radius of the Interstate 80 and North 27th Street Interchange and ongoing residential and commercial development. Based on the information we have reviewed, we surmise that further degradation or loss of suitable habitats and the increased distance between areas of suitable habitat will further reduce the likelihood that Salt Creek tiger beetles will be able to move and recolonize other sites and establish additional populations. If so, as existing occupied habitats become degraded, and these areas become smaller and smaller, existing populations of Salt Creek tiger beetles may become extirpated.

Floods and Droughts

The extirpation of a local population of Salt Creek tiger beetles has occurred due to a naturally occurring flood event. Although Salt Creek tiger beetle larvae are able to withstand submersion for prolonged periods (possibly up to 2 weeks) (Hoback *et al.* 1998; L. Higley, pers. comm. 2001), flooding results in soil erosion of larval burrow sites and washes larvae downstream. Flooding also results in the deposition of sediments from adjacent agricultural lands into larval and adult habitats. In the mid-1980s, floodwaters carried large loads of sediment from adjacent cropfields and deposited it into the saline wetlands associated with Rock Creek in northern Lancaster and southern Saunders Counties (M. Fritz, pers. comm. 2003). This flood event covered barren salt flats used by Salt Creek tiger beetles in the Jack Sinn WMA population. The mid-1980s flood resulted in the loss of Salt Creek tiger beetle larvae because of the depth of sediment deposited. The larvae were unable to remove the 8 to 10 cm (3 to 4 in) of sediment deposited because they extract excess soil material out and away from a burrow and not inward (M. Fritz, pers. comm. 2003). The mid-1980s flood also changed the vegetation of the area. After the flood event, a thick herbaceous overstory composed of reed canarygrass and cattail infested the area, making it unsuitable for the Salt Creek tiger beetle. In 1993, back-to-back 50-year rain events inundated the entire area, including saline wetlands and Salt Creek tiger beetle habitats of the Jack Sinn WMA population (U.S. Department of Agriculture 1996). Surveys of the Jack Sinn WMA population have only found two individuals since 1993 and, as already mentioned, the Jack Sinn WMA population is considered to be extirpated.

Extirpation of either the Little Salt Creek-Arbor Lake population or Little Salt Creek-Roper population of Salt Creek tiger beetle, or both, is highly likely to occur if the Little Salt Creek drainage experiences an event similar to the 1993 Rock Creek drainage flood. Flooding, even after a normal rainfall, is likely to occur at a higher frequency and volume due to the increased storm water runoff from developments and channelization of tributaries.

Drought also may have impacted prey populations, leading to higher mortality rates of the Salt Creek tiger beetle (Spomer and Higley 2001). Dry conditions result in the loss of moist saline seep habitat used as larval, ovipositing, and foraging habitat by the Salt Creek tiger beetle. Drought also can change the abundance and diversity of prey items used by adult and larval Salt Creek tiger beetles. In Nebraska, 2002 was the third driest year on record (*i.e.,* 115 years) (Nebraska's Climate Assessment and Response Committee 2003) and June 2002 was the driest month on record (University of Nebraska 2003). June is the month when the Salt Creek tiger beetle is most active. L. Higley (pers. comm. 2003) predicts that if the drought that Nebraska has experienced over the past couple of years continues, the remaining Salt Creek tiger beetle populations will decline in number of individuals due to the lack of prey available to the beetle and its larvae.

Pesticides

Corn, soybean, and sorghum fields dominate the Little Salt Creek watershed, and insecticides are applied annually to these fields. Insecticides that enter occupied habitats of the Salt Creek tiger beetle through runoff have the potential for direct impact or indirect impact through modification of prey availability. There have been no studies to evaluate pesticide exposure and adverse effects to Salt Creek tiger beetles; however, research on ground beetles (family Carabidae) suggests pesticide exposure may place the Salt Creek tiger beetle at risk from decreased survival and reproduction.

Dietary and topical exposure of ground beetles (*Harpalus pennsylvanicus*) in Kentucky turfgrass plots to a carbamate insecticide (bediocarb) and a chloro-nicotinyl insecticide (imidacloprid) resulted in lethal and sublethal effects (Kunkel *et al.* 2001). The carbamate insecticide resulted in a high incidence of mortality, whereas exposure to the chloro-nicotinyl insecticide resulted in neurotoxic effects, including paralysis, impaired walking, and excessive grooming. Beetles recovered from the sublethal effects in the laboratory; however, field observations indicated that intoxicated beetles were highly vulnerable to predation (Kunkel *et al.* 2001). Bendiocarb and imidacloprid have been used for insect control in corn (Extoxnet 1996). Other carbamate pesticides recommended for use in corn, soybean, and sorghum production in Nebraska include carbofuran, methomyl, thiodicarb, trimethacarb, and carbaryl (Wright *et al.* 1994; Hunt 2003).

Organophosphate and pyrethroid insecticide effects to ground beetles also have been evaluated. Thacker *et al.* (1995) found that microapplicators in laboratory-based topical bioassays greatly underestimated the toxicity of the chlorpyrifos (an organophosphate) and deltamethrin (a pyrethroid) pesticides. Whole field experiments in England designed to study the effects of pesticides on nontarget invertebrates reported that chlorpyrifos and fonofos, both organophosphate pesticides, affect the activity of ground beetles and seemed to result from direct toxicity rather than a depleted prey base (Luff *et al.* 1990). Organophosphate and pyrethroid pesticides recommended for use on corn, soybean, and sorghum crops in Nebraska include chlorpyrifos, malathion, methyl parathion, dimethoate, ethoprop, fonofos, phorate, terbufos, tefluthrin, tralomethrin, permethrin, esfenvalerate, cyfluthrin, zeta-cypermethrin, and lambda-cyhalothrin (Wright *et al.* 1994; Hunt 2003).

Salt Creek tiger beetles also may be exposed to pesticides applied to control mosquitoes, grasshoppers, and pests in residential yards and gardens. Nagano (1982) referred to a report of an entire population of tiger beetles (*C. haemorrhagica* and *C. pusilla*) in the State of Washington being eradicated by pesticides. The disappearance of the tiger beetle *C. marginata* in New Hampshire also was believed to be the result of insecticide spraying to control salt marsh mosquitoes (Dunn 1978, as cited by Nagano 1982). Insecticides applied annually to lawns and landscaping plants at residential and commercial developments near Little Salt Creek have the potential to enter the creek and impact the Salt Creek tiger beetle and its prey base. A local government has proposed for the last two years to apply pesticide for the control of mosquitos along Little Salt Creek where the Little Salt Creek-Roper population exists.

Artificial Lights

Artificial lights along streets and highways in Lincoln, particularly

mercury vapor lamps, also may contribute to population losses of the Salt Creek tiger beetle, as such lights have been implicated in population losses of nocturnal insects elsewhere (Pyle *et al.* 1981). Adult tiger beetles of many species are regularly attracted to lights at night, which may be associated with nocturnal dispersal (Pearson 1988). Larochelle (1977) documented 122 species and subspecies of Cicindelidae found at night light sources. Tiger beetle species that were attracted to light sources at night include *C. togata, C. fulgida,* and *C. circumpicta* (Willis 1970). The subspecies, *C. n. knausi,* the closest insect relative to the Salt Creek tiger beetle, also is attracted to artificial light sources at night (Willis 1970). Allgeier *et al.* (2003) found that Salt Creek tiger beetles are attracted to artificial light in the following order of preference—black light; mercury vapor; incandescent; fluorescent; and sodium vapor (Allgeier *et al.* 2003). The 2003 mark/recapture study of the Little Salt Creek-Arbor Lake population shows that Salt Creek tiger beetles move a distance of at least of 460 m (1,509 ft) (Allgeier *et al.* 2003). Allgeier *et al.* (2003) also found that female Salt Creek tiger beetles oviposition at night and that outdoor light sources may reduce reproduction. It is thought that fewer eggs are deposited if artificial light sources draw females away from their breeding habitat. Allgeier *et al.* (2003) recommended an 805-m (2,640-ft) (0.8-km (0.5-mi)) buffer zone to protect all existing Salt Creek tiger beetle populations from possible outdoor light sources.

Movement away from habitat to lighted areas, such as areas surrounding major transportation routes (*e.g.*, Interstate 80) and associated residential, commercial, and industrial developments may increase energy expenditure, reduce reproductive success, and ultimately impact the survival of the two largest populations of Salt Creek tiger beetles (L. Higley, pers. comm. 2002). Distances between outdoor light sources within commercial and residential developments and the Little Salt Creek-Roper and Little Salt Creek-Arbor Lake populations are less than the 805-m (2,640-ft) (0.8-km (0.5-mi)) buffer recommended by Allgeier *et al.* (2003) (J. Cochnar, pers. obs. 2002).

Electric insect light traps are possibly a greater threat to the Salt Creek tiger beetle than lights illuminating urban streets, houses, parking lots, and commercial buildings. Electric insect light traps use ultraviolet light to attract flying insects toward an electrified metal grid where they are destroyed (Frick and Tallamy 1996). Another type of trap that uses black light, a form of ultraviolet light, has a sticky paper backing where the insects are caught and die. Electrical insect light traps have been used extensively since the middle 1900s for research and surveillance in disease prevention, and control of indoor and outdoor insects in homes and agricultural and industrial operations (Urban and Broce 1999). Mosquitoes (Culicidae), horse and deer flies (Tabanidae), house flies (Muscidae), and biting midges (Ceratopogonidae) are the most commonly targeted species of biting insects. However, during the summer of 1994 at 6 sample sites, Frick and Tallamy (1996) found 13,789 insects that were electrocuted by electric insect light traps. Of these, 6,670 insects (48.4 percent) were nontarget and nonharmful aquatic insects from nearby rivers and streams. Additionally, Frick and Tallamy (1996) identified that 1,868 of these insects (13.5 percent) were predators and parasites of the targeted, harmful insects.

Black-light or ultraviolet based insect traps could become an ever increasing threat as residential and commercial development continues to encroach upon the two largest populations of Salt Creek tiger beetles.

Conclusion of Status Evaluation

In making this proposed rule determination, we carefully assessed the best scientific and commercial information available regarding past, present, and future threats faced by the Salt Creek tiger beetle. The immediate concerns for the Salt Creek tiger beetle are associated with the extremely small, fluctuating populations, the number of which has declined by 50 percent since surveys began in 1991, and habitat degradation, destruction, and fragmentation. The Salt Creek tiger beetle is currently restricted to three populations on approximately 6 ha (15 ac) of not highly degraded barren salt flat and saline stream edge habitats contained within the eastern Nebraska saline wetlands and associated saline streams (*i.e.*, Little Salt Creek). Ninety-nine percent of all remaining Salt Creek tiger beetles are located approximately 1.6 km (1 mi) apart, making them especially susceptible to extirpation from a single catastrophic event. They also are located within a 1.2-km (0.7-mi) radius of the Interstate 80 and North 27th Street Interchange and the associated growth and development that is underway.

As discussed in Factor A of the Summary of Factors Affecting the Species section of this rule, there are a number of immediate threats that can be attributed to urban and agricultural development projects that threaten the Salt Creek tiger beetle with extinction. Ongoing residential and commercial developments may threaten all remaining populations of the Salt Creek tiger beetle with extirpation. These developments can cause changes to hydrologic regimes, resulting in freshwater inflows and sediment runoff, which in turn reduces salinity concentrations and encourages vegetation invasion into previously unvegetated saline habitats. Proposed projects, such as road expansion projects, also pose threats to the two largest remaining populations of the Salt Creek tiger beetle.

Other immediate threats to the habitat of the Salt Creek tiger beetle are sediment erosion from adjacent agricultural fields and urban development construction sites; livestock grazing (trampling of larvae burrows); changes in saline stream morphology; and drainage of saline wetlands due to the incisement of associated streams.

The Salt Creek tiger beetle also is vulnerable to chance environmental or demographic events (*e.g.*, flood, drought, disease, and pesticides). As discussed in Factor E, extirpation of the Jack Sinn WMA population of Salt Creek tiger beetles occurred because of such an event. The combination of the two largest populations, their close proximity to each other, and restricted, specialized, and diminishing aquatic habitats, makes the Salt Creek tiger beetle highly susceptible to extirpation or extinction from its entire range. Since the two largest populations are located so close together, any chance environmental catastrophe or demographic event that causes a population to be extirpated would significantly increase the likelihood of the extinction of the Salt Creek tiger beetle.

In addition to the protections that would be afforded to the species by listing, the low population numbers and close proximity of the populations indicate that survival of the Salt Creek tiger beetle will likely depend upon establishing additional populations in suitable habitats at other locations through a captive rearing program, to the extent that random demographic events or environmental catastrophes no longer pose an immediate threat to the beetle. Since the number of Salt Creek tiger beetle populations has declined to just three, and these are subject to numerous immediate, ongoing, and future threats as described above, we have determined that the Salt Creek

tiger beetle is in danger of extinction throughout all of its range (section 3(6) of the Act) and, therefore, meets the Act's definition of endangered.

Critical Habitat

Critical habitat is defined in section 3 of the Act as: (i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species, and (II) that may require special management considerations or protection, and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary of the Interior (Secretary) that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Section 4(a)(3) of the Act and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. In the near future we will publish a proposed rule to designate critical habitat for the Salt Creek tiger beetle. We expect to have a final decision on critical habitat when we make our final decision on listing in 2005.

Available Conservation Measures

Listing will require consultation with the Service under section 7 of the Act for any actions that may affect the Salt Creek tiger beetle on lands and for activities under Federal jurisdiction, State plans developed pursuant to section 6 of the Act, scientific investigations and efforts to enhance the propagation or survival of the Salt Creek tiger beetle pursuant to section 10(a)(1)(A) of the Act, and habitat conservation plans developed for non-Federal lands and activities pursuant to section 10(a)(1)(B) of the Act. In anticipation of the Service listing the Salt Creek tiger beetle, in a letter dated February 28, 2003, the NGPC notified the Service that it was planning to develop a Regional Habitat Conservation Plan (HCP) for the Salt Creek tiger beetle. As part of the HCP proposal, Lincoln, Lancaster County Board of Commissioners, Lower Platte South Natural Resources District, NDOR, UNL, and TNC all provided letters of support to NGPC. The NGPC identified the need for the Regional HCP to provide long-term protection of the Salt Creek tiger beetle and its habitats in the eastern Nebraska saline wetlands and associated streams and provide regulatory certainty for the citizens of Lancaster and Saunders Counties.

Section 7(a) of the Act requires Federal agencies 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 designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer informally 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. If a species is subsequently listed, section 7(a)(2) of the Act 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 must enter into formal consultation with us.

Federal agency actions that may affect the Salt Creek tiger beetle and may require consultation with the Service include, but are not limited to, those within the jurisdiction of the Service, Corps, EPA, FHWA, Department of Housing and Urban Development (HUD), Federal Housing Administration (FHA), Federal Aviation Administration (FAA), Natural Resources Conservation Service (NRCS), and Farm Service Agency (FSA).

Federal agencies expected to be involved with the Salt Creek tiger beetle or its habitat include the Corps and EPA, due to their permit and enforcement authority under section 404 of the CWA. In addition, EPA will be involved through provisions of section 402 of the CWA. The FHWA has authority and funding responsibilities for highway construction projects that could have impacts on habitat both formerly and presently occupied by the Salt Creek tiger beetle. The HUD and FHA may provide grants for urban development, in particular, installation of utilities. Planned locations of such utility installation and associated development will likely be affected by listing of the Salt Creek tiger beetle. The FAA has jurisdiction over the Lincoln Municipal Airport, an area formerly occupied by the Salt Creek tiger beetle that may still provide suitable habitat near Capital Beach in northern Lincoln. The NRCS and FSA administer numerous new and reauthorized programs under The Farm Security and Rural Investment Act of 2004 (2004 Farm Bill). Although the majority of 2004 Farm Bill programs should have beneficial effects for the Salt Creek tiger beetle, certain conservation practices implemented under the various programs, which would alter the hydrological regime of eastern Nebraska saline wetlands and associated stream habitats, requires a determination of potential effects on the Salt Creek tiger beetle.

The Act sets forth a series of general prohibitions and exceptions that apply to all endangered wildlife species. The prohibitions make it illegal for any person subject to the jurisdiction of the United States to take, import or export, transport in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any endangered species. Under section 3(19) of the Act, the term ''take'' includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct. Pursuant to 50 CFR 17.3, the Service further defines ''harass'' as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to breeding, feeding, or sheltering. In addition, under this regulation, the Service defines ''harm'' to include significant habitat modification or destruction that results in the death or injury to listed species by significantly impairing behavior patterns such as breeding, feeding, or sheltering. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies. Permits may be issued to carry out otherwise prohibited activities involving listed species. Such permits are available for scientific purposes, to enhance the propagation or survival of the Salt Creek tiger beetle, or for incidental take in connection with otherwise lawful activities.

As published in the **Federal Register** on July 1, 1994, (59 FR 34272), it is the Service's policy, to identify, to the maximum extent practical at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of listing on proposed and ongoing activities within a species' range, and to assist the public

in identifying measures needed to protect the species. For the Salt Creek tiger beetle, activities that we believe are unlikely to result in a violation of section 9, provided these activities are carried out in accordance with any existing regulations and permit requirements, include:

(1) Possession, delivery, or movement, including interstate transport and import into or export from the United States, of dead Salt Creek tiger beetles that were collected prior to the date of publication of this proposed rule in the **Federal Register**;

(2) Any action authorized, funded, or carried out by a Federal agency that may affect the Salt Creek tiger beetle, when the action is conducted in accordance with the consultation requirements for listed species pursuant to section 7 of the Act;

(3) Any action carried out for scientific research or to enhance the propagation or survival of the Salt Creek tiger beetle that is conducted in accordance with the conditions of a section 10(a)(1)(A) permit; and,

(4) Any incidental take of the Salt Creek tiger beetle resulting from an otherwise lawful activity conducted in accordance with the conditions of an incidental take permit issued under section 10(a)(1)(B) of the Act.

Activities involving the Salt Creek tiger beetle (including all of its metamorphic or life stages) that the Service believes likely would be considered a violation of section 9, include, but are not limited to:

(1) Harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting any of these activities, of the Salt Creek tiger beetle without a permit, except in accordance with applicable Federal and State fish and wildlife conservation laws and regulations;

(2) Possessing, selling, delivering, carrying, transporting, or shipping illegally taken Salt Creek tiger beetles or any body part thereof;

(3) Interstate and foreign commerce (commerce across State and international boundaries) and import/export (as discussed earlier in this section) without appropriate permits;

(4) Use of pesticides/herbicides that results in take of the Salt Creek tiger beetle;

(5) Release of biological control agents that attack any life stage of this taxon;

(6) Discharges or dumping of toxic chemicals, silts, or other pollutants into, or other alteration of the quality of waters supporting Salt Creek tiger beetles that results in take of the species; and,

(7) Activities (*e.g.,* land leveling/clearing, grading, discing, soil compaction, soil removal, dredging, excavation, deposition of dredged or fill material, erosion and deposition of sediment/soil, stream alteration or channelization, stream bank stabilization, alteration of stream or wetland hydrology and chemistry, grazing or trampling by livestock, minerals extraction or processing, residential, commercial, or industrial developments, utilities development, off-road vehicle use, road construction, or water development and impoundment) that result in the death or injury of eggs, larvae, sub-adult, or adult Salt Creek tiger beetles, or modify Salt Creek tiger beetle habitat in such a way that it kills or injures Salt Creek tiger beetles by adversely affecting their essential behavioral patterns including breeding, foraging, sheltering, or other life functions. Otherwise lawful activities that incidentally take Salt Creek tiger beetles, but have no Federal nexus, will require a permit under section 10(a)(1)(B) of the Act.

Questions regarding whether specific activities will constitute a violation of section 9 should be directed to the Field Supervisor of the Ecological Services Field Office, Grand Island, Nebraska (*see* **ADDRESSES**).

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22. For endangered species, you may obtain permits for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. You may request copies of the regulations regarding listed wildlife from, and address questions about prohibitions and permits to, the U.S. Fish and Wildlife Service, Ecological Services, Endangered Species Permits, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225–0486 (telephone: 303/236–7400; facsimile: 303/236–0027).

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods, as listed above in **ADDRESSES.** If you submit comments by e-mail, please submit them as an ASCII file format and avoid the use of special characters and encryption. Please include Attn: [RIN 1018–AE59]'' and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly by calling our Nebraska Field Office (telephone: 308/382–6468). Please note that this e-mail address will be closed out at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking– record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. Anonymous comments will not be considered. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

We will take into consideration your comments and any additional information received on this taxon when making a final determination regarding this proposal. The final determination may differ from this proposal based upon the information we receive.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we will solicit the expert opinions of at least three appropriate and independent specialists for peer review of this proposed rule. The purpose of such review is to ensure that listing decisions are based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed listing of this species. We will summarize the opinions of these reviewers in the final decision document, and we will consider their

input as part of our process of making a final decision on the proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. You may request a public hearing on this proposed rule. Your request for a hearing must be made in writing and filed at least 15 days prior to the close of the public comment period. Address your request to the Supervisor (*see* **ADDRESSES** section). We will schedule at least one public hearing on this proposal, if requested, and announce the date, time, and place of any hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

Clarity of the Rule

Executive Order 12866 requires agencies to write regulations that are easy to understand. We invite your comments on how to make this proposal easier to understand including answers to questions such as the following: (1) Is the discussion in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposal? (2) Does the proposal contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposal (groupings and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? What else could we do to make the proposal easier to understand? Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov.*

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 rule 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.

National Environmental Policy Act

We have determined that an environmental assessment and environmental impact statement, as defined under the authority of NEPA, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Paperwork Reduction Act

This rule does not contain any new collections of information other than those already approved under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and assigned Office of Management and Budget clearance number 1018–0094, which expires on July 31, 2004. 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 control number. For additional information concerning permit and associated requirements for endangered species, see 50 CFR 17.21 and 17.22.

References Cited

A complete list of references cited in this rule is available upon request from the Field Supervisor, U.S. Fish and Wildlife Service, Grand Island, Nebraska (*see* **ADDRESSES**).

Author

The primary authors of this proposed rule are John F. Cochnar and Robert R. Harms, U.S. Fish and Wildlife Service, Grand Island, Nebraska (*see* **ADDRESSES**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and record keeping requirements, Transportation.

Regulation Promulgation

Accordingly, we propose to 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. In § 17.11(h), add the following, in alphabetical order under INSECTS, to the List of Endangered and Threatened Wildlife:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
INSECTS							
*	*	*	*	*	*		*
Beetle, Salt Creek tiger.	*Cicindela nevadica lincolniana.*	U.S.A. (NE)	NA	E	NA	NA	
*	*	*	*	*	*		*

Dated: January 10, 2005.

Marshall P. Jones,

Acting Director, U. S. Fish and Wildlife Service.

[FR Doc. 05–1669 Filed 1–31–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AT95

Endangered and Threatened Wildlife and Plants; Exclusion of U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; notice of availability of a draft environmental assessment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to amend the regulations promulgated under the Endangered Species Act (ESA or Act) (16 U.S.C. 1531 *et seq.*) to add a new subsection to govern certain activities with U.S. captive-bred populations of three antelope species that have been proposed for listing as endangered, should they become listed. These specimens are the scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Gazella dama*). For U.S. captive-bred live specimens, embryos, gametes, and sport-hunted trophies of these three species, this proposed rule would authorize certain otherwise prohibited activities that enhance the propagation or survival of the species. International trade in specimens of these species will continue to require permits under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). We have prepared a draft Environmental Assessment of the impact of this proposed rule under regulations implementing the National Environmental Policy Act of 1969 (NEPA). The Service seeks data and comments from the public on this proposed rule and the draft Environmental Assessment.

DATES: Written comments on the proposed rule and the draft Environmental Assessment must be submitted by April 4, 2005.

ADDRESSES: Submit any comments and information by mail to the Chief, Division of Scientific Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 750, Arlington, VA 22203; or by fax to 703–358–2276; or by e-mail to *ScientificAuthority@fws.gov.* Comments and supporting information will be available for public inspection, by appointment, from 8 a.m. to 4 p.m. at the above address. You may also obtain copies of the November 5, 1991, proposed rule; July 24, 2003, proposed rule and notice to re-open the comment period; November 26, 2003, proposed rule and notice to re-open the comment period (68 FR 66395); and a copy of the draft Environmental Assessment from the above address.

SUPPLEMENTARY INFORMATION:

Background

Historically, the scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Gazella dama*) occupied the same general region of North Africa. The primary reason for the decline of all three antelope species in their native range is desertification, coupled with severe droughts, which has dramatically reduced available habitat. The growth of permanent farming in their native range has brought additional pressures, such as human habitat disturbance and competition from domestic livestock, which have restricted these antelopes to marginal habitat. Additional pressures from the civil wars in Chad and the Sudan have resulted in increased military activity, construction, and uncontrolled hunting.

Of the three antelope species, the scimitar-horned oryx is the most threatened with extinction. By the mid-1980s, it was estimated that only a few hundred were left in the wild, with the only viable populations known to be in Chad. However, no sightings of this species in the wild have been reported since the late 1980s, and the *2003 Red List of Threatened Species* shows that the status of the scimitar-horned oryx is ''extinct in the wild'' (World Conservation Union [IUCN] 2003). Captive-bred specimens of this antelope have been placed into large fenced areas for breeding in Tunisia. Once animals are reintroduced, continuous natural breeding is anticipated so that wild populations will be re-established.

It is believed that the addax was extirpated from Tunisia during the 1930s, and the last animals were killed in Libya and Algeria in 1966 and 1970, respectively. Remnant populations may still exist in the remote desert areas of Chad, Niger, and Mali, with occasional movements into Libya and Algeria during times of good rainfall. In the IUCN/SSC Antelope Specialist Group's *Global Survey of Antelopes,* the addax is considered to be ''regionally extinct'' (Mallon and Kingswood 2001). The addax is listed as critically endangered in the *2003 Red List of Threatened Species* and probably numbers fewer than 250 in the wild (IUCN 2003).

The dama gazelle is able to utilize both semi-desert and desert habitats, and is smaller than the scimitar-horned oryx or addax. Of the three antelope species, the dama gazelle is the least susceptible to pressures from humans and livestock. The original source of its decline was uncontrolled hunting; however, habitat loss through human settlement and livestock grazing, in addition to civil unrest, has more recently contributed to the decline. It is estimated that only small numbers survive in most of the eight countries within its historical range. The dama gazelle has declined rapidly over the last 20 years, with recent estimates of fewer than 700 in the wild. Noble (2003) estimates that the wild population of addra gazelle (*G. dama ruficollis*) is less than 200 specimens, the wild population of dama gazelle (*G. dama dama*) is about 500 specimens, and the mhorr gazelle (*G. dama mhorr*) is extinct in the wild. It was previously extinct in Senegal, but has since been reintroduced, and in 1997, at least 25 animals existed there as part of a semi-captive breeding program (IUCN 2003). The IUCN lists all subspecies of dama gazelles as endangered.

For further information regarding background biological information, factors affecting the species, and conservation measures available to scimitar-horned oryx, addax, and dama gazelle, please refer to the November 5, 1991, and July 24, 2003, **Federal Register** documents discussed below.

Previous Federal Action

A proposed rule to list all three species as endangered under 50 CFR 17.11(h) was published on November 5, 1991 (56 FR 56491). We re-opened the comment period to request current information and comments from the public regarding the proposed rule on July 24, 2003 (68 FR 43706), and November 26, 2003 (68 FR 66395). Stakeholders and interested parties, including the public, governmental agencies, the scientific community, industry, and the range countries of the species, were requested to submit comments or information. We received 32 responses by the end of the comment period, including multiple comments from some stakeholders. In accordance with the Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities published on July 1, 1994 (59 FR 34270), we selected three appropriate independent specialists to

review the proposed rule. The purpose of such peer review is to ensure that listing decisions are based on scientifically sound data, assumptions, and analysis. The reviewers selected have considerable knowledge and field experience with scimitar-horned oryx, addax, and dama gazelle biology and conservation. Comments were received from all of the peer reviewers.

Contribution of Captive Breeding to Species Propagation or Survival

Captive breeding in the United States has enhanced the propagation and survival of the scimitar-horned oryx, addax, and dama gazelle worldwide by rescuing these species from near extinction and providing the founder stock necessary for reintroduction. Some U.S. captive-breeding facilities allow sport hunting of surplus captive-bred animals. Sport hunting of surplus captive-bred animals generates revenue that supports these captive breeding operations and relieves hunting pressure on wild populations. We are proposing a new rule under the Act's regulations in 50 CFR part 17 that would authorize otherwise prohibited activities for U.S. captive-bred live specimens, embryos, gametes, and sport-hunted trophies of these species that enhance the propagation or survival of the species. Thus, we are proposing that, notwithstanding paragraphs (b), (c), (e), and (f) of 50 CFR 17.21, any person subject to the jurisdiction of the United States may take; export or re-import; deliver, receive, carry, transport, or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any live specimen, embryo, gamete, or sport-hunted trophy of scimitar-horned oryx, addax, or dama gazelle that was bred in captivity in the United States.

A consistent theme among the comments received from peer reviewers and stakeholders on the proposed rule to list these species as endangered is the vital role of captive breeding in the conservation of these species. One reviewer noted that 100% of the world's scimitar-horned oryx population (including the reintroduced population that is in an enclosed area), 71% of the addax population, and 48% of the world's dama gazelle population are in captive herds. Captive-breeding programs operated by zoos and private ranches have effectively increased the number of these animals while genetically managing their populations. International studbook keepers and managers of the species in captivity manage these programs in a manner that maintains the captive populations as a demographically and genetically diverse megapopulation (Mallon and Kingswood 2001). In the 1980s and 1990s, captive-breeding operations in Germany, the United Kingdom, and the United States provided scimitar-horned oryx, addax, and dama gazelle to Bou-Hedma National Park in Tunisia (Mallon and Kingswood 2001). These animals have become the founding stock of captive *in situ* herds that have grown substantially since 1995. The IUCN Species Survival Commission has proposed that some of the antelopes produced be used to establish other captive-breeding operations within the range countries or, given the appropriate conditions in the wild, for reintroduction. Similar *in situ* breeding programs for future reintroduction are occurring in Senegal and Morocco with captive stock produced and provided by breeding operations outside of these countries.

In addition, this proposed rule would not authorize or lead to the removal of any specimen of the three species from the wild. This rule would not affect prohibitions against possession and other acts with unlawfully taken wildlife or importation. This rule also would apply only to specimens that are captive bred in the United States. Any person who wishes to engage in any act that is prohibited under the Endangered Species Act with a specimen that has not been captive bred in the United States will still need to obtain a permit under the Act. The issuance or denial of such permits is decided on a case-by-case basis and only after all required findings have been made.

The probable positive direct and indirect effects of facilitating captive breeding in the U.S. for the conservation of scimitar-horned oryx, addax, and dama gazelle are exemplified in the research and reintroduction efforts involving the American Zoo and Aquarium Association (AZA) and the Sahelo-Saharan Interest Group (SSIG) of the United Nations Environment Program. In North America, the AZA manages captive populations of scimitar-horned oryx, addax, and dama gazelle through Species Survival Plans (SSP). The scimitar-horned oryx population in North America and Europe is derived from two captures that occurred in Chad in 1963 and 1966. Members of the scimitar-horned oryx SSP are faced with three challenges (Antelope Taxon Advisory Group 2002c): they must manage the captive population to maximize the genetic contributions of founder stock; second, they must find solutions for disposition of surplus animals given the limited holding space among SSP members; and third, they must find facilities that can house individual males or bachelor herds. Only through inter-institutional collaboration among members, such as the exchange of live specimens or gametes to maintain genetic diversity, can these challenges be surmounted. In one example, thirty founder lines are represented at one ranch that works closely with the SSP. Since typical oryx herds consist of one male and 10–30 females, there will always be a need to manage non-breeding males. Although the SSP consists mostly of AZA-accredited zoos, ranches can serve as repositories for surplus animals. These partnerships also provide opportunities for behavioral and other research in spacious areas found in some zoos and ranches that can be used in forming and preparing groups of animals for reintroduction.

Members of the Addax SSP have also been involved in translocating animals for captive breeding and release in Tunisia and Morocco. Animals held by members of the SSP are included in an international studbook for this species that includes addaxes in zoos and private facilities worldwide (Antelope Taxon Advisory Group 2002a). The dama gazelle North American studbook also includes zoos and ranch participants worldwide. Some of the specimens bred in zoos originated from ranched stock (Metzler 2000).

We are unaware of any negative direct or indirect effects from this rule on wild populations. As mentioned above, this proposed rule would not authorize or lead to the removal of any specimen of the three species from the wild. Indeed, many facilities in the United States that breed these species are working with range countries to breed and reintroduce specimens in areas that they have occupied historically. In 2000, the SSIG was formed as a consortium of individuals and organizations interested in conserving Sahelo-Saharan antelopes and their ecosystems (SSIG 2002). The SSIG has members representing 17 countries and shares information on wildlife management and conservation, captive breeding, wildlife health and husbandry, establishment and management of protected areas, and wildlife survey methods. Members are involved in *in situ* and *ex situ* conservation efforts for the scimitar-horned oryx, addax, and dama gazelle. Several of its projects involve the translocation of captive-bred antelopes to range countries for establishment of herds in large fenced breeding areas prior to reintroduction.

The proposed rule would not directly or indirectly conflict with any known program intended to enhance the

survival probabilities of the three antelope species. The SSP and SSIG programs work collaboratively with range country scientists and governments. Although the proposed rule would not authorize or lead to the removal of any specimen of the three species from the wild, it may contribute to other programs by providing founder stock for reintroduction or research.

This proposed rule would reduce the threat of extinction facing the scimitar-horned oryx, addax, and dama gazelle by facilitating captive breeding for all three species in the United States. Based on information available to the Service, captive breeding in the U.S. has contributed significantly to the conservation of these species. Scimitar-horned oryx are extinct in the wild and therefore, but for captive breeding, the species would be extinct. For addax and dama gazelle, they occur in very low numbers in the wild and a significant percentage of remaining specimens survive only through captivity (71% and 48% respectively). Threats that have reduced the species' to current levels in the wild continue throughout most of the historic range. As future opportunities arise for reintroduction in the antelope range countries, captive-breeding programs will be able to provide genetically diverse and otherwise suitable specimens. Ranches and large captive wildlife parks for non-native populations (*e.g.*, The Wilds, Ohio; Fossil Rim Wildlife Center, Texas) are able to provide large areas of land that simulate the species' native habitat and can accommodate a larger number of specimens than can most urban zoos. Thus, they provide opportunities for research, breeding, and preparing antelopes for eventual reintroduction. International consortia of zoos, private owners, researchers, and range country decision makers have acknowledged the need to protect the habitat of the scimitar-horned oryx, addax, and dama gazelle. They also recognize that, but for captive breeding, it would be difficult, or in some cases impossible, to restore the species in the wild, particularly for species that have become extinct in the wild.

One way the proposed rule would reduce the threat of extinction is by allowing limited sport hunting of U.S. captive-bred specimens to facilitate captive breeding of all three species. Given the cost of establishing and maintaining a large captive breeding operation and the large amount of land that is required to maintain bachelor herds or surplus animals, it is difficult for many private landowners to participate in such endeavors. One incentive to facilitate such captive breeding operations and ensure that genetically viable populations are available for future reintroduction programs is to allow the limited sport hunting of captive-bred specimens of these species to generate needed operational funds. Such an activity, therefore, reduces the threat of the species' extinction. Most of the available land for captive-held specimens is owned by private landowners (ranchers) or zoos. In Texas, the ranched scimitar-horned oryx population went from 32 specimens in 1979 to 2,145 in 1996; addax increased from 2 specimens in 1971 to 1,824 in 1996; and dama gazelle increased from 9 specimens in 1979 to 369 in 2003 (Mungall 2004). These population increases were due mostly to captive breeding at the ranches supplemented with some imported captive-bred founder stock. Limited hunting of captive-bred specimens facilitated these increases by generating revenue for herd management and the operation of the facility. Ranches also need to manage populations demographically (*i.e.*, age, gender) and genetically (*i.e.*, maximize genetic diversity). Such management may include culling specimens, which may be accomplished through sport hunting. For example, a ranch may need to reduce the number of adult males to achieve the necessary sex ratio for establishing a polygamous breeding group and facilitating the typical breeding behavior of the species. Hunting also provides an economic incentive for private landowners such as ranchers to continue to breed these species and maintain them as a genetic reservoir for future reintroduction or research, and as a repository for excess males from smaller populations, such as those held by zoos. Sport hunting of U.S. captive-bred specimens may reduce the threat of extinction of wild populations by providing an alternative to legal and illegal hunting of wild specimens in range countries.

The movement of live U.S. captive-bred specimens, both by interstate transport and export, is critical to the captive-breeding efforts to manage the captive populations as well as provide animals for reintroduction. Since 1997, 15 scimitar-horned oryx, 40 addax, and 36 dama gazelle have been exported from the United States. Population managers may recommend that specimens be exchanged among breeding institutions to achieve management goals for genetic or other reasons. These institutions may be separated by State (within the United States) or national boundaries. Zoos in Germany, for example, exchange specimens with zoos in the United States, as recommended by the International Studbook Keeper. The need to quickly move U.S. captive-bred specimens among breeding facilities is reflected in this proposed rule by allowing such movement without requiring a separate ESA permit.

The opinions or views of scientists or other persons or organizations having expertise concerning these species have been taken into account by this proposed rule. The comments received from peer reviewers on our proposed rule for the listing of the three antelopes as endangered alerted us to the vital role that captive breeding, whether at zoos or ranches, is playing in species recovery and reintroduction. Thus, the opinions or views of scientists or other persons or organizations having expertise concerning the three antelope species and other germane matters have been considered in the development of this proposed rule.

The U.S. expertise, facilities, and other resources available to captive-breeding operations have resulted in such a high level of breeding success that the SSIG estimated that there are 4,000'5,000 scimitar-horned oryx, 1,500 addax, and 750 dama gazelle in captivity worldwide, many of which are held in the United States. The U.S. specimens have resulted from very few wild-caught founders that have been carefully managed to increase the numbers of specimens and maintain genetic diversity. Husbandry methods are shared by participants in regional and international studbooks through specialist meetings such as the Antelope Taxon Advisory Group meeting held at the AZA Annual Meeting. Such cooperation allows the sharing of resources among participants of coordinated breeding programs as specimens are moved from one facility to another according to management recommendations. As indicated by the Scimitar-horned Oryx SSP, one of the major issues confronting the captive-breeding community is how to preserve the necessary genetic diversity and manage population surplus, particularly given the space limitations at some facilities. Private ranches in the United States have contributed to the success of captive-breeding programs by absorbing the surplus specimens produced in zoos so that zoos can utilize available space for more genetically important specimens or the appropriate herd social structure. Ranches have also enlarged the captive populations since they are able to house more specimens because of their greater space dedicated to these species than is available in zoos.

Because captive breeding in the U.S. has already contributed significantly to the propagation or survival of the three antelope species and because of the need to facilitate the continued captive breeding of these species among private ranchers and zoos, the proposed rule is an appropriate regulatory management provision for scimitar-horned oryx, addax, and dama gazelle captive-bred in the United States. The probable direct and indirect effects of this proposed rule will be to facilitate activities associated with captive breeding and thus contribute to the propagation and survival of the species. The proposed rule would not, directly or indirectly, conflict with any known program intended to enhance the survival of the population from which the original breeding stock was removed. By maintaining genetic diversity and providing captive-bred stock for reintroduction efforts and research, zoos and ranches in the United States are reducing the threat of extinction of the three antelope species. The proposed rule would facilitate the functioning of programs such as those organized by the AZA and SSIG, and encourage the breeding and management of these antelopes in zoos and on private ranches. In fact, the proposed rule provides an incentive to continue captive breeding.

Therefore, we are proposing to amend current regulations in 50 CFR 17.21 that would authorize otherwise prohibited activities, for U.S. captive-bred live specimens, embryos, gametes, and sport-hunted trophies of these species, that enhance the propagation or survival of the species. We are proposing that any person subject to the jurisdiction of the United States may take; export or re-import; deliver, receive, carry, transport, or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce live specimens or sport-hunted trophies of scimitar-horned oryx, addax, or dama gazelle that were captive-bred in the United States.

The proposed rule would not exempt the importation of specimens from foreign facilities. Since the proposed rule pertains only to U.S. captive-bred specimens, all wild specimens and specimens bred in captivity outside of the United States would remain subject to the Act's prohibitions as set forth in § 17.21. The proposed rule contains provisions that will allow the Service to monitor the activities being carried out by captive-breeding operations within the United States to ensure that these activities continue to provide a benefit to the three antelope species. It is, in part, due to the fact that we can require recordkeeping and access to records that distinguishes U.S. captive-breeding operations from foreign captive-breeding operations. In addition, we have no information on how foreign breeding operations (other than some zoos) manage their captive populations. Until the Service has significantly more information on the breeding operations in other countries, how these operations have contributed to the propagation or survival of the species, and the controls that have been established for these breeding operations, the Service cannot expand this proposed exemption to specimens produced outside the United States.

The proposed rule would not apply to any U.S. specimen that does not meet the definition of captive-bred under 50 CFR 17.3. For any animal that does not meet the definition or for captive-bred specimens produced outside the United States or wild specimens, all prohibitions under § 17.21(a)–(f), 17.22, and 17.23 would apply. The proposed rule also does not include dead specimens other than sport-hunted trophies and specimens that are from activities that do not increase or sustain population numbers.

The United States is a Party to CITES. The scimitar-horned oryx, addax, and dama gazelle are listed in Appendix I of CITES, which requires strict regulation of international movement of these species. In general, any international trade in live or dead specimens of Appendix-I species requires both export permits and import permits issued by the CITES Management Authorities of the exporting and importing countries, respectively. To receive such a permit, certain criteria must be met, including that the Management Authority of the importing country must be satisfied that the import is not to be used for primarily commercial purposes. The importing country's Scientific Authority must advise the Management Authority that the import will be for purposes that are not detrimental to the survival of the species and, if it is a live specimen, that the proposed recipient is suitably equipped to house and care for it. The proposed rule would not affect the CITES requirements for these species.

Any commercial trade in specimens of Appendix-I species is limited to the extent to which such specimens may qualify for an exemption to the general permit provisions of CITES, either because they are pre-Convention specimens (*i.e.*, acquired before the species was listed under CITES) or, for animals such as these antelopes, because they were bred in captivity. These exemptions have strict requirements. Pre-Convention specimens must be adequately documented as such, so that it is clear as to when the specimen was acquired. For specimens bred in captivity (including parts and products derived from such animals), they must have been produced from parents that mated in captivity, and the parents must have been acquired in accordance with national laws and CITES requirements, and must have been obtained in a manner that was not detrimental to the survival of the wild population. The species must also have been bred in captivity to the second or subsequent generations, and they must have been produced in a facility registered with the CITES Secretariat as an operation breeding Appendix-I species for commercial purposes. Registration of captive-breeding operations carries further requirements, including review by experts, and notification of and opportunity for comment—including objections—by all the CITES Parties.

Therefore, any import into or export from the United States of specimens of these species would not be authorized until all required conservation findings have been made and permits issued by the Service's Division of Management Authority. These existing protections under CITES, in conjunction with the new provisions for the species under this rule, would create an appropriate regulatory framework that protects populations in the wild, ensures appropriate management of U.S. captive-bred populations, and provides an incentive for future captive breeding.

We find that the scimitar-horned oryx, addax, and dama gazelle are dependent on captive breeding and activities associated with captive breeding for their conservation, and that activities associated with captive breeding within the United States enhance the propagation and survival of these species. We therefore propose amending 50 CFR 17.21 by adding a new subsection (h), which would apply to U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle. The revision would allow for the take; export or re-import; delivery, receipt, carrying, transporting or shipping in interstate or foreign commerce, in the course of a commercial activity; or sale or offering for sale in interstate or foreign commerce any U.S. captive-bred scimitar-horned oryx, addax, or dama gazelle live specimen, sport-hunted trophy, embryo, or gamete.

Public Comments Solicited

We will accept written comments and information pertaining to this proposed rule during this comment period from

the public, other concerned governmental agencies, the scientific community, industry, or any other interested party. Comments on the draft Environmental Assessment will also be considered in our decision regarding whether to finalize the proposed rule.

Our practice is to make comments, including names and addresses of respondents, available for public review during regular business hours. Any person commenting may request that we withhold their home address, which we will honor to the extent allowable by law. In some circumstances, we may also withhold a commenter's identity, as allowable by law. If you wish us to withhold your name or address, you must state this request prominently at the beginning of your comment. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, from 8 a.m. to 4 p.m., Monday through Friday, at the Division of Scientific Authority (see **ADDRESSES** section).

Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping or order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? What else could we do to make the rule easier to understand? Send a copy of any comments that concern how we could make this rule easier to understand to Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You may also e-mail the comments to *Exsec@ios.doi.gov*.

Required Determinations

A Record of Compliance was prepared for this proposed rule. A Record of Compliance certifies that a rulemaking action complies with the various statutory, Executive Order, and Department Manual requirements applicable to rulemaking. Without this proposed regulation, individuals subject to the jurisdiction of the United States would need permits to engage in various otherwise prohibited activities, including domestic and international trade in live and dead captive-bred specimens for commercial purposes. Captive-bred specimens in international trade for non-commercial purposes (*e.g.*, breeding loans requiring export or import) would have to be authorized through the permit process. This process takes time, sometimes causing delays in moving animals for breeding or reintroduction. Such movements must often be completed within a narrow time frame and can be further complicated by quarantine requirements and other logistics. We note that the economic effects of the proposed rule do not rise to the level of ''significant'' under the following required determinations.

Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not a significant regulatory action. This proposed rule would not have an annual economic impact of more than $100 million, or significantly affect any economic sector, productivity, jobs, the environment, or other units of government. This proposed rule would reduce the regulatory burden on captive-breeding operations that breed the scimitar-horned oryx, addax, and dama gazelle if the three antelopes are listed as endangered because it provides exemptions to the prohibitions of section 9 of the ESA that would otherwise apply to businesses and individuals under U.S. jurisdiction. The exemptions to the prohibitions of the ESA provided by this proposed rule will reduce economic costs of the listing. The economic effect of the proposed rule is a benefit to the captive-breeding operations for the three antelopes because it would allow the take and interstate commerce of captive-bred specimens. The proposed rule, by itself, would not have an annual economic impact of more than $100 million, or significantly affect any economic sector, productivity, jobs, the environment, or other units of government. A cost-benefit and economic analysis is not required. This proposed rule will not create inconsistencies with other Federal agencies' actions. Thus, no Federal agency actions are affected by this proposed rule.

This proposed rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. This proposed rule will not raise novel legal or policy issues. The Service has previously promulgated species-specific rules for other endangered and threatened species, including other rules for captive-bred specimens.

Regulatory Flexibility Act

To assess the effects of the proposed rule on small entities, we focused on the exotic wildlife ranching community in the United States because these are the entities most likely to be affected by the proposed rule. We have determined that this proposed rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because it allows for the continued breeding of the species and trade in live specimens, embryos, gametes, and sport-hunted trophies of the three antelopes. An initial Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required. If the three antelope species are listed, this proposed rule would reduce the regulatory burden, because without this rule all prohibitions of section 9 of the ESA would apply (*i.e.*, take; import, export; delivery, receipt, carrying, transporting or shipping in interstate or foreign commerce, in the course of a commercial activity; or sale or offering for sale in interstate or foreign commerce any live or dead specimen).

Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule would reduce regulatory obligations and 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, individual industries, Federal, State, or local government agencies, or geographic regions; 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.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*), this proposed rule would not

impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. This proposed rule would not have a significant or unique effect on State, local, or tribal governments or the private sector. A Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630, this proposed rule does not have significant takings implications. By reducing the regulatory burden placed on affected individuals resulting from the possible listing of the three antelopes as endangered species, this proposed rule would not affect the likelihood of potential takings. Affected individuals would have more freedom to pursue activities that involve captive-bred specimens without first obtaining individual authorization.

Federalism

In accordance with Executive Order 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

Paperwork Reduction Act

The Office of Management and Budget approved the information collection in part 17 and assigned OMB Control Numbers 1018–0093 and 1018–0094. This proposed rule does not impose new reporting or recordkeeping requirements on State or local governments, individuals, businesses, or organizations. We cannot conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

Council on Environmental Quality regulations in 40 CFR 1501.3(b) state that an agency ''may prepare an environmental assessment on any action at any time in order to assist agency planning and decision making.'' We have drafted an environmental assessment for this proposed rule in accordance with the criteria of the National Environmental Policy Act of 1969 (NEPA). We are soliciting comments on the environmental assessment as well as on the proposed rule.

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 Governments'' (59 FR 22951) and 512 DM 2, we have evaluated possible effects on Federally recognized Indian tribes and have determined that there are no effects.

Executive Order 13211

We have evaluated this proposed rule in accordance with E.O. 13211 and have determined that this rule would have no effects on energy supply, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

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Author

The primary author of this notice is Robert R. Gabel, Chief, Division of Scientific Authority, U.S. Fish and Wildlife Service (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Proposed Regulation Promulgation

Accordingly, we hereby propose to amend part 17 of subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend §17.21 by adding paragraph (h) to read as follows:

§ 17.21 Prohibitions.

* * * * *

(h) *U.S. captive-bred scimitar-horned oryx, addax*, and *dama gazelle*. Notwithstanding paragraphs (b), (c), (e) and (f) of this section, any person subject to the jurisdiction of the United States may take; export or re-import; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce live specimens, embryos, gametes, and sport-hunted trophies of scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Gazella dama*) provided:

(1) The purpose of such activity is associated with the transfer of live specimens, embryos, or gametes or sport hunting in a manner that contributes to increasing or sustaining captive population numbers or to potential reintroduction to range countries;

(2) The specimen was captive-bred, in accordance with §17.3, within the United States;

(3) Any exports of such specimens meet the requirements of paragraph (g)(4) of this section, as well as parts 13 and 23 of this chapter;

(4) Each specimen to be re-imported is uniquely identified by a tattoo or other means that was reported on the documentation required under (h)(3); and

(5) Each person claiming the benefit of the exception of this paragraph (h) must maintain accurate written records of activities, including births, deaths, and transfers of specimens, and make those records accessible to Service agents for inspection at reasonable hours set forth in §§ 13.46 and 13.47 of this chapter.

Dated: January 10, 2005.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 05–1698 Filed 1–31–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List a Karst Meshweaver, *Cicurina cueva*, as an Endangered Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list a karst meshweaver (spider), Cicurina cueva (no common name), under the Endangered Species Act of 1973, as amended (Act) with critical habitat. We find that the petition presented substantial scientific and commercial data indicating that listing *Cicurina cueva* may be warranted. Therefore, we are initiating a status review to determine if listing the species is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information regarding this species.

DATES: The administrative finding announced in this document was made on January 26, 2005. To be considered in the 12-month finding for this petition, comments and information should be submitted to us by May 15, 2005.

ADDRESSES: Data, information, comments, or questions concerning this petition and our finding should be submitted to the Field Supervisor, Austin Ecological Services Office, 10711 Burnet Rd., Suite 200, Austin, Texas, 78758. The petition, supporting data, and comments will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Robert Pine, Supervisor, Austin Ecological Services Field Office (telephone 512–490–0057 and facsimile 512–490–0974).

SUPPLEMENTARY INFORMATION:

Public Information Solicited

When we make a finding that substantial information exists to indicate that listing a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial data, we are soliciting information on *Cicurina cueva*. We request any additional information, comments, and suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested parties concerning the status of *Cicurina cueva*. We are seeking information regarding the species' historic and current status and distribution, biology and ecology, ongoing conservation measures for the species and its habitat, and threats to the species and its habitat.

If you wish to comment or provide information, you may submit your comments and materials concerning this finding to the Field Supervisor (*see* **ADDRESSES** section above). Our practice is to make comments and materials provided, including names and home addresses of respondents, available for public review during regular business hours. Respondents may request that we withhold a respondent's identity, to the extent allowable by law. If you wish us to withhold your name or address, you must state this request prominently at the beginning of your submission. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial data indicating that the petitioned action may be warranted. We are to base this finding on all information available to us at the time we make the finding. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and publish our notice of this finding promptly in the **Federal Register**.

Our standard for substantial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial information was presented, we are required to promptly commence a review of the status of the species, if one has not already been initiated, under our internal candidate assessment process.

In making this finding, we relied on information provided by the petitioners and evaluated that information in accordance with 50 CFR 424.14(b). This finding summarizes information included in the petition and information available to us at the time of the petition review. Our process of coming to a 90-day finding under section 4(b)(3)(A) of the Act and § 424.14(b) of our regulations is limited to a determination of whether the information in the petition meets the ''substantial information'' threshold.

We do not conduct additional research at this point, nor do we subject the petition to rigorous critical review. Rather, as the Act and regulations direct, in coming to a 90-day finding, we accept the petitioner's sources and characterizations of the information unless we have specific information to the contrary.

Our finding considers whether the petition states a reasonable case for listing on its face. Thus, our finding expresses no view as to the ultimate issue of whether the species should be listed. We reach a conclusion on that issue only after a more thorough review of the species' status. In that review, which will take approximately 9 more months, we will perform a rigorous, critical analysis of the best available scientific and commercial data, not just the information in the petition. We will ensure that the data used to make our determination as to the status of the species is consistent with the Act and Information Quality Act.

On July 8, 2003, we received a petition requesting that we list *Cicurina cueva* (no common name) as an endangered species with critical habitat. The petition, submitted by the Save Our Springs Alliance (SOSA), Save Barton Creek Association, and Austin Regional Group of the Sierra Club, was clearly identified as a petition for a rule, and contained the names, signatures, and addresses of people representing the requesting parties. Included in the petition was supporting information

regarding the species' taxonomy and ecology, historic and current distribution, present status, and potential causes of decline. We acknowledged the receipt of the petition in a letter to Mr. Colin Clark and Dr. Mark Kirkpatrick, dated September 22, 2003. In this letter, we also advised the petitioners that because of staff and budget limitations, we had developed a Listing Priority Guidance document that was published in the **Federal Register** on October 22, 1999 (64 FR 57114). In that guidance, processing of petitions is classified as a ''Priority 4'' activity, behind emergency listing (Priority 1), processing final decisions on proposed listing (Priority 2), and resolving the status of candidate species (Priority 3). We also stated in that letter that we did not have funds available to process a petition finding for *Cicurina cueva*.

On December 22, 2003, SOSA sent us a Notice of Intent to sue for violating the Act by failing to make a timely 90-day finding on the petition to list *Cicurina cueva*. On May 25, 2004, SOSA filed a complaint against the Secretary of the Interior and the U.S. Fish and Wildlife Service for failure to make a 90-day petition finding under section 4 of the Act for *Cicurina cueva*. In our response to Plaintiff's motion for summary judgment on October 15, 2004, we informed the court that, based on current funding and workload projections, we believed that we could complete a 90-day finding by January 20, 2005, and if we determined that the 90-day finding was that the petition provided substantial scientific and commercial data, we could make a 12-month warranted or not warranted finding by December 8, 2005. This notice constitutes our 90-day finding on whether the petition provided substantial information indicating that listing *Cicurina cueva* may be warranted.

Species Information

Cicurina cueva is a member of the family Dictynidae, and a member of the subgenus *Cicurella* that was first described by Gertsch (1992). Members of this subgenus are mostly small forms derived from eight-eyed spiders that are progressively losing or have lost their eyes (Gertsch 1992). The majority of the eyeless *Cicurina* are known only from the Edwards Plateau region in central Texas and are obligate karst-dwelling species referred to as troglobites. Troglobites are animals restricted to the subterranean environment and which typically exhibit morphological adaptations to their cave environments, such as elongated appendages and loss or reduction of eyes and pigment (Veni 1995).

Gertsch (1992) described *Cicurina cueva* using adult female specimens collected from Cave X, Travis County, Texas, in 1962 by Bell and Woolsey. Adults are 5.4 millimeters (mm) (0.2 inches (in.)) long and unpigmented. Positive identification of this species currently requires examination of adult female specimens, which are distinguishable from other adult female eyeless *Cicurina* spiders by their reproductive organs (Gertsch 1992).

This eyeless, troglobitic spider is believed to only inhabit caves or other geological features in rocks known as karst. Troglobites are species that are restricted to the subterranean environment and which usually exhibit morphological adaptations to that environment, for example elongated appendages and loss or reduction of eyes and pigment. The term ''karst'' refers to a type of terrain that is formed by the slow dissolution of calcium carbonate from limestone bedrock by mildly acidic groundwater. This process creates numerous cave openings, cracks, fissures, fractures, and sinkholes, and the bedrock resembles a honeycomb.

The primary habitat requirements of troglobitic invertebrate species, such as *Cicurina cueva* include: (1) Subterranean spaces in karst rocks with stable temperatures, high humidity (near saturation), and suitable substrates (for example, spaces between and underneath rocks suitable for foraging and sheltering) (Barr 1968; Mitchell 1971a); and (2) a healthy surface community of native plants and animals that provide nutrient input and, in the case of native plants, act to buffer the karst ecosystem from adverse effects (for example, invasions of nonnative species, contaminants, and fluctuations in temperature and humidity) (Biological Advisory Team 1990; Veni 1988; Elliott 1994a; Helf, *in litt.* 2002; and Porter *et al.* 1988).

Troglobites require stable temperatures and constant, high humidity (Barr 1968; Mitchell 1971) because they are vulnerable to desiccation in drier habitats (Howarth 1983), or cannot detect and cope with more extreme temperatures (Mitchell 1971). Temperatures in caves typically remain at the average annual surface temperature, with little variation (Howarth 1983; Dunlap 1995). Relative humidity is typically near 100 percent in caves that support troglobitic invertebrates (Elliott and Reddell 1989). During temperature extremes, troglobites may retreat into small interstitial spaces (human-inaccessible) connected to a cave, where the physical environment provides the required humidity and temperature levels (Howarth 1983), and may spend the majority of their time in such retreats, only leaving them to forage in the larger cave passages (Howarth 1987).

Spiders in caves act as predators (Gertsch 1992). *Cicurina* sp. has been seen preying on immature *Speodesmus* sp. millipedes (Reddell 1994). Since sunlight is either absent or present in extremely low levels in caves, most karst ecosystems depend on nutrients derived from the surface either by organic material brought in by animals, washed in, or deposited through root masses or through feces, eggs, and carcasses of trogloxenes (species that regularly inhabit caves for refuge, but return to the surface to feed) and troglophiles (species that may complete their life cycle in the cave, but may also be found on the surface) (Barr 1968; Poulson and White 1969; Howarth 1983; Culver 1986). Primary sources of nutrients in cave ecosystems include leaf litter, cave crickets, small mammals, and other vertebrates that defecate or die in the cave.

The conservation of troglobitic species depends on a viable karst ecosystem that protects the cave entrance and footprint, the surface and subsurface drainage basins associated with the cave, interstitial spaces or conduits associated with the cave, and a viable surface animal and plant community for nutrient input. Surface vegetation acts as a buffer for the subsurface environment against drastic changes in the temperature and moisture regime and serves to filter pollutants before they enter the karst system (Biological Advisory Team 1990; Veni 1988). In some cases, healthy native plant communities also help control certain exotic species (such as fire ants) (Porter *et al.* 1988) that may compete with or prey upon the listed species and other species (such as cave crickets) that are important nutrient contributors (Elliott 1994a; Helf, *in litt.* 2002). Population sizes of troglobitic invertebrates are typically low, with most species known from only a few specimens (Culver *et al.* 2000), making them difficult to detect in the cave and making it very difficult to determine trends in population size. *Cicurina cueva* is currently known from two caves in southern Travis County, Texas: Cave X and Flint Ridge Cave.

Flint Ridge Cave is located on property owned by the City of Austin at the southern edge of Travis County, Texas, in the recharge zone of the Barton Springs segment of the Edwards Aquifer. It is the fifth longest and second deepest cave documented in

Travis County (Russell 1996). The cave has a surveyed length of 316.4-meters (m) (1,038-feet (ft)) (Jenkins and Russell 1999) and depth of 47-m (154-ft) (Russell 1996). Cave X is located on the site of the Regents School in southwest Austin, Texas.

While currently known from two caves, the species may occur in other caves in southern Travis County. According to James Reddell, Texas Memorial Museum (*in litt.* Service files, August 12, 2003) immature, blind *Cicurina* sp. have been collected from Blowing Sink, Driskill Cave, Cave Y, and Irelands' Cave, and these species may be *C. cueva*. However, he states that these specimens could also be one of two other blind *Cicurina* species found in the area and that a taxonomic review of these populations in south Austin is necessary to determine the status and range of blind *Cicurina* sp. in southern Travis County.

Dr. Marshall Hedin at San Diego State University is currently under contract with the Service to develop genetic assessment techniques for definitive species-level identification of immature specimens of blind *Cicurina* spiders in Travis County, Texas. Cooperative efforts are also underway by various parties to collect *Cicurina* specimens from various locations in an attempt to find additional locations of *Cicurina cueva.*

Summary of Factors Affecting the Species

Under section 4(a) of the Act, we may list a species on the basis of any of the five factors, as follows: Factor (A) the present or threatened destruction, modification, or curtailment of its habitat or range; Factor (B) overutilization for commercial, recreational, scientific, or educational purposes; Factor (C) disease or predation; Factor (D) the inadequacy of existing regulatory mechanisms; and Factor (E) other natural or manmade factors affecting its continued existence. The petition contends that factors A, C, D, and E are applicable to *Cicurina cueva* (see below). A brief discussion of how each of the listing factors applies to *Cicurina* cueva follows.

Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Cicurina cueva is currently known to exist in two caves, Cave X and Flint Ridge Cave, located in southern Travis County. The petition cites Reddell (1994) as indicating that all troglobitic species with a limited distribution in the area from the greater Austin area to San Antonio are highly likely to be endangered. The petition also refers to ''many precedents for giving endangered species listing to species with similar biology (and facing similar threats to extinction) in the Austin area.'' As discussed in the final rules listing seven karst invertebrate species as endangered in Travis and Williamson Counties, Texas, and nine in Bexar County, Texas, the continuing expansion of the human population in karst terrain constitutes the primary threat to karst species in Central Texas through: (1) Destruction or deterioration of habitat by construction; (2) filling of caves and karst features and loss of permeable cover; (3) contamination from septic effluent, sewer leaks, runoff, pesticides, and other sources; (4) exotic species, especially nonnative fire ants (*Solenopsis invicta*); and (5) vandalism (USFWS 1994; 2000).

Flint Ridge Cave is located on the approximately 100-ha (300-ac) Tabor Tract, purchased by the City of Austin under the Proposition 2 watershed protection program. The cave is hydrologically significant, draining a relatively large area of runoff into the Edwards Aquifer (Veni 2000).

The petition states that the proposed construction and operation of State Highway (SH) 45 South threatens the survival of *Cicurina cueva.* The petition describes possible roadway impacts from increased sedimentation, blasting, petrochemical contamination, and herbicide and pesticide use for right-of way maintenance. The petition also refers to another case where habitat for the endangered cave spider *Neoleptoneta myopica* may be threatened by the cave's proximity to a new highway (Elliot and Reddell 1989). In a letter to the Service dated August 6, 2003, the Texas Department of Transportation (Texas DOT) stated they have ''never considered blasting for this project, it is not necessary and will not be allowed.''

The petition states that Flint Ridge Cave is being negatively affected by SH 45 South prior to highway construction. It states that during pre-construction activities for SH 45 South, a contractor for the Texas DOT excavated a soil sampling pit within 30.5-m (100-ft) of the entrance to Flint Ridge Cave on City of Austin property against the expressed wishes of the City (cited in the petition as William Conrad, pers. comm., 2003).

In 1998, Travis County acquired an easement on the Tabor Tract as right-of-way for the construction and operation of SH 45 South, which will connect two major roadways, Interstate 35 and MOPAC. While the exact alignment of the roadway within the acquired right-of-way has not yet been determined, the entrance to Flint Ridge Cave is about 30-m (100-ft) down-gradient of the right-of-way, which also overlies a portion of the cave's footprint (Mike Walker, Texas DOT, pers. comm. August 6, 2003). A significant portion of the cave's extensive surface drainage area is bisected by the right-of-way for the proposed SH 45 South project. Veni (2000) delineated an approximately 16-ha (40-ac) surface drainage area associated with the cave. However, recent field surveys by the City of Austin indicate that the surface drainage area associated with Flint Ridge Cave could be approximately 22-ha (54-ac) (Nico Hauwert, City of Austin, pers. comm., August 13, 2003). The right-of-way also overlies an approximately 6.9-ha (17-ac) subsurface drainage basin associated with the cave as estimated by Veni (2000).

The petition indicates that there are no ''best management practices'' that could be proposed for use that would be 100 percent efficient at removing all contaminants and state that ''contamination of cave sediments is inevitable, and leaks or spills will be an ever present risk.'' Information in our files indicates that any runoff not diverted away from the cave or which leaks or spills past diversion structures has the possibility of introducing potentially significant levels of contaminations that may harm the quality of groundwater in the Edwards Aquifer and the Flint Ridge Cave ecosystem (Veni 2000). The petition further states that ''best management practices'' alter the hydrological regime of their drainage basins, so the delicate balance of humidity and moisture in the cave would be threatened.'' The petition indicates that because cave-adapted species require high humidity, alteration of the hydrologic regime may result in decreased humidity in the cave which may impact these species, including *Cicurina cueva.*

The petition also describes possible threats to *Cicurina cueva* in Cave X. The petition states that the Regent's School has submitted a development plan to the City of Austin for construction of buildings, expansion of a parking lot, and expansion of a water quality pond. It further states that the habitat in Cave X may presently be degraded and may face further degradation due to the minimal buffer between the cave entrance and existing development, a road that goes over the cave, and plans for further development. There is a fence about 18-m (20-yards) from the gated cave entrance between the Regents' School property and a residential subdivision (cited in petition as Russell, pers. comm., 2003).

However, information in our files indicates that in November 1999, as part of an agreement with the City of Austin to protect recharge to the Edwards Aquifer, the Regents School established two legally-recorded setbacks associated with the cave, an approximately 0.61-ha (1.5-ac) area around the cave entrance and an approximately 1-ha (3-ac) area containing the majority of the cave's footprint. As noted in factor D below, the agreement between the City of Austin and the Regents School was implemented primarily for the protection of the federally-listed Barton Springs salamander (*Eurycea sosorum*), which is dependent on the Edwards Aquifer, and may not adequately protect the integrity of the cave environment for long-term conservation of *Cicurina cueva* and other rare troglobitic species. The setback areas do not include the extent of the surface drainage area associated with Cave X. The extent of the groundwater (subsurface) drainage basin associated with the cave has not been determined, and, therefore, it is uncertain whether or not it is contained within the set-back areas. Both set-back areas are adjacent to existing development and are separated by a one-lane paved road that overlies a portion of the cave footprint. According to the legally-recorded restrictive covenant for the property, this road is only accessible to emergency vehicles and water quality pond maintenance crews. Cave crickets have been found foraging within 50-m (164-ft) of and up to 95-m (311-ft) from caves and other karst features in Central Texas (Elliott 1994; Steve Taylor, Illinois Natural History Survey, pers. comm., 2002). The foraging area around the cave entrance has been largely reduced to the 0.61-ha (1.5-ac) set-back area, which is adjacent to a subdivision on one side and a one-lane road on the other. The lot lines of this subdivision lie less than 10-m (40-ft) from the cave entrance. A portion of this 10-m (33-ft) area also serves as a utility easement developed with utility poles, and water and wastewater lines. The 1-ha (3-ac) setback area allows for a larger foraging area for cave crickets accessing the cave through other karst features. The school's future plans include construction of four (the petition said three) new buildings, all located adjacent to one of the cave's two setback areas (September 5, 2003, meeting notes in Service's files).

Information in our files indicates that surface drainage to Cave X is generally toward the southeast, with some drainage coming from the Travis County Subdivision (Nico Hauwert, City of Austin, pers. comm., August 13, 2003). The natural drainage pattern may have been altered due to the construction of the road, which was constructed at a higher elevation than the cave entrance and the construction of the subdivision (Nico Hauwert and Mark Sanders, City of Austin, pers. comm., August 13, 2003).

Factor B: Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The petition did not provide any information pertaining to Factor B. Information in our files indicates this species is of little interest in the insect trade or to amateur collectors. They are collected occasionally by scientists conducting studies of cave fauna. The City of Austin, who owns and manages Flint Ridge Cave, limits the access into the cave to research personnel. The Regents School, which owns and manages Cave X, occasionally allows fire department personnel to access the cave to conduct cave rescue training. Access for recreational caving and educational purposes is prohibited in both Flint Ridge Cave and Cave X.

Factor C: Disease or Predation

The petition identifies imported fire ants (*Solenopsis invicta*) as a threat to *Cicurina cueva*. The petition says this fire ant, which was introduced to the southeastern United States from Brazil, started colonizing karst areas of Central Texas in the late 1980s (Elliot 1993). Invasion of imported fire ants causes devastating and long-lasting impacts on arthropod species and threatens their biodiversity (Porter and Savignano 1990). Increases in imported fire ants have lead to 40% reduction in arthropod species in some instances. Imported fire ants will consume a wide variety of plants and animals (Vinson and Sorensen 1986).

Information in our files indicates that, in addition to preying on cave invertebrate species, including cave crickets, fire ants may compete with cave crickets for food (Elliott 1994; Helf *in litt.* 2002). Helf (*in litt.* 2002) states that competition for food between fire ants and cave crickets (*Ceuthophilus secretus*) may be a more important interaction between these species than predation. The presence of fire ants in and around karst areas could have a drastic detrimental effect on the karst ecosystem through loss of or reduction in both surface and subsurface species that are critical links in the food chain. The invasion of fire ants is known to be aided by ''any disturbance that clears a site of heavy vegetation and disrupts the native ant community'' (Porter *et al.* 1988).

The petition indicates that proposed SH 45 South would result in invasion of fire ants into habitat of *Cicurina cueva* in Flint Ridge Cave because construction of SH 45 South will disturb soil and vegetation near the entrance to the cave, creating conditions that favor fire ant invasion. The petition also states that after construction, State Highway 45 South and its shoulders and right-of-way will contribute to fire ant habitat because the land is disturbed and there is a steady supply of food from litter thrown from cars and insects killed by cars.

The petition also says existence of a residential subdivision and a school near Cave X increases the probability of fire ant invasion because fire ants are attracted by disturbance of natural vegetation, food debris, trash, and electrical lines, and that cave setbacks at Cave X on the Regents School site are insufficient to stop fire ant infestation.

Factor D: The Inadequacy of Existing Regulatory Mechanisms

The petition states ''existing rules and regulations enacted by the City of Austin, Travis County, and the State of Texas are inadequate to protect *Cicurina cueva.* State guidelines allow for plugging or filling of caves and karst features, which can significantly alter and disturb drainage and recharge patterns that affect temperature, humidity, and food webs of cave ecosystems.'' The Texas Commission on Environmental Quality (formerly Texas Natural Resources Conservation Commission) does not require surveys for invertebrate species in karst assessments. The petition states that ''Hundreds of potential karst features have been identified in the right-of-way for State Highway 45 South, including Flint Ridge Cave's drainage basin. Many of these karst features will be paved over, possibly blocking recharge to Flint Ridge Cave.''

An Incidental Take Permit issued pursuant to section 10(a)(1)(B) of the Act was issued to the City of Austin and Travis County on May 2, 1996. Both Cave X and Flint Ridge Cave are listed on the permit and the associated Balcones Canyonlands Conservation Plan (BCCP) as caves containing species of concern, including *Circurina cueva* (a covered species under this permit). Under the permit, the City of Austin and Travis County are required to acquire and manage Cave X and Flint Ridge Cave, or implement formal management agreements adequate to preserve the environmental integrity of these caves, to get authorization for incidental take of this species in other caves if this species is federally-listed in the future.

However, in their 2000, 2001, and 2002 annual permit reports, the City of Austin/Travis County recognize that many buffer areas associated with caves currently ''protected'' under the BCCP are not large enough to adequately protect the caves and do not have adequate buffer areas surrounding the caves to meet species needs, as indicated by information assembled by the Service in 2001 (Travis County and City of Austin 2000; 2001; 2002). Take of this species is not prohibited since the species is not listed.

The petition cites the 2000 BCCP Annual Report as saying the status of Cave X is described as ''unknown, new agreement not working smoothly yet.'' The petition also says that per the Texas Cave Management Association, the agreement is inadequate to protect the cave (cited in petition as Julie Jenkins, pers. comm., 2003). The 2001 BCCP Annual Report states that because species of concern, such as *Cicurina cueva,* are not federally listed as endangered, many of the caves supporting species of concern are severely threatened.

In addition to the information in the petition, information in our files indicates the City of Austin entered into an agreement with the Regents School in November 1999, establishing two legally recorded setbacks associated with Cave X: an approximately 0.61-ha (1.5-ac) area around the cave entrance and an approximately 1-ha (3-ac) area containing the majority of the cave's footprint. Under the agreement, the Regents School was allowed to construct an approximately one-lane paved road accessible only to emergency vehicles and water quality pond maintenance crews over a portion of the cave's footprint. The setback areas do not include the extent of the surface drainage area associated with Cave X. The extent of the groundwater (subsurface) drainage basin associated with the cave has not been determined, and, therefore, it is uncertain whether or not it is contained within the set-back areas.

Under the agreement, the Regents School is responsible for monthly inspections of the setback areas, which includes looking for evidence of tampering or vandalism, removing any accumulated trash or debris, or presence of potentially toxic materials. They are also responsible for vegetation management and biannual fire ant control. The Regents School gated the cave and fenced a small area around the cave entrance to protect it from unauthorized trespassing and vandalism, but no additional management activities have been conducted to date (Charles Evans, Headmaster, Regents School, pers. comm., August 15, 2003). The agreement between the City of Austin and the Regents School was implemented primarily for the protection of the federally-listed Barton Springs salamander (*Eurycea sosorum*), which is dependent on the Edwards Aquifer, and may not adequately protect the integrity of the cave environment for long-term conservation of *Cicurina cueva* and other rare troglobitic species.

Factor E: Other Natural or Manmade Factors Affecting Its Continued Existence

The petition contends that the following three features of this species make it vulnerable to extinction: (1) The narrowly limited distribution and small population size of *Cicurina cueva* make it more vulnerable to alteration of habitat, loss of prey species, and failure of reproduction; (2) the dissected and extremely faulted geology of the Balcones Fault Zone makes travel between caves infeasible, therefore dispersal opportunities and habitat selection are not available to this species, resulting in small isolated populations; and, (3) the species is reliant on stable environmental conditions. The petition points out that troglobites have developed in unique cave ecosystems and require high humidity and stable temperatures (Service 1994), and the petition further states that ''Troglobites evolved over millions of years in secluded, stable habitats.''

Information in our files also indicates that many caves in the Austin metropolitan area have been subject to vandalism and trash dumping. Cave X is protected by an animal-friendly cave gate. The cave entrance area is also enclosed within a 1.8-m (6-ft) chain-linked security fence. The City of Austin has gated the entrance to Flint Ridge Cave (Dr. Kevin Thuesen, pers. comm. to Service, 2004). The City of Austin's Tabor Tract, where Flint Ridge Cave is located, is protected by five-strand barbed-wire fencing and ''No Trespassing'' signs.

Finding

We have reviewed the petition, the literature cited in the petition, and information in our files. On the basis of our review, we find that the petition presents substantial scientific and commercial information indicating that listing *Cicurina cueva* may be warranted.

The petition also requested that we emergency list *Cicurina cueva.* We have reviewed the available information to determine if the existing and foreseeable threats pose immediate and urgent risks to the species' continued existence. According to our Endangered Species Listing Handbook (March 1994), ''Expected losses during the normal listing process that would risk the continued existence of the entire listed species are grounds for an emergency rule. The purpose of the emergency rule provision of the Act is to prevent species from becoming extinct by affording them immediate protection while the normal rulemaking procedures are being followed.'' At this time, we are working with the property owners of the two known locations to determine what conservation measures are needed to protect the species at their sites. Texas DOT and the Regents School have indicated an interest in avoiding or minimizing impacts to the species. Texas DOT is working on a re-design of the project to a six-lane rather than a four-lane highway and expects to submit a Biological Evaluation to the Service in October or November 2005 (Mike Walker, pers. comm. to the Service, 2004). In comments hand-delivered to the Service on August 6, 2003, Texas DOT said ''it is not possible to award any construction contracts until all coordination with resource agencies, including the [Service], has been completed.'' The Regents School of Austin owns Cave X, and they are working on a management plan and a conservation agreement to provide conservation measures that would protect *Cicurina cueva* on their property.

Based on the willingness of these two parties to work with us to identify conservation measures that will provide for the long-term survival of the species at the two known sites and the project schedule provided to us by Texas DOT, we believe the available information indicates that an emergency listing action is not necessary at this time. This decision is based on our understanding of the immediacy of potential threats to *Cicurina cueva* at its two known locations. However, if at any time we determine that emergency listing of *Cicurina cueva* is warranted, we will seek to initiate the appropriate protective measures.

The petitioners also requested that critical habitat be designated for this species. We always consider the need for critical habitat designation when listing species. If we determine in our 12-month finding that listing *Cicurina cueva* is warranted, we will address the designation of critical habitat in the subsequent proposed rule.

References Cited

A complete list of all references cited herein is available upon request from the Field Supervisor (*see* **ADDRESSES** section above).

Author

The primary authors of this document are staff at the Austin Ecological Services Office (*see* **ADDRESSES** section above).

Authority

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

Dated: January 26, 2005.

Marshall P. Jones, Jr.,

Acting Director, Fish and Wildlife Service.

[FR Doc. 05–1765 Filed 1–31–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[I.D. 012405B]

Gulf of Mexico Fishery Management Council; Public Hearings

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

ACTION: Public hearings; request for comments.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will hold a series of public hearings to receive public comments on ''Amendment Number 13 to the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, U.S. Waters with Environmental Assessment, Regulatory Impact Review, and Regulatory Flexibility Act Analysis.''

DATES: Written comments must be received by the Council on or before March 4, 2005. The meetings will be held in February 2005 (see **SUPPLEMENTARY INFORMATION** for specific dates and times).

ADDRESSES: The hearings will be held in Alabama, Florida, Louisiana, Mississippi, and Texas (see **SUPPLEMENTARY INFORMATION** for specific locations).

Comments may be submitted by any of the following methods:

- E-mail: *gulfcouncil@gulfcouncil.org.*
- Federal e-Rulemaking: *http://www.regulations.gov.*
- Mail: Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301, North, Suite 1000, Tampa, FL 33619.

Copies of Amendment 13 to the Shrimp FMP can be obtained from the Gulf of Mexico Fishery Management Council.

FOR FURTHER INFORMATION CONTACT: Richard Leard, Deputy Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 228–2815.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico Fishery Management Council (Council) will hold a series of public hearings to receive public comments on ''Amendment Number 13 to the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, U.S. Waters with Environmental Assessment, Regulatory Impact Review, and Regulatory Flexibility Act Analysis.'' Amendment 13 contains alternatives to (1) establish a separate vessel permit for the royal red shrimp fishery or an endorsement to the existing federal shrimp vessel permit (Action 1); (2) define MSY, OY, the overfishing threshold, and the overfished condition for royal red and penaeid shrimp stocks in the Gulf (Actions 2 through 7); (3) establish bycatch reporting methodologies and improve collection of shrimping effort data in the EEZ through the use of logbooks, electronic logbooks, and observers (Action 8); (4) require completion of a Gulf Shrimp Vessel and Gear Characterization Form by at least a subset of shrimp vessel permit holders (Action 9); (5) establish a moratorium on the issuance of commercial shrimp vessel permits (Action 10); and (6) require reporting and certification of landings during a moratorium (Action 11). For each action, a ''No Action'' alternative may also be considered. The Council is soliciting public comment on alternatives under each of these potential actions, and for other alternatives, that should be considered by the Council. The Council is soliciting public comment on these issues through the public hearings, by mail and by e-mail; and must be received by the Council on or before March 4, 2005.

The Gulf of Mexico Fishery Management Council is one of the eight regional fishery management councils that were established by the Magnuson-Stevens Fishery Conservation and Management Act of 1976. The Gulf of Mexico Fishery Management Council prepares fishery management plans that are designed to manage fishery resources in the Exclusive Economic Zone (EEZ) of the U.S. Gulf of Mexico.

Hearing Dates, Times, and Locations

The hearings will begin at 7 p.m. and end no later than 10 p.m. on the following dates and at the locations specified below:

Monday, February 14, 2005, Holiday Inn I–10, 5465 Highway 90 West, Mobile, AL 36619; 866-436-4329;

Tuesday, February 15, 2005, Mississippi Department of Marine Resources, 1141 Bayview Drive, Biloxi, MS 39530; 228-374-5000;

Tuesday, February 15, 2005, DoubleTree Grand Key Resort, 3990 South Roosevelt Boulevard, Key West, FL 33040; 888-310-1540;

Wednesday, February 16, 2005, LSU Agricultural Center Extension Office, 1105 West Port Street, Abbeville, LA 70510; 337-898-4335;

Thursday, February 17, 2005, Ramada Inn Houma, 1400 West Tunnel Boulevard, Houma, LA 70360; 985-879-4871;

Thursday, February 17, 2005, DoubleTree Guest Suites Tampa Bay, 3050 North Rocky Point Drive, Tampa, FL 33607; 813-888-8800;

Monday, February 21, 2005, Brownsville Events Center, 1 Events Center Boulevard, Brownsville, TX 78526; 956-554-0700;

Tuesday, February 22, 2005, Palacios Rec Center, 2401 Perryman, Palacios, TX 77465; 361-972-2387;

Wednesday, February 23, 2005, San Luis Resort, 5222 Seawall Boulevard, Galveston Island, TX 77651; 409-744-1500; and

Thursday, February 24, 2005, New Orleans Airport Ramada Inn & Suites, 110 James Drive East, St. Rose, LA 70087; 504-466-1355.

Special Accommodations

The hearings are open to the public and are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Dawn Aring at the Council office (see **ADDRESSES**) by February 7, 2005.

Dated: January 27, 2005.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 05–1800 Filed 1–31–05; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 70, No. 20
Tuesday, February 1, 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

Submission for OMB Review; Comment Request

January 27, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Pamela_Beverly_OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

30-day Federal Register Notice

Forest Service

Title: Evaluation of the Environment Intervention Handbook.

OMB Control Number: 0596–NEW.

Summary of Collection: The Environmental Intervention Handbook is a tool for resource managers to address depreciative activities in recreation settings. The Forest Service (FS) and university researchers will contact recipients of a handbook designed to help managers reduce depreciative activities. Through those contacts they will evaluate the uses of the handbook, barriers to usage, and the need for the revision of the handbook or creation of supplementary materials. This will help the researchers improve their ability to provide information to natural resource managers on reducing activities like littering, vandalism, and other activities that cause damage. To gather this information, a mini-survey will be sent through the mail to all handbook recipients.

Need and Use of the Information: The information from the survey will be used by FS to evaluate the application and uses of the handbook, the need for revision of the handbook, and the need for additional tools or supplementary information to be used with the handbook. Without the proposed information collection, assessment of how the handbook was used, how well it worked, whether or not we need to revise it, and if we need to provide additional tools will not be known.

Description of Respondents: Individuals or households.

Number of Respondents: 50.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 27.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 05–1797 Filed 1–31–05; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[TM–03–03]

National Organic Program: Development, Issuance, and Use of Guidance Documents

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice with request for comments.

SUMMARY: This notice sets forth the U.S. Department of Agriculture's (USDA) National Organic Program (NOP) procedures for the development, issuance, and use of guidance documents. This document is intended to make the NOP's procedures clearer to the public.

DATES: Comments must be submitted April 4, 2005.

ADDRESSES: Interested persons are invited to submit written comments on this notice using the following addresses:

- Mail: Richard H. Mathews, Associate Deputy Administrator, National Organic Program, USDA–AMS–TMP–NOP, 1400 Independence Ave., SW., Room 4008 South., Ag Stop 0268, Washington, DC 20250–0268.
- E-mail: *NOP.Guidance@usda.gov*. (Not case sensitive)
- Fax: (202) 205–7808.
- Internet: *http://www.regulations.gov*.

Procedures for Submitting Comments: Comments on this notice must be in writing and should be identified with the docket number TM–03–03. Comments should identify the topic and section number of this notice to which the comment refers. If you choose to comment, you should clearly indicate if you are for or against the notice or some portion of it and the reason(s) for your position. If you are suggesting changes to the notice, you should include recommended language changes, as appropriate, along with any relevant supporting documentation.

It is our intention to have all comments to this notice whether submitted by mail, e-mail, or fax, available for viewing on the NOP homepage. Comments submitted in response to this notice will be available for viewing at USDA–AMS, Transportation and Marketing Programs,

Room 4008-South Building, 1400 Independence Avenue, SW., Washington, DC, from 9 a.m. to 12 noon and from 1 p.m. to 4 p.m., Monday through Friday (except for official Federal holidays). Persons wanting to visit the USDA South Building to view comments received in response to this notice are requested to make an appointment in advance by calling (202) 720–3252.

FOR FURTHER INFORMATION CONTACT:

Keith Jones, Team Leader, Program Development, National Organic Program, 1400 Independence Ave., SW., Room 4008–S, Ag Stop 0268, Washington, DC 20250–0268; Telephone: (202) 720–3252; Fax: (202) 205–7808; and e-mail: *keith.jones@usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Related Documents

We have published five notices related to this action in the **Federal Register**. The NOP final rule was published on December 21, 2000 (65 FR 80548). Two rules proposing to amend the NOP's National List were published on April 16, 2003 (68 FR 18566), and May 22, 2003 (68 FR 27941). Two final rules amending the NOP's National List were published on October 31, 2003 (68 FR 61987) and November 3, 2003 (68 FR 62215).

II. Statutory and Regulatory Authority

This notice is issued under the authority of the Organic Foods Production Act of 1990 (Act), as amended (7 U.S.C. 6501 *et seq.*).

III. Background

The preamble to the March 13, 2000, NOP notice (65 FR 13543–44) and the December 21, 2000, final rule (65 FR 80557) made several references to program manuals as a mechanism for further clarifying regulatory characteristics and expectations of the NOP. The NOP's goal is to use program manuals to enable reliably uniform regulatory decisions.

The guidance documents referred to in this notice are the specific documents that will comprise a program manual. The guidance documents will address, over time, each final rule section, as appropriate, and offer information, procedures, and protocols. Prior to the publication of this notice the NOP communicated with accredited certifying agents, their clients and program participants and the public on regulatory characteristics and expectations through the publication and dissemination of documents know as ''policy statements'' and through a question and answer format (Q and A's). Issuance of policy statements and Q and A's was viewed by the NOP as a temporary step toward the publication of this notice. The guidance documents that would be implemented by this action will replace the existing policy statements and Q and A's.

These guidance documents will represent NOP's current thinking on a particular topic. Consistent with earlier statements in the proposed and final rule, they do not create or confer any rights for or on any person and do not operate to bind NOP or the public. An alternative approach may be used if such approach satisfies the requirements of the Act and its implementing regulations. NOP will be available to discuss alternative approaches to ensure that the alternative complies with the Act and its implementing regulations. However, because a guidance document represents the program's current thinking on the subject addressed in the document, NOP will take steps to ensure that its staff does not deviate from the guidance document without appropriate justification and appropriate supervisory concurrence.

The use of guidance documents to assist in developing uniform regulatory decisions is a standard government practice, and the NOP has reviewed examples of guidance documents from various Federal regulatory agencies. Additionally, we may use public meetings as a forum for input on the development and issuance of guidance documents as well as the format and scope of the program manual. Your comments on this notice will help AMS evaluate the potential effectiveness of the development, issuance, and use of guidance documents in ensuring uniform regulatory decisions.

Of course, if in developing program guidance, it appears that modifications or changes in the NOP regulations are required, such modifications would be made through notice and comment rulemaking.

IV. Overview of Procedures

A. Purpose

This ''Good Guidance Practices'' (GGP's) document sets forth NOP's general policies and procedures for developing, issuing, and using guidance documents. The purpose of this document is to help ensure that program guidance documents are developed with adequate public participation, that guidance documents are readily available to the public, and that guidance documents are not applied as binding requirements. The program wants to ensure uniformity in the development, issuance, and use of guidance documents.

The purposes of guidance documents are to:

(1) Provide assistance to the regulated industry by clarifying requirements that have been imposed by the Act or its implementing regulations and by explaining how industry may comply with those statutory and regulatory requirements; and

(2) provide specific review and enforcement approaches to help ensure that NOP staff implements the program's mandate in an effective, fair, and consistent manner. Certain guidance documents may provide information about what the program considers to be the important regulatory characteristics of production and processing practices. Some may address appropriate certification protocols to verify adherence to statutory and regulatory requirements. Others may explain NOP's views on complex or controversial regulatory issues. Still others may address how to avoid enforcement actions.

This document represents the program's codification of best practices for developing, issuing, and using guidance documents. The NOP may issue additional/more detailed procedures to implement the general principles set forth herein.

B. Guidance Documents

The term ''guidance documents'' will refer to documents prepared by the NOP, for accredited certifying agents, their clients and program participants and the public that: (1) Relate to the production, handling, processing, labels, labeling and marketing information, certification, accreditation of certifying agents, the National List of Allowed and Prohibited Substances, State Organic Programs, fees, compliance, inspection and testing, reporting and exclusion from sale, compliance, adverse action appeals process and enforcement policies regarding agricultural products regulated under 7 CFR Part 205; (2) describe the program's policy and regulatory approach to an issue; or (3) establish inspection and enforcement policies and procedures. ''Guidance documents'' do not include documents relating to internal NOP procedures, program reports, general information documents provided to consumers, speeches, journal articles and editorials, media interviews, press materials, letters addressing enforcement or compliance actions, or other communications directed to individual persons or firms.

C. Legal Effect of Guidance Documents

Guidance documents do not themselves establish legally enforceable rights or responsibilities and are not legally binding on the public or the program. Rather, they explain how the Act and its implementing regulations apply to certain regulated activities. However, because a guidance document represents the program's current thinking on the subject addressed in the document, the NOP will take steps to ensure that its staff does not deviate from the guidance document without appropriate justification and appropriate supervisory concurrence.

Alternative methods that comply with the Act and its implementing regulations are acceptable. If a regulated company or person wishes or chooses to use an approach other than that set forth in a guidance document, the NOP will, upon request, discuss with that company or person alternative methods of complying with the Act and its implementing regulations.

The NOP strongly encourages industry to discuss alternative approaches with the NOP before implementing them to avoid unnecessary or wasteful expenditures of resources.

D. Application of GGP's

NOP staff will adhere to these GGP's. Documents and other means of communication excluded from the definition of guidance should not be used to initially communicate new or different regulatory expectations not readily apparent from the Act or its implementing regulations to a broad public audience. Whenever such regulatory expectations are first communicated to a broad public audience, these GGP's should be followed. This does not limit the program's ability to respond to questions as to how an established policy applies to a specific situation or to questions about areas that may lack established policy. However, such questions may signal the need to develop guidance in that area.

E. Procedures for Developing Guidance Documents

NOP has adopted a two-level approach to the development of guidance documents. The procedures for developing a guidance document will depend on whether that guidance document is a ''Level 1'' guidance or a ''Level 2'' guidance. Level 1 guidance documents generally include guidance directed primarily to accredited certifying agents or other members of the regulated industry that set forth first interpretations of statutory or regulatory requirements, changes in interpretation or policy that are of more than a minor nature, or address unusually complex or highly controversial issues. Level 2 guidance documents include all other guidance documents.

1. *Development of Level 1 Guidance Documents*. For Level 1 guidance documents, the program will solicit public input prior to implementation, unless: (1) There are significant regulatory justifications for immediate implementation; (2) there is a new statutory requirement, executive order, or court order that requires immediate implementation, and guidance is needed to help effect such implementation; or (3) the guidance presents a less burdensome policy that is consistent with the purposes of the Act and implementing regulations. In the latter situation, the program will solicit public input upon issuance/implementation.

For Level 1 guidance, the program will, at a minimum, solicit public input by (1) issuing a notice of availability of a draft of the guidance in the **Federal Register** and indicating its availability on the NOP home page and (2) posting the draft on the NOP home page or making the draft otherwise available. The notice of availability will provide information regarding how to obtain a copy of the draft guidance; hard copies of the draft will be available upon request. The program may use a single **Federal Register** notice of availability to solicit public input on several different draft guidance documents. For Level 1 guidance documents, the program also may hold a public workshop to discuss a draft and/or present a draft to the public when, for example, there are highly controversial or unusually complex issues. Guidance document notices and/or drafts will be posted on the NOP home page or will be accessible from there.

Because the program recognizes that it is important to solicit input prior to its decision to issue guidance and also, perhaps, during the development of a draft of a Level 1 guidance, the program is implementing various practices to obtain input at the earliest stages of Level 1 guidance document development. For example, these GGP's provide that the public will have an opportunity to comment on and suggest areas for guidance development or revision and to submit draft guidances for possible adoption by the program. (See the ''Guidance Document Agenda'' and ''Guidance Proposal Policy'' set forth below.)

In addition, NOP may solicit or accept early input on the need for new or revised guidance or assistance in the development of particular guidance documents from interested parties such as the National Organic Standards Board, consumer groups, trade associations, public interest groups and the general public. The program may participate in meetings with these various parties to obtain each party's views on priorities for developing guidance documents. The program may also hold public meetings and workshops to obtain input from each interested party on the development or revision of guidance documents in a particular NOP subject area.

Comments submitted on draft Level 1 guidance documents will be submitted to the docket identified in the **Federal Register** notice and on the NOP home page. All comments will be available to the public for review. The program will review all comments. The program will make changes to the guidance document in response to comments, as appropriate.

2. *Development of Level 2 Guidance Documents*. For Level 2 guidance, the NOP will provide an opportunity for public comment upon issuance. Unless otherwise indicated, the guidance will be implemented upon issuance. The availability of new Level 2 guidance documents should be posted on the NOP home page as each guidance is issued. The program will publish a list in the **Federal Register** of all new Level 2 guidance documents issued during any quarter. The list of guidance documents will not be published following any quarter in which no guidance document was issued.

The NOP may, at its discretion, solicit comment before implementing a Level 2 guidance document. The NOP will review all comments and may make changes to the guidance in response to comments, as appropriate.

3. *Comments on Guidance Documents In Use*. For all guidance documents comments will be accepted at any time. Comments on the guidance documents in use should be submitted to NOP at the address identified in the guidance. Guidance may be revised in response to such comments, as appropriate.

4. *Authorization Policy*. All drafts of Level 1 guidance documents that are made available for public comment will be signed by the Deputy Administrator, Transportation and Marketing Programs. All final versions of Level 1 guidance documents will receive the sign-off by the Associate Administrator, AMS. All Level 2 guidance documents will receive the sign-off of the Associate Deputy Administrator, NOP.

5. *Guidance Document Agenda*. The NOP will update all existing policy

statements and Q and A's to the guidance format using the standard elements listed in this notice as soon as possible. On a semi-annual basis, the NOP will publish in the **Federal Register** and on the NOP home page possible topics for guidance document development or revision during the next year. At that time, the NOP will specifically solicit input from the public regarding these and additional ideas for new guidance documents or guidance document revisions or priorities. The NOP is not bound by the list of possible topics—*i.e.*, it is not required to issue every guidance document on the list and it is not precluded from issuing guidance documents that are not included on the list.

6. *Guidance Proposal Policy*. If a member of the public wishes to propose one or more topics for new guidance or guidance revisions, or to propose one or more draft guidance documents for adoption by NOP, that person should submit the proposal to the NOP. The submission should include a statement regarding why new or revised guidance is necessary. The statement should clearly and completely address the scope of the issue, its effect on accredited certifying agents, their clients and program participants and/or the public, and how a guidance document would enable reliably uniform regulatory decisions.

If the NOP agrees that the proposed topic should be covered by a guidance document, it will develop a guidance document in accordance with these GGP's. If the NOP agrees that a guidance document should be updated/revised, it will develop a revision in accordance with these GGP's. If the submitter has proposed a draft of the guidance document that the NOP agrees can form the basis for a guidance document, the NOP will follow the GGP's for issuing and implementing a guidance document based on that proposed draft.

7. *Review and Revision of Guidance Documents*. The NOP intends to review existing guidance documents on a regular basis. As part of the ''Guidance Proposal Policy,'' an individual may request review or revision of a particular guidance document on the basis that it is no longer current. Such requests should be accompanied by an explanation of why the guidance is out of date and how it should be revised. The NOP will review such requests to determine if the guidance document at issue needs to be updated/revised. The NOP will, when appropriate, update or revise that guidance document in accordance with these GGP's. In addition, when significant changes are made to an applicable statute or regulation, the NOP will, on its own initiative, review and, as appropriate, revise guidance documents relating to that changed statute or regulation.

F. Standard Elements

1. *Nomenclature*. All guidance documents will include: (a) the umbrella term ''guidance'', (b) information that identifies the NOP as having produced the document, and (c) the regulatory activity to which and/or the persons to whom the document applies. In practice, the majority of guidance documents issued will be called ''guidance for industry.''

2. *Statement of Nonbinding Effect*. All guidance documents will include language such as this guidance represents the NOP's current thinking on this topic. This guidance is designed to assist interested parties in complying with the requirements of the Organic Foods Production Act of 1990 (OFPA) and its implementing regulations. It does not create or confer any rights for or on any person and does not operate to bind the NOP or the public. You may use an alternative approach if the approach satisfies the requirements of OFPA and its implementing regulations. Before adopting an alterative approach, the NOP strongly encourages industry to discuss any alternative approach with the NOP in order to avoid unnecessary or wasteful expenditures and to ensure the proposed alternative approach complies with OFPA and its implementing regulations.

3. *Absence of Mandatory Language*. Because guidance documents are not binding, mandatory words such as ''shall,'' ''must,'' ''require,'' and ''requirement'' are inappropriate unless they are being used to describe or discuss a statutory or regulatory requirement. Before a new guidance is issued, it will be reviewed to ensure that mandatory language has not been used, except to describe or discuss a statutory or regulatory requirement.

4. *Other Standard Elements*. Each guidance document will include the dates of issuance, date of effect and latest revision. Documents that are being made available for comment will include a ''draft'' notation. When a guidance supersedes another guidance document, the new guidance document will identify the document that it is superseding. Superseded documents that remain available for historical purposes will be stamped or otherwise identified as superseded. All guidance documents will include a cover sheet that is modeled after the example in Appendix A attached to this document.

G. NOP Implementation of GGP's

1. *Education*. All current and new NOP employees involved in the development, issuance, or application of guidance documents will be provided a copy of and directed to review the program's GGP's. The program will conduct additional training of employees involved in the development and use of guidance documents that will describe in more detail how to develop and use guidance documents under these GGP's. This training will emphasize the principles set forth in section III, above, regarding the legal effect of guidance documents.

The program also will educate the public about the legal effect of guidance. These GGP's and the statement of the nonbinding effect of guidance that will be included in every future guidance document and on the comprehensive list of guidance documents (discussed in section VIII below) will help to educate the public about the legal effect of guidance. The NOP staff will take the opportunity to state and explain the legal effect of guidance when speaking to the public about guidance documents.

2. *Monitoring*. The NOP will monitor staff's use of guidance documents. As part of this process, NOP will monitor the development and issuance of guidance documents to ensure that these GGP's are being followed. In addition, NOP will spot-check the use of guidance documents to ensure that they are not being applied as binding requirements. Finally, NOP will spot-check the use of documents and communications that are not defined as guidance, such as warning letters and speeches, to ensure that these documents are not being used to initially express a new regulatory expectation to a broad public audience.

Three years after these GGP's have been implemented; the program will perform an internal review to determine whether these GGP's have been successful in achieving NOP's goal in issuing them. The internal review will determine whether the GGP's are ensuring: (1) Adequate public participation in the development of guidance, (2) that guidance documents are readily available to the public and (3) that guidance documents are not being applied as binding requirements. The internal review will also examine the results of the program's monitoring efforts as well as the number and results of appeals relating to the development and/or use of guidance documents.

H. Dissemination/Availability to Public

A comprehensive list of all current guidance documents will be maintained on the NOP home page. New guidance documents will be added to the list within 30 days of issuance. NOP will publish the comprehensive list in the **Federal Register** annually. NOP will publish a **Federal Register** notice that lists all guidance documents that were issued during any quarter and all guidance documents that have been withdrawn during the same quarter. Publication will not occur following any quarter in which no guidance document was issued or withdrawn.

The guidance document list will include the name of each guidance document, the document issuance/effective/revision dates, and information to obtain copies of the document. The list will be organized by NOP and will group guidance documents by their intended users and/or the regulatory activities to which they apply. The list also will include (properly identified) draft documents being made available for public comment.

The NOP will be responsible for maintaining a comprehensive set of guidance documents and making those guidance documents available to the public. All guidance documents made available will be included on the comprehensive list. To the extent feasible, guidance documents will be made available electronically (*e.g.*, on the NOP home page). The NOP will make all guidance documents available in hard copy, upon request.

I. Appeals

These GGP's should foster the development and use of guidance documents consistent with NOP's intended goal of regulatory decisions that will be reliably uniform throughout the world. Nevertheless, an effective appeal mechanism is needed to address instances in which the GGP's may not have been followed or the GGP's fail to achieve their purpose. The NOP will provide an opportunity for appeal by a person who believes that GGP's were not followed in issuing a particular guidance document or who believes that a guidance document has been treated as a binding requirement.

As a general matter, a person with a dispute involving a guidance document should begin with the supervisor of the person applying the guidance document. If the issue cannot be resolved at that level, the matter should be brought to the next level. This process would continue on up the chain of command. If a matter is unresolved at the level of the Associate Deputy Administrator, NOP, the Deputy Administrator for Transportation and Marketing Programs or the Administrator of AMS may be asked to become involved.

The language below will be inserted into and made part of the program manual for the National Organic Program.

National Organic Program Good Guidance Practices

What Are Good Guidance Practices?

Good guidance practices (GGP's) are the National Organic Program's (NOP) policies and procedures for developing, issuing, and using guidance documents.

What Is a Guidance Document?

A guidance document is a document prepared by the NOP for accredited certifying agents, their clients and program participants, and the public that describe the NOP's current interpretation of or policy on a regulatory issue. Guidance documents include, but are not limited to:

- Documents related to the production, handling, labels, labeling and market information, certification, accreditation of certifying agents, the National List of Allowed and Prohibited Substances, State Organic Programs, fees, compliance, inspection and testing, reporting and exclusion from sale, compliance, adverse action appeals process and enforcement policies regarding agricultural products regulated under the National Organic Program;
- Documents that describe NOP's policy and regulatory approach to an issue; or
- Documents that establish inspection and enforcement policies and procedures.

Guidance documents do not include documents that relate to internal NOP procedures, program reports, general information documents provided to consumers or agriculture and food professionals, speeches, journal articles and editorials, media interviews, press materials, letters regarding enforcement or compliance actions, memoranda of understanding, or other communications directed to individual persons or firms.

What Other Terms Have a Special Meaning?

Level 1 guidance documents include guidance documents that set forth initial interpretations of statutory or regulatory requirements; set forth changes in interpretation or policy that are of significance; include complex issues; or cover highly controversial issues. Level 2 guidance documents are guidance documents that set forth existing practices or minor changes in interpretation or policy. Level 2 guidance documents include all guidance documents that are not classified as Level 1. The term ''you'' refers to all affected parties outside of NOP.

Are You or NOP Required To Follow a Guidance Document?

No. Guidance documents do not establish legally enforceable rights or responsibilities. They do not legally bind the public or NOP. You may choose to use an approach other than the one set forth in a guidance document. However, your alternative approach must comply with all applicable Federal and State statutes and regulations. NOP is willing to discuss an alternative approach with you to ensure that your alternative complies with all applicable Federal and State statutes and regulations. However, although guidance documents are not legally binding, they represent the NOP's current thinking. Therefore, NOP employees may depart from guidance documents only with appropriate justification and supervisory concurrence.

Can NOP Use Means Other Than a Guidance Document To Communicate New Program Policy or a New Regulatory Approach to a Broad Public Audience?

The program may not continually use documents or other means of communication that are excluded from the definition of guidance document to informally communicate new or different regulatory expectations to a broad public audience. These GGP's must be followed whenever regulatory expectations that are not readily apparent from the Statute or regulations are first communicated to a broad public audience. These GGP's do not limit the NOP's ability to respond to questions as to how an established policy applies to a specific situation or to questions about areas that may lack established policy.

How Can You Participate in the Development and Issuance of Guidance Documents?

You can provide input on guidance documents that NOP is developing under the procedures described below under the heading ''What are NOP's procedures for the developing and issuing guidance documents?'' You may also suggest areas for guidance document development. Your suggestions should address why a guidance document is necessary, should

clearly and completely address the scope of the issue, its effect on accredited certifying agents, their clients and program participants and/or the public, and how a guidance document would enable reliably uniform regulatory decisions. You may also submit drafts of proposed guidance documents for NOP to consider. When you do so, you should mark the document ''Guidance Document Submission'' and send it to: USDA/AMS/TMP/NOP, 1400 Independence Ave., SW., Room 4008 South, Ag Stop 0268, Washington, DC 20250–0268. NOP may designate an electronic e-mail address for the purpose of receiving comments on guidance documents. At any time, you may suggest that NOP revise or withdraw an already existing guidance document. Your suggestion should address why the guidance document should be revised or withdrawn and, if applicable, how it should be revised. Annually, NOP will publish, both in the **Federal Register** and on its Web site, a list of possible topics for future guidance document development or revision during the next year. You can comment on this list (*e.g.*, by suggesting alternatives or making recommendations on the topics that NOP is considering). To participate in the development and issuance of guidance documents through one of these mechanisms described above, you should contact the program. If NOP agrees to draft or revise a guidance document, you can participate in the development of that guidance document under the procedures described below.

What Are NOP's Procedures for Developing and Issuing Guidance Documents?

Before NOP prepares a draft of a Level 1 guidance document, NOP can seek or accept early input from individuals or groups outside the program. For example, NOP can do this by participating in or holding public meetings and workshops. After NOP prepares a draft of a Level 1 guidance document, NOP will publish a notice in the **Federal Register** announcing that the draft guidance document is available. NOP will then post the draft guidance document on the NOP website and make it available in hard copy on request and invite your comment on the draft guidance document. To submit your comments, see the paragraph ''How should you submit comments on a guidance document?'' below. After NOP prepares a draft of a Level 1 guidance document, NOP can also hold public meetings or workshops or present the draft guidance document to an advisory committee for review. After providing an opportunity for public comment on a Level 1 guidance document, NOP will review all comments received and prepare the final version of the guidance document incorporating suggested changes when appropriate. NOP will then publish a notice in the **Federal Register** announcing that the guidance document is available, post the guidance document on the NOP website and make it available in hard copy on request, and implement the guidance. After providing an opportunity for comment, NOP may decide that it should issue a revised draft of the guidance document. In this case, NOP will follow the applicable steps listed in the paragraph describing how NOP develops and issues guidance documents. NOP will not seek your comment before it implements a Level 1 guidance document if NOP determines that prior public participation is not feasible or appropriate. When public participation is determined infeasible or inappropriate, NOP will prepare a guidance document, publish a notice in the **Federal Register** announcing that the guidance document is available on request, post the guidance document on the NOP website and make it available in hard copy, immediately implement the guidance document; and invite your comment when it issues or publishes the guidance document. If NOP receives comments on the guidance document, NOP will review those comments and revise the guidance document when appropriate. If a version is revised, the new version will be placed on the NOP website.

Procedures for Developing and Issuing Level 2 Guidance Documents.

After NOP prepares a Level 2 guidance document, NOP will post the guidance document on the NOP website and make it available in hard copy on request, immediately implement the guidance document, unless indicated otherwise when the document is made available, and invite your comment on the Level 2 guidance document. If NOP receives comments on a Level 2 guidance document, NOP will review those comments and revise the document if appropriate. If revised, the new version will be placed on the NOP website. You may comment on any guidance document at any time, using the procedures described below. NOP will revise guidance documents in response to your comments when appropriate.

How Should You Submit Comments on a Guidance Document?

If you choose to submit comments on any guidance document, you must send your comments to: USDA/AMS/TMP/NOP, 1400 Independence Ave., SW, Room 4008 South, Ag Stop 0268, Washington, DC 20250–0268. NOP may designate an electronic e-mail address for the purpose of receiving electronic comments on guidance documents. Comments should identify the docket number on the guidance document, if such a docket number exists. For documents without a docket number, the title of the guidance document should be included. Comments will be available to the public in accordance with NOP's public comment access policy.

What Standard Elements Must NOP Include in a Guidance Document?

A guidance document must include the term ''guidance'' and identify that NOP is issuing the document. The guidance document must identify the activity to which and the people to whom the document applies. The document must prominently display a statement of the document's nonbinding effect and include the date it is issued as well as its effective date. The document should note if it is a revision to a previously issued guidance and identify the document being replaced, and contain the word ''draft'' if the document is a draft guidance. Guidance documents will not use mandatory language such as ''shall,'' ''must,'' ''required,'' or ''requirement,'' unless NOP is quoting from existing statutory or regulatory requirements. (Note that draft guidance documents that are the product of international negotiations may not follow these standard elements, however, any final guidance document issued according to this provision must contain these standard elements described in this paragraph.)

Who, Within NOP, Can Approve Issuance of Guidance Documents?

The NOP will have written internal procedures for the approval of guidance documents. Those procedures will ensure that issuance of all documents is approved by appropriate NOP and AMS staff.

How Will NOP Review and Revise Existing Guidance Documents?

The NOP will periodically review existing guidance documents to determine whether they need to be changed or withdrawn. When significant changes are made to an applicable statute or regulation, NOP will review and, if appropriate, revise

guidance documents relating to the change in statute or regulation. Also, as discussed above, you may at any time suggest that NOP revise a guidance document.

How Will NOP Ensure That NOP Staff Is Following These GGP's?

All current and new NOP employees involved in the development, issuance, or application of guidance documents will be trained regarding the program's GGP's. NOP will monitor the use of guidance documents by NOP staff to ensure that GGP's are being followed in the absence of an approved alternative approach.

How Can You Get Copies of NOP Guidance Documents?

NOP will make copies available in hard copy on request and through the NOP website.

How Will NOP Keep You Informed of the Guidance Documents That Are Available?

NOP will maintain on its website a list of all current guidance documents. New documents will be added to this list within 30 days of issuance. Annually, NOP will publish in the **Federal Register** its comprehensive list of guidance documents. The comprehensive list will identify documents that have been added to the list or withdrawn from the list since the previous comprehensive list. NOP's guidance document lists will include the name of the guidance document, issuance and revision dates, and information on how to obtain copies of the document.

What Can You Do If You Believe That Someone at NOP Is Not Following These GGP's?

If you believe that someone at NOP did not follow the procedures in this section or that someone at NOP treated a guidance document as a binding requirement, you should contact that person's supervisor. If the issue cannot be resolved, you should contact the next highest supervisor. If you are unable to resolve the issue, you may ask the Deputy Administrator for Transportation and Marketing Programs, or the Administrator of AMS to become involved.

Dated: January 26, 2005.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 05–1748 Filed 1–31–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

Trade Adjustment Assistance for Farmers

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Notice.

The Administrator, Foreign Agricultural Service (FAS), today accepted a petition filed by the Gollott's Oil Dock and Icehouse, Inc., Biloxi, Mississippi, for trade adjustment assistance. Gollott's represents Mississippi shrimpers. The Administrator will determine within 40 days whether or not imports of shrimp contributed importantly to a decline in domestic producer prices of more than 20 percent during the marketing year period beginning January 2003 through December 2003. If the determination is positive, all shrimp producers in Mississippi will be eligible to apply to the Farm Service Agency for technical assistance at no cost and for adjustment assistance payments.

FOR FURTHER INFORMATION CONTACT: Jean-Louis Pajot, Coordinator, Trade Adjustment Assistance for Farmers, FAS, USDA, (202) 720–2916, e-mail: *trade.adjustment@fas.usda.gov*.

Dated: January 12, 2005.

A. Ellen Terpstra,

Administrator, Foreign Agricultural Service.

[FR Doc. 05–1749 Filed 1–31–05; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Producing Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration (EDA).

ACTION: To give all interested parties an opportunity to comment.

Petitions have been accepted for filing on the dates indicated from the firms listed below.

LIST OF PETITION ACTION BY TRADE ADJUSTMENT ASSISTANCE FOR PERIOD DECEMBER 17, 2004–JANUARY 21, 2005

Firm name	Address	Date petition accepted	Product
C & M Technologies Group, Inc.	51 South Walnut Street, Wauregan, CT 06387	12/27/2004	Wire, cable and cable assemblies.
Leonardi Manufacturing Co., Inc.	2728 Erie Drive, Weedsport, NY 13166	12/27/2004	Metal stamped and press brake formed brackets and frames for automobiles and air conditioning units, and metal handbag and luggage frames.
Adcor Industries, Inc.	234 South Haven Street, Baltimore, MD 21224	1/10/2005	Machinery and spare parts for the bottling industry.
Bernier Cast Metals, Inc.	2626 Hess Street, Saginaw, MI 48601	1/12/2005	Sand cast metal products, i.e. bearings and housings.
All Service Plastic Molding, Inc.	3365 Obco Court, Dayton, OH 45413	1/14/2005	Injection molded plastic parts, i.e. cases, boxes and plastic parts and accessories for automobiles.
Holcombe Armature Company	905 Rockmart Road, Villa Rica, GA 30180	1/21/2005	Starter motor and generator armatures for automotive and other internal combustion engine applications.

The petitions were submitted pursuant to section 251 of the Trade Act of 1974 (19 U.S.C. 2341). Consequently, the United States Department of Commerce has initiated separate investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each firm

contributed importantly to total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm. Any party having a substantial interest in the proceedings may request a public hearing on the matter. A request for a hearing must be received by Trade Adjustment Assistance, Room 7315, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than the close of business of the tenth calendar day following the publication of this notice. The Catalog of Federal Domestic Assistance official program number and title of the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance.

Dated: January 26, 2005.

Anthony J. Meyer,

Senior Program Analyst, Office of Strategic Initiatives.

[FR Doc. 05–1804 Filed 1–31–05; 8:45 am]

BILLING CODE 3510–24–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of opportunity to request administrative review of antidumping or countervailing duty order, finding, or suspended investigation.

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspension of investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (the Act), may request, in accordance with section 351.213 (2004) of the Department of Commerce (the Department) Regulations, that the Department conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

Opportunity To Request a Review: Not later than the last day of February 2005, interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in February for the following periods:

Antidumping duty proceedings	Period
Brazil: Stainless Steel Bar, A–351–825	2/1/04–1/31/05
France:	
Certain Cut-to-Length Carbon-Quality Steel Plate, A–427–816	2/1/04–1/31/05
Uranium, A–427–818	2/1/04–1/31/05
Germany: Sodium Thiosulfate, A–428–807	2/1/04–1/31/05
India:	
Certain Cut-to-Length Carbon-Quality Steel Plate, A–533–817	2/1/04–1/31/05
Forged Stainless Steel Flanges, A–533–809	2/1/04–1/31/05
Stainless Steel Bar, A–533–810	2/1/04–1/31/05
Certain Preserved Mushrooms, A–533–813	2/1/04–1/31/05
Indonesia:	
Certain Cut-to-Length Carbon-Quality Steel Plate, A–560–805	2/1/04–1/31/05
Certain Preserved Mushrooms, A–560–802	2/1/04–1/31/05
Italy:	
Certain Cut-to-Length Carbon-Quality Steel Plate, A–475–826	2/1/04–1/31/05
Stainless Steel Butt-Weld Pipe Fittings, A–475–828	2/1/04–1/31/05
Japan:	
Carbon Steel Butt-Weld Pipe Fittings, A–588–602	2/1/04–1/31/05
Certain Cut-to-Length Carbon-Quality Steel Plate, A–588–847	2/1/04–1/31/05
Mechanical Transfer Presses, A–588–810	2/1/04–1/31/05
Melamine In Crystal Form, A–588–056	2/1/04–8/31/04
Stainless Steel Bar, A–588–833	2/1/04–1/31/05
Malaysia: Stainless Steel Butt-Weld Pipe Fittings, A–557–809	2/1/04–1/31/05
Mexico: Welded Large Diameter Line Pipe, A–201–828	2/1/04–1/31/05
Philippines: Stainless Steel Butt-Weld Pipe Fittings, A–565–801	2/1/04–1/31/05
Republic of Korea:	
Certain Cut-to-Length Carbon-Quality Steel Plate, A–580–836	2/1/04–1/31/05
Stainless Steel Butt-Weld Pipe Fittings, A–580–813	2/1/04–1/31/05
Taiwan: Forged Stainless Steel Flanges, A–583–821	2/1/04–1/31/05
The People's Republic of China:	
Axes/adzes, A–570–803	2/1/04–1/31/05
Bars/wedges, A–570–803	2/1/04–1/31/05
Certain Preserved Mushrooms, A–570–851	2/1/04–1/31/05
Coumarin, A–570–830	2/1/04–1/31/05
Creatine Monohydrate, A–570–852	2/1/04–1/31/05
Hammers/sledges, A–570–803	2/1/04–1/31/05
Natural Bristle Paint Brushes and Brush Heads, A–570–501	2/1/04–1/31/05
Picks/mattocks, A–570–803	2/1/04–1/31/05
Sodium Thiosulfate, A–570–805	2/1/04–1/31/05
The United Kingdom: Sodium Thiosulfate, A–412–805	2/1/04–1/31/05
Countervailing Duty Proceedings	
France:	
Certain Cut-to Length Carbon-Quality Steel Plate, C–427–817	1/1/04–12/31/04
Low Enriched Uranium, C–427–819	1/1/04–12/31/04
Germany: Low Enriched Uranium, C–428–829	1/1/04–12/31/04
India:	

Antidumping duty proceedings	Period
Certain Cut-to-Length Carbon-Quality Steel Plate, C–533–818	1/1/04–12/31/04
Prestressed Concrete Steel Wire Strand, C–533–829	7/8/03–12/31/04
Indonesia: Certain Cut-to-Length Carbon-Quality Steel Plate, C–560–806	1/1/04–12/31/04
Italy: Certain Cut-to-Length Carbon-Quality Steel Plate, C–475–827	1/1/04–12/31/04
Netherlands: Low Enriched Uranium, C–421–809	1/1/04–12/31/04
Republic of Korea: Certain Cut-to-Length Carbon-Quality Steel Plate, C–580–837	1/1/04–12/31/04
The United Kingdom: Low Enriched Uranium, C–412–821	1/1/04–12/31/04

Suspension Agreements

None.

In accordance with section 351.213(b) of the regulations, an interested party as defined by section 771(9) of the Act, may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review, and the requesting party must state why it desires the Secretary to review those particular producers or exporters. If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which were produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 69 FR 23954 (May 6, 2003), the Department has clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders. *See also* the Import Administration Web site at *http://www.ia.ita.doc.gov*.

Six copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230. The Department also asks parties to serve a copy of their requests to the Office of Antidumping/Countervailing Enforcement, Attention: Sheila Forbes, in room 3065 of the main Commerce Building. Further, in accordance with section 351.303(f)(l)(i) of the regulations, a copy of each request must be served on every party on the Department's service list.

The Department will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of February 2005. If the Department does not receive, by the last day of February 2005, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, the Department will instruct the Customs Service to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from use, for consumption and to continue to collect the cash deposit previously ordered.

This notice is not required by statute but is published as a service to the international trading community.

Dated: January 26, 2005.

Holly A. Kuga,

Senior Office Director, Office for Import Administration.

[FR Doc. E5–375 Filed 1–31–05; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–824]

Notice of Final Results of Antidumping Duty Changed Circumstances Review and Revocation, in Part: Certain Corrosion-Resistant Carbon Steel Flat Products From Japan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* February 1, 2005.

FOR FURTHER INFORMATION CONTACT: Christopher Hargett, George McMahon, or James Terpstra, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–4161, (202) 482–1167, or (202) 482–3965, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 19, 1993, the Department of Commerce (the Department) published an antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan. *See Antidumping Duty Orders: Certain Corrosion-Resistant Carbon Steel Flat Products From Japan*, 58 FR 44163 (August 19, 1993). On October 26, 2004, Taiho requested that the Department revoke the antidumping duty order on 24 separate bushing alloy-lined corrosion-resistant carbon steel coil products from Japan through the initiation of a changed circumstances review. *See* section 751(b) of the Tariff Act of 1930 (the Act). Taiho also requested that the Department conduct an expedited changed circumstances review pursuant to 19 CFR 351.221(c)(3)(ii).

Taiho asserts that the domestic producers, United States Steel (U.S. Steel), and International Steel Group (ISG), do not have any interest in the continuation of the order with respect to the 24 products. The Department received a letter on November 22, 2004, on behalf of U.S. Steel stating they have no objection to the initiation of the changed circumstances review, and on December 3, 2004, received a letter on behalf of ISG, attesting to their lack of interest regarding continuation of the order with respect to the specified 24 products.

In response to Taiho's request and based on the information provided by U.S. Steel and ISG, on December 20, 2004, the Department simultaneously initiated a changed circumstances review and issued a notice of preliminary intent to revoke the order, in part (69 FR 75907). The Department provided interested parties an opportunity to comment on our preliminary intent to revoke the order, in part, with respect to the specified 24 products. We did not receive any comments. Therefore, the final results of review are not different from the preliminary results and we are revoking

the order, in part, with respect to the specified 24 products as described in the ''Scope of the Order'' section of this notice.

Scope of the Order

The products subject to this order include flat-rolled carbon steel products, of rectangular shape, either clad, plated, or coated with corrosion-resistant metals such as zinc, aluminum, or zinc-, aluminum-, nickel-or iron-based alloys, whether or not corrugated or painted, varnished or coated with plastics or other nonmetallic substances in addition to the metallic coating, in coils (whether or not in successively superimposed layers) and of a width of 0.5 inch or greater, or in straight lengths which, if of a thickness less than 4.75 millimeters, are of a width of 0.5 inch or greater and which measures at least 10 times the thickness or if of a thickness of 4.75 millimeters or more are of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the Harmonized Tariff Schedule under item numbers: 7210.30.0030, 7210.30.0060, 7210.41.0000, 7210.49.0030, 7210.49.0090, 7210.61.0000, 7210.69.0000, 7210.70.6030, 7210.70.6060, 7210.70.6090, 7210.90.1000, 7210.90.6000, 7210.90.9000, 7212.20.0000, 7212.30.1030, 7212.30.1090, 7212.30.3000, 7212.30.5000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7212.60.0000, 7215.90.1000, 7215.90.3000, 7215.90.5000, 7217.20.1500, 7217.30.1530, 7217.30.1560, 7217.90.1000, 7217.90.5030, 7217.90.5060, and 7217.90.5090.

Included in the order are flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.*, products which have been ''worked after rolling'')—for example, products which have been bevelled or rounded at the edges.

Excluded from the scope of the order are flat-rolled steel products either plated or coated with tin, lead, chromium, chromium oxides, both tin and lead (''terne plate''), or both chromium and chromium oxides (''tin-free steel''), whether or not painted, varnished or coated with plastics or other nonmetallic substances in addition to the metallic coating. Also excluded from the scope of the order are certain clad stainless flat-rolled products, which are three-layered corrosion-resistant carbon steel flat-rolled products less than 4.75 millimeters in composite thickness that consist of a carbon steel flat-rolled product clad on both sides with stainless steel in a 20%–60%–20% ratio. *See Antidumping Duty Orders: Certain Corrosion-Resistant Carbon Steel Flat Products From Japan*, 58 FR 44163 (August 19, 1993).

Also excluded from the scope of this order are imports of certain corrosion-resistant carbon steel flat products meeting the following specifications: Widths ranging from 10 millimeters (0.394 inches) through 100 millimeters (3.94 inches); thicknesses, including coatings, ranging from 0.11 millimeters (0.004 inches) through 0.60 millimeters (0.024 inches); and a coating that is from 0.003 millimeters (0.00012 inches) through 0.005 millimeters (0.000196 inches) in thickness and that is comprised of three evenly applied layers, the first layer consisting of 99% zinc, 0.5% cobalt, and 0.5% molybdenum, followed by a layer consisting of chromate, and finally a layer consisting of silicate. *See Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Final Results of Changed Circumstances Antidumping Duty Administrative Review, and Revocation in Part of Antidumping Duty Order*, 62 FR 66848 (December 22, 1997).

Also excluded from the scope of this order are imports of subject merchandise meeting all of the following criteria: (1) Widths ranging from 10 millimeters (0.394 inches) through 100 millimeters (3.94 inches); (2) thicknesses, including coatings, ranging from 0.11 millimeters (0.004 inches) through 0.60 millimeters (0.024 inches); and (3) a coating that is from 0.003 millimeters (0.00012 inches) through 0.005 millimeters (0.000196 inches) in thickness and that is comprised of either two evenly applied layers, the first layer consisting of 99% zinc, 0.5% cobalt, and 0.5% molybdenum, followed by a layer consisting of chromate, or three evenly applied layers, the first layer consisting of 99% zinc, 0.5% cobalt, and 0.5% molybdenum followed by a layer consisting of chromate, and finally a layer consisting of silicate. *See Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Final Results of Changed Circumstances Antidumping Duty Administrative Review, and Revocation in Part of Antidumping Duty Order*, 64 FR 14861 (March 29, 1999).

Also excluded from the scope of this order are: (1) Carbon steel flat products measuring 1.84 mm in thickness and 43.6 mm or 16.1 mm in width consisting of carbon steel coil (SAE 1008) clad with an aluminum alloy that is balance aluminum, 20% tin, 1% copper, 0.3% silicon, 0.15% nickel, less than 1% other materials and meeting the requirements of SAE standard 783 for Bearing and Bushing Alloys; and (2) carbon steel flat products measuring 0.97 mm in thickness and 20 mm in width consisting of carbon steel coil (SAE 1008) with a two-layer lining, the first layer consisting of a copper-lead alloy powder that is balance copper, 9% to 11% tin, 9% to 11% lead, less than 1% zinc, less than 1% other materials and meeting the requirements of SAE standard 792 for bearing and bushing alloys, the second layer consisting of 45% to 55% lead, 38% to 50% PTFE, 3% to 5% molybdenum disulfide and less than 2% other materials. *See Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Final Results of Changed Circumstances Review, and Revocation in Part of Antidumping Duty Order*, 64 FR 57032 (October 22, 1999).

Also excluded from the scope of the order are imports of doctor blades meeting the following specifications: Carbon steel coil or strip, plated with nickel phosphorous, having a thickness of 0.1524 millimeters (0.006 inches), a width between 31.75 millimeters (1.25 inches) and 50.80 millimeters (2.00 inches), a core hardness between 580 to 630 HV, a surface hardness between 900–990 HV; the carbon steel coil or strip consists of the following elements identified in percentage by weight: 0.90% to 1.05% carbon; 0.15% to 0.35% silicon; 0.30% to 0.50% manganese; less than or equal to 0.03% of phosphorous; less than or equal to 0.006% of sulfur; other elements representing 0.24%; and the remainder of iron. *See Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Final Results of Changed Circumstances Review, and Revocation in Part of Antidumping Duty Order*, 65 FR 53983 (September 6, 2000).

Also excluded from the scope of the order are imports of carbon steel flat products meeting the following specifications: Carbon steel flat products measuring 1.64 millimeters in thickness and 19.5 millimeters in width consisting of carbon steel coil (SAE 1008) with a lining clad with an aluminum alloy that is balance aluminum; 10 to 15% tin; 1 to 3% lead; 0.7 to 1.3% copper; 1.8 to 3.5% silicon; 0.1 to 0.7% chromium; less than 1% other materials and meeting the requirements of SAE standard 783 for Bearing and Bushing Alloys. *See Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Final Results of Changed Circumstances Review, and Revocation in Part of Antidumping Duty Order*, 66 FR 8778 (February 2, 2001).

Also excluded from the scope of the order are carbon steel flat products meeting the following specifications: (1) Carbon steel flat products measuring 0.975 millimeters in thickness and 8.8 millimeters in width consisting of carbon steel coil (SAE 1012) clad with a two-layer lining, the first layer consisting of a copper-lead alloy powder that is balance copper, 9%–11% tin, 9%–11% lead, maximum 1% other materials and meeting the requirements of SAE standard 792 for Bearing and Bushing Alloys, the second layer consisting of 13%–17% carbon, 13%–17% aromatic polyester, with a balance (approx. 66%–74%) of polytetrafluorethylene (PTFE); and (2) carbon steel flat products measuring 1.02 millimeters in thickness and 10.7 millimeters in width consisting of carbon steel coil (SAE 1008) with a two-layer lining, the first layer consisting of a copper-lead alloy powder that is balance copper, 9%–11% tin, 9%–11% lead, less than 0.35% iron, and meeting the requirements of SAE standard 792 for bearing and bushing alloys, the second layer consisting of 45%–55% lead, 3%–5% molybdenum disulfide, with a balance (approx. 40%–52%) of polytetrafluorethylene (PTFE). *See Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Notice of Final Results of Changed Circumstances Review, and Revocation in Part of Antidumping Duty Order*, 66 FR 15075 (March 15, 2001).

Also excluded from this order are products meeting the following specifications: Carbon steel coil or strip, measuring 1.93 millimeters or 2.75 millimeters (0.076 inches or 0.108 inches) in thickness, 87.3 millimeters or 99 millimeters (3.437 inches or 3.900 inches) in width, with a low carbon steel back comprised of: Carbon under 8%, manganese under 0.4%, phosphorous under 0.04%, and sulfur under 0.05%; clad with aluminum alloy comprised of: 0.7% copper, 12% tin, 1.7% lead, 0.3% antimony, 2.5% silicon, 1% maximum total other (including iron), and remainder aluminum. Also excluded from this order are products meeting the following specifications: Carbon steel coil or strip, clad with aluminum, measuring 1.75 millimeters (0.069 inches) in thickness, 89 millimeters or 94 millimeters (3.500 inches or 3.700 inches) in width, with a low carbon steel back comprised of: Carbon under 8%, manganese under 0.4%, phosphorous under 0.04%, and sulfur under 0.05%; clad with aluminum alloy comprised of: 0.7% copper, 12% tin, 1.7% lead, 2.5% silicon, 0.3% antimony, 1% maximum total other (including iron), and remainder aluminum. *See Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Notice of Final Results of Changed Circumstances Review, and Revocation in Part of Antidumping Duty Order*, 66 FR 20967 (April 26, 2001).

Also excluded from this order are products meeting the following specifications: Carbon steel coil or strip, measuring a minimum of and including 1.10mm to a maximum of and including 4.90mm in overall thickness, a minimum of and including 76.00mm to a maximum of and including 250.00mm in overall width, with a low carbon steel back comprised of: carbon under 0.10%, manganese under 0.40%, phosphorous under 0.04%, sulfur under 0.05%, and silicon under 0.05%; clad with aluminum alloy comprised of: under 2.51% copper, under 15.10% tin, and remainder aluminum as listed on the mill specification sheet. *See Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Notice of Final Results of Changed Circumstances Review, and Revocation in Part of Antidumping Duty Order*, 67 FR 7356 (February 19, 2002).

Also excluded from this order are products meeting the following specifications: (1) Diffusion annealed, non-alloy nickel-plated carbon products, with a substrate of cold-rolled battery grade sheet (''CRBG'') with both sides of the CRBG initially electrolytically plated with pure, unalloyed nickel and subsequently annealed to create a diffusion between the nickel and iron substrate, with the nickel plated coating having a thickness of 0–5 microns per side with one side equaling at least 2 microns; and with the nickel carbon sheet having a thickness of from 0.004'' (0.10mm) to 0.030'' (0.762mm) and conforming to the following chemical specifications (%): C <= 0.08; Mn <= 0.45; P <= 0.02; S <= 0.02; Al <= 0.15; and Si <= 0.10; and the following physical specifications: Tensile = 65 KSI maximum; Yield = 32–55 KSI; Elongation = 18% minimum (aim 34%); Hardness = 85–150 Vickers; Grain Type = Equiaxed or Pancake; Grain Size (ASTM) = 7–12; Delta r value = aim less than ±0.2; Lankford value = <== 1.2.; and (2) next generation diffusion-annealed nickel plate meeting the following specifications: (a) Nickel-graphite plated, diffusion annealed, tin-nickel plated carbon products, with a natural composition mixture of nickel and graphite electrolytically plated to the top side of diffusion annealed tin-nickel plated carbon steel strip with a cold rolled or tin mill black plate base metal conforming to chemical requirements based on AISI 1006; having both sides of the cold rolled substrate electrolytically plated with natural nickel, with the top side of the nickel plated strip electrolytically plated with tin and then annealed to create a diffusion between the nickel and tin layers in which a nickel-tin alloy is created, and an additional layer of mixture of natural nickel and graphite then electrolytically plated on the top side of the strip of the nickel-tin alloy; having a coating thickness: top side: Nickel-graphite, tin-nickel layer <== 1.0 micrometers; tin layer only <== 0.05 micrometers, nickel-graphite layer only <= 0.2 micrometers, and bottom side: Nickel layer <== 1.0 micrometers; (b) nickel-graphite, diffusion annealed, nickel plated carbon products, having a natural composition mixture of nickel and graphite electrolytically plated to the top side of diffusion annealed nickel plated steel strip with a cold rolled or tin mill black plate base metal conforming to chemical requirements based on AISI 1006; with both sides of the cold rolled base metal initially electrolytically plated with natural nickel, and the material then annealed to create a diffusion between the nickel and the iron substrate; with an additional layer of natural nickel-graphite then electrolytically plated on the top side of the strip of the nickel plated steel strip; with the nickel-graphite, nickel plated material sufficiently ductile and adherent to the substrate to permit forming without cracking, flaking, peeling, or any other evidence of separation; having a coating thickness: top side: Nickel-graphite, tin-nickel layer <== 1.0 micrometers; nickel-graphite layer <== 0.5 micrometers; bottom side: nickel layer <== 1.0 micrometers; (c) diffusion annealed nickel-graphite plated products, which are cold-rolled or tin mill black plate base metal conforming to the chemical requirements based on AISI 1006; having the bottom side of the base metal first electrolytically plated with natural nickel, and the top side of the strip then plated with a nickel-graphite composition; with the strip then annealed to create a diffusion of the nickel-graphite and the iron substrate on the bottom side; with the nickel-graphite and nickel plated material sufficiently ductile and adherent to the substrate to permit forming without cracking, flaking, peeling, or any other evidence of separation; having coating thickness: top side: Nickel-graphite layer <== 1.0 micrometers; bottom side: nickel layer <== 1.0 micrometers; (d) nickel-phosphorous plated diffusion annealed

nickel plated carbon product, having a natural composition mixture of nickel and phosphorus electrolytically plated to the top side of a diffusion annealed nickel plated steel strip with a cold rolled or tin mill black plate base metal conforming to the chemical requirements based on AISI 1006; with both sides of the base metal initially electrolytically plated with natural nickel, and the material then annealed to create a diffusion of the nickel and iron substrate; another layer of the natural nickel-phosphorous then electrolytically plated on the top side of the nickel plated steel strip; with the nickel-phosphorous, nickel plated material sufficiently ductile and adherent to the substrate to permit forming without cracking, flaking, peeling or any other evidence of separation; having a coating thickness: Top side: nickel-phosphorous, nickel layer <== 1.0 micrometers; nickel-phosphorous layer <== 0.1 micrometers; bottom side : nickel layer <== 1.0 micrometers; (e) diffusion annealed, tin-nickel plated products, electrolytically plated with natural nickel to the top side of a diffusion annealed tin-nickel plated cold rolled or tin mill black plate base metal conforming to the chemical requirements based on AISI 1006; with both sides of the cold rolled strip initially electrolytically plated with natural nickel, with the top side of the nickel plated strip electrolytically plated with tin and then annealed to create a diffusion between the nickel and tin layers in which a nickel-tin alloy is created, and an additional layer of natural nickel then electrolytically plated on the top side of the strip of the nickel-tin alloy; sufficiently ductile and adherent to the substrate to permit forming without cracking, flaking, peeling or any other evidence of separation; having coating thickness: Top side: nickel-tin-nickel combination layer <== 1.0 micrometers; tin layer only <== 0.05 micrometers; bottom side: nickel layer <== 1.0 micrometers; and (f) tin mill products for battery containers, tin and nickel plated on a cold rolled or tin mill black plate base metal conforming to chemical requirements based on AISI 1006; having both sides of the cold rolled substrate electrolytically plated with natural nickel; then annealed to create a diffusion of the nickel and iron substrate; then an additional layer of natural tin electrolytically plated on the top side; and again annealed to create a diffusion of the tin and nickel alloys; with the tin-nickel, nickel plated material sufficiently ductile and adherent to the substrate to permit forming without cracking, flaking, peeling or any other evidence of separation; having a coating thickness: Top side: nickel-tin layer <== 1 micrometer; tin layer alone <== 0.05 micrometers; bottom side: nickel layer <== 1.0 micrometer. *See Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Notice of Final Results of Changed Circumstances Review, and Revocation in Part of Antidumping Duty Order*, 67 FR 47768 (July 22, 2002).

Also excluded from this order are products meeting the following specifications: (1) Widths ranging from 10 millimeters (0.394 inches) through 100 millimeters (3.94 inches); (2) thicknesses, including coatings, ranging from 0.11 millimeters (0.004 inches) through 0.60 millimeters (0.024 inches); and (3) a coating that is from 0.003 millimeters (0.00012 inches) through 0.005 millimeters (0.000196 inches) in thickness and that is comprised of either two evenly applied layers, the first layer consisting of 99% zinc, 0.5% cobalt, and 0.5% molybdenum, followed by a layer consisting of phosphate, or three evenly applied layers, the first layer consisting of 99% zinc, 0.5% cobalt, and 0.5% molybdenum followed by a layer consisting of phosphate, and finally a layer consisting of silicate. *See Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Notice of Final Results of Changed Circumstances Review, and Revocation in Part of Antidumping Duty Order,* 67 FR 57208 (September 9, 2002).

Also excluded from this order are products meeting the following specifications: (1) Flat-rolled products (provided for in HTSUS subheading 7210.49.00), other than of high-strength steel, known as ''ASE Iron Flash'' and either: (A) Having a base layer of zinc-based zinc-iron alloy applied by hot-dipping and a surface layer of iron-zinc alloy applied by electrolytic process, the weight of the coating and plating not over 40 percent by weight of zinc; or (B) two-layer-coated corrosion-resistant steel with a coating composed of (a) a base coating layer of zinc-based zinc-iron alloy by hot-dip galvanizing process, and (b) a surface coating layer of iron-zinc alloy by electro-galvanizing process, having an effective amount of zinc up to 40 percent by weight, and (2) corrosion resistant continuously annealed flat-rolled products, continuous cast, the foregoing with chemical composition (percent by weight): Carbon not over 0.06 percent by weight, manganese 0.20 or more but not over 0.40, phosphorus not over 0.02, sulfur not over 0.023, silicon not over 0.03, aluminum 0.03 or more but not over 0.08, arsenic not over 0.02, copper not over 0.08 and nitrogen 0.003 or more but not over 0.008; and meeting the characteristics described below: (A) Products with one side coated with a nickel-iron-diffused layer which is less than 1 micrometer in thickness and the other side coated with a two-layer coating composed of a base nickel-iron-diffused coating layer and a surface coating layer of annealed and softened pure nickel, with total coating thickness for both layers of more than 2 micrometers; surface roughness (RA-microns) 0.18 or less; with scanning electron microscope (SEM) not revealing oxides greater than 1 micron; and inclusion groups or clusters shall not exceed 5 microns in length; (B) products having one side coated with a nickel-iron-diffused layer which is less than 1 micrometer in thickness and the other side coated with a four-layer coating composed of a base nickel-iron-diffused coating layer; with an inner middle coating layer of annealed and softened pure nickel, an outer middle surface coating layer of hard nickel and a topmost nickel-phosphorus-plated layer; with combined coating thickness for the four layers of more than 2 micrometers; surface roughness (RA-microns) 0.18 or less; with SEM not revealing oxides greater than 1 micron; and inclusion groups or clusters shall not exceed 5 microns in length; (C) products having one side coated with a nickel-iron-diffused layer which is less than 1 micrometer in thickness and the other side coated with a three-layer coating composed of a base nickel-iron-diffused coating layer, with a middle coating layer of annealed and softened pure nickel and a surface coating layer of hard, luster-agent-added nickel which is not heat-treated; with combined coating thickness for all three layers of more than 2 micrometers; surface roughness (RA-microns) 0.18 or less; with SEM not revealing oxides greater than 1 micron; and inclusion groups or clusters shall not exceed 5 microns in length; or (D) products having one side coated with a nickel-iron-diffused layer which is less than 1 micrometer in thickness and the other side coated with a three-layer coating composed of a base nickel-iron-diffused coating layer, with a middle coating layer of annealed and softened pure nickel and a surface coating layer of hard, pure nickel which is not heat-treated; with combined coating thickness for all three layers of more than 2 micrometers; surface roughness (RA-microns) 0.18 or less; SEM not revealing oxides greater than 1 micron; and inclusion groups or clusters shall not exceed 5 microns in length. *See*

Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Notice of Final Results of Changed Circumstances Review, and Revocation in Part of Antidumping Duty Order, 68 FR 19970 (April 23, 2003).

Also excluded from the scope of this order is merchandise meeting the following specifications:

Property	Specification
Base metal	Aluminum Killed, Continuous Cast, Carbon Steel SAE 1008.
Chemical composition.	C: 0.08% max. Si: 0.03% max. Mn: 0.40% max. P: 0.020% max. S: 0.020% max.
Nominal thickness.	0.054 millimeters.
Thickness tolerance.	Minimum 0.0513 millimeters. Maximum 0.0567 millimeters.
Width	600 millimeters or greater.
Nickel plate	Min. 2.45 microns per side.

See Notice of Final Results of Changed Circumstances Review and Revocation, in Part: Certain Corrosion-Resistant Carbon Steel Flat Products From Japan, 70 FR 2608 (January 14, 2005).

As a result of this review, also excluded from the scope of this order are the following 24 separate corrosion-resistant carbon steel coil products meeting the following specifications:

Product 1

Products described in industry usage as of carbon steel, measuring 1.625 mm to 1.655 mm in thickness and 19.3 mm to 19.7 mm in width, consisting of carbon steel coil (SAE 1010) with a lining clad with an aluminum alloy containing by weight 10 percent or more but not more than 15 percent of tin, 1 percent or more but not more than 3 percent of lead, 0.7 percent or more but not more than 1.3 percent of copper, 1.8 percent or more but not more than 3.5 percent of silicon, 0.1 percent or more but not more than 0.7 percent of chromium and less than or equal to 1 percent of other materials, and meeting the requirements of SAE standard 788 for Bearing and Bushing Alloys.

Product 2

Products described in industry usage as of carbon steel, measuring 0.955 mm to 0.985 mm in thickness and 8.6 mm to 9.0 mm in width, consisting of carbon steel coil (SAE 1012) clad with a two-layer lining, the first layer consisting of a copper-lead alloy powder that contains by weight 9 percent or more but not more than 11 percent of tin, 9 percent or more but not more than 11 percent of lead, less than 0.05 percent phosphorus, less than 0.35 percent iron and less than or equal to 1 percent other materials, and meeting the requirements of SAE standard 797 for Bearing and Bushing Alloys, with the second layer containing by weight 13 percent or more but not more than 17 percent of carbon, 13 percent or more but not more than 17 percent of aromatic polyester, and the remainder (approx. 66–74 percent) of polytetrafluorethylene (PTFE).

Product 3

Products described in industry usage as of carbon steel, measuring 1.01 mm to 1.03 mm in thickness and 10.5 mm to 10.9 mm in width, consisting of carbon steel coil (SAE 1010) with a two-layer lining, the first layer consisting of a copper-lead alloy powder that contains by weight 9 percent or more but not more than 11 percent of tin, 9 percent or more but not more than 11 percent of lead, less than 1 percent zinc and less than or equal to 1 percent other materials, and meeting the requirements of SAE standard 797 for Bearing and Bushing Alloys, with the second layer containing by weight 45 percent or more but not more than 55 percent of lead, 3 percent or more but not more than 5 percent of molybdenum disulfide, and the remainder made up of PTFE (approximately 38 percent to 52 percent) and less than 2 percent in the aggregate of other materials.

Product 4

Products described in industry usage as of carbon steel, measuring 1.8 mm to 1.88 mm in thickness and 43.4 mm to 43.8 mm or 16.1 mm to 1.65 mm in width, consisting of carbon steel coil (SAE 1010) clad with an aluminum alloy that contains by weight 19 percent to 20 percent tin, 1 percent to 1.2 percent copper, less than 0.3 percent silicon, 0.15 percent nickel and less than 1 percent in the aggregate other materials and meeting the requirements of SAE standard 783 for Bearing and Bushing Alloys.

Product 5

Products described in industry usage as of carbon steel, measuring 0.95 mm to 0.98 mm in thickness and 19.95 mm to 20 mm in width, consisting of carbon steel coil (SAE 1010) with a two-layer lining, the first layer consisting of a copper-lead alloy powder that contains by weight 9 percent or more but not more than 11 percent of tin, 9 percent or more but not more than 11 percent of lead, less than 1 percent of zinc and less than or equal to 1 percent in the aggregate of other materials and meeting the requirements of SAE standard 797 for Bearing and Bushing Alloys, with the second layer consisting by weight of 45 percent or more but not more than 55 percent of lead, 3 percent or more but not more than 5 percent of molybdenum disulfide and with the remainder made up of polytetrafluoroethylene (PTFE) (approximately 38 percent to 52 percent) and up to 2 percent in the aggregate of other materials.

Product 6

Products described in industry usage as of carbon steel, measuring 0.96 mm to 0.98 mm in thickness and 18.75 mm to 18.95 mm in width; base of SAE 1010 steel with a two-layer lining, the first layer consisting of copper-base alloy powder with chemical composition (percent by weight): Tin 9 to 11, lead 9 to 11, phosphorus less than 0.05, ferrous group less than 0.35, and other materials less than 1 percent; meeting the requirements of SAE standard 797 for bearing and bushing alloys; the second layer consisting of lead 33 to 37 percent, aromatic polyester 28 to 32 percent, and other materials less than 2 percent with a balance of polytetrafluoroethylene (PTFE).

Product 7

Products described in industry usage as of carbon steel, measuring 1.21 mm to 1.25 mm in thickness and 19.4 mm to 19.6 mm in width; base of SAE 1012 steel with lining of copper base alloy with chemical composition (percent by weight): Tin 9 to 11, lead 9 to 11, phosphorus less than 0.05, ferrous group less than 0.35 and other materials less than 1 percent; meeting the requirements of SAE standard 797 for bearing and bushing alloys.

Product 8

Products described in industry usage as of carbon steel, measuring 0.96 mm to 0.98 mm in thickness and 21.5 mm to 21.7 mm in width; base of SAE 1010 steel with a two-layer lining, the first layer consisting of copper-base alloy powder with chemical composition (percent by weight): Tin 9 to 11, lead 9 to 11, phosphorus less than 0.05 percent, ferrous group less than 0.35 and other materials less than 1; meeting the requirements of SAE standard 797 for bearing and bushing alloys; the second layer consisting of (percent by weight) lead 33 to 37, aromatic polyester 28 to 32 and other materials less than 2 with a balance of polytetrafluoroethylene (PTFE).

Product 9

Products described in industry usage as of carbon steel, measuring 0.96 mm to 0.99 mm in thickness and 7.65 mm to 7.85 mm in width; base of SAE 1012 steel with a two-layer lining, the first

layer consisting of copper-based alloy powder with chemical composition (percent by weight): Tin 9 to 11, lead 9 to 11, phosphorus less than 0.05, ferrous group less than 0.35 and other materials less than 1; meeting the requirements of SAE standard 797 for bearing and bushing alloys; the second layer consisting of (percent by weight) carbon 13 to 17 and aromatic polyester 13 to 17, with a balance of polytetrafluoroethylene (''PTFE'')

Product 10

Products described in industry usage as of carbon steel, measuring 0.955 mm to 0.985 mm in thickness and 13.6 mm to 14 mm in width; base of SAE 1012 steel with a two-layer lining, the first layer consisting of copper-based alloy powder with chemical composition (percent by weight): Tin 9 to 11, lead 9 to 11, phosphorus less than 0.05, ferrous group less than 0.35 and other materials less than 1; meeting the requirements of SAE standard 797 for bearing and bushing alloys; the second layer consisting of (percent by weight) carbon 13 to 17, aromatic polyester 13 to 17, with a balance (approximately 66 to 74) of polytetrafluoroethylene (PTFE).

Product 11

Products described in industry usage as of carbon steel, measuring 1.2 mm to 1.24 mm in thickness; 20 mm to 20.4 mm in width; consisting of carbon steel coils (SAE 1012) with a lining of sintered phosphorus bronze alloy with chemical composition (percent by weight): Tin 5.5 to 7; phosphorus 0.03 to 0.35; lead less than 1 and other non-copper materials less than 1.

Product 12

Products described in industry usage as of carbon steel, measuring 1.8 mm to 1.88 mm in thickness and 43.3 mm to 43.7 mm in width; base of SAE 1010 steel with a lining of aluminum based alloy with chemical composition (percent by weight: Tin 10 to 15, lead 1 to 3, copper 0.7 to 1.3, silicon 1.8 to 3.5, chromium 0.1 to 0.7 and other materials less than 1; meeting the requirements of SAE standard 788 for bearing and bushing alloys.

Product 13

Products described in industry usage as of carbon steel, measuring 1.8 mm to 1.88 mm in thickness and 24.2 mm to 24.6 mm in width; base of SAE 1010 steel with a lining of aluminum alloy with chemical composition (percent by weight): Tin 10 to 15, lead 1 to 3, copper 0.7 to 1.3, silicon 1.8 to 3.5, chromium 0.1 to 0.7 and other materials less than 1; meeting the requirements of SAE standard 788 for bearing and bushing alloys.

Product 14

Flat-rolled coated SAE 1009 steel in coils, with thickness not less than 0.915 mm but not over 0.965 mm, width not less than 19.75 mm or more but not over 20.35 mm; with a two-layer coating; the first layer consisting of tin 9 to 11 percent, lead 9 to 11 percent, zinc less than 1 percent, other materials (other than copper) not over 1 percent and balance copper; the second layer consisting of lead 45 to 55 percent, molybdenum disulfide (MoS2) 3 to 5 percent, other materials not over 2 percent, balance polytetrafluoroethylene (PTFE).

Product 15

Flat-rolled coated SAE 1009 steel in coils with thickness not less than 0.915 mm or more but not over 0.965mm; width not less than 18.65 mm or more but not over19.25 mm; with a two-layer coating; the first layer consisting of tin 9 to 11 percent, lead 9 to 11 percent, zinc less than 1 percent, other materials (other than copper) not over 1 percent, balance copper; the second layer consisting of lead 33 to 37 percent, aromatic polyester 13 to 17 percent, other materials (other than polytetrafluoroethylene (PTFE)) less than 2 percent, balance PTFE.

Product 16

Flat-rolled coated SAE 1009 steel in coils with thickness not less than 0.920 mm or more but not over 0.970 mm; width not less than 21.35 mm or more but not over 21.95 mm; with a two-layer coating; the first layer consisting of tin 9 to 11 percent, lead 9 to 11 percent, zinc less than 1 percent, other materials (other than copper) not over 1 percent, balance copper; the second layer consisting of lead 33 to 37 percent, aromatic polyester 13 to 17 percent, other materials (other than PTFE) less than 2 percent, balance PTFE.

Product 17

Flat-rolled coated SAE 1009 steel in coils with thickness not less than 1.80 mm or more but not over 1.85 mm, width not less than 14.7 mm or more but not over 15.3 mm; with a lining consisting of tin 2.5 to 4.5 percent, lead 21.0 to 25.0 percent, zinc less than 3 percent, iron less than 0.35 percent, other materials (other than copper) less than 1 percent, balance copper.

Product 18

Flat-rolled coated SAE 1009 steel in coils with thickness 1.59 mm or more but not over 1.64 mm; width 14.5 mm or more but not over 15.1 mm; with a lining consisting of tin 2.3 to 4.2 percent, lead 20 to 25 percent, iron 1.5 to 4.5 percent, phosphorus 0.2 to 2.0 percent, other materials (other than copper) less than 1 percent, balance copper.

Product 19

Flat-rolled coated SAE 1009 steel in coils with thickness not less than 1.75 mm or more but not over 1.8 mm; width not less than 18.0 mm or more but not over 18.6 mm; with a lining consisting of tin 2.3 to 4.2 percent, lead 20 to 25 percent, iron 1.5 to 4.5 percent, phosphorus 0.2 to 2.0 percent, other materials (other than copper) less than 1 percent, balance copper.

Product 20

Flat-rolled coated SAE 1009 steel in coils with thickness 1.59 mm or more but not over 1.64 mm; width 13.6 mm or more but not over14.2 mm; with a lining consisting of tin 2.3 to 4.2 percent, lead 20 to 25 percent, iron 1.5 to 4.5 percent, phosphorus 0.2 to 2.0 percent, other materials (other than copper) less than 1 percent, with a balance copper.

Product 21

Flat-rolled coated SAE 1009 steel in coils with thickness 1.59 mm or more but not over 1.64 mm; width 11.5 mm or more but not over 12.1 mm; with a lining consisting of tin 2.3 to 4.2 percent, lead 20 to 25 percent, iron 1.5 to 4.5 percent, phosphorus 0.2 to 2.0 percent, other materials (other than copper) less than 1 percent, balance copper.

Product 22

Flat-rolled coated SAE 1009 steel in coils with thickness 1.59 mm or more but not over 1.64 mm; width 11.2 mm or more but not over 11.8 mm, with a lining consisting of copper 0.7 to 1.3 percent, tin 17.5 to 22.5 percent, silicon less than 0.3 percent, nickel less than 0.15 percent, other materials less than 1 percent, balance aluminum.

Product 23

Flat-rolled coated SAE 1009 steel in coils with thickness 1.59 mm or more but not over1.64 mm; width 7.2 mm or more but not over 7.8 mm; with a lining consisting of copper 0.7 to 1.3 percent, tin 17.5 to 22.5 percent, silicon less than 0.3 percent, nickel less than 0.15 percent, other materials (other than copper) less than 1 percent, balance copper.

Product 24

Flat-rolled coated SAE 1009 steel in coils with thickness 1.72 mm or more but not over 1.77 mm; width 7.7 mm or more but not over 8.3 mm; with a lining consisting of copper 0.7 to 1.3 percent, tin 17.5 to 22.5 percent, silicon less than 0.3 percent, nickel less than 0.15 percent, other materials (other than copper) less than 1 percent, balance copper.

Final Results of Review and Revocation of Antidumping Duty Order, In Part

Pursuant to sections 751(d)(1) and 782(h)(2) of the Act, as amended (the Act), the Department may revoke an antidumping or countervailing duty order based on a review under section 751(b) of the Act (*i.e.*, a changed circumstances review). Section 751(b)(1) of the Act requires a changed circumstances review to be conducted upon receipt of a request which shows changed circumstances sufficient to warrant a review.

In this case, based on the information provided by Taiho, and comments from U.S. Steel and ISG, the Department preliminarily found that the continued relief provided by the order with respect to the 24 separate products from Japan is no longer of interest to the domestic industry. We did not receive any comments. Therefore, the Department is revoking the order on CORE from Japan with regard to the products that meet the specifications detailed above.

We will instruct U.S. Customs and Border Protection (CBP) to liquidate without regard to antidumping duties, and to refund any estimated antidumping duties collected on all unliquidated entries of the 24 separate products which are not covered by the final results of an administrative review or automatic liquidation. The most recent period for which the Department has completed an administrative review, or ordered automatic liquidation, is August 1, 2002 through July 31, 2003. Therefore, we will instruct CBP to liquidate entries entered, or withdrawn from warehouse, for consumption on or after August 1, 2003, *i.e.*, after the close of the last completed review. Any prior entries are subject to either the final results of review or automatic liquidation. We will also instruct CBP to pay interest on such refunds in accordance with section 778 of the Act and 19 CFR 351.222(g)(4).

This changed circumstances administrative review, partial revocation of the antidumping duty order and notice are in accordance with sections 751(b) and (d) and 782(h) of the Act and section 351.216(e) and 351.222(g)(1)(i) of the Department's regulations.

Dated: January 26, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–374 Filed 1–31–05; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

(A–351–838)

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Brazil[1]

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

EFFECTIVE DATE: February 1, 2005.

FOR FURTHER INFORMATION CONTACT: Kate Johnson or Rebecca Trainor, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4929 or (202) 482–4007, respectively.

SUPPLEMENTARY INFORMATION:

Amendment to Final Determination

In accordance with sections 735(a) and 777(i)(1) of the Tariff Act of 1930, as amended, (the Act), on December 23, 2004, the Department published its notice of final determination of sales at less than fair value (LTFV) in the investigation of certain frozen and canned warmwater shrimp from Brazil. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil*, 69 FR 76910 (*Final Determination*). On December 23, 2004, we received an allegation, timely filed pursuant to 19 CFR 351.224(c)(2), from the petitioners (*i.e.*, Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company) that the Department made a ministerial error with respect to its exclusion of ''dusted'' shrimp from the scope of this investigation. On December 28, 2004, Eastern Fish Company, Inc., and Long John Silver's, Inc., interested parties in this investigation, submitted a response to the petitioners' December 23, 2004, ministerial error allegation. In addition, on December 30, 2004, we received allegations, timely filed pursuant to 19 CFR 351.224(c)(2), from the petitioners and the respondents (*i.e*, Central de Industrialização e Distribuição de Alimentos Ltda. (CIDA) and Empresa de Armazenagem Frigorifica Ltda. (EMPAF)) that the Department also made ministerial errors in the final margin calculations. On January 5 and 10, 2005, we received submissions containing rebuttal comments from the petitioners with respect to the ministerial error allegations made by EMPAF and CIDA, respectively.

After analyzing the submissions filed by CIDA, EMPAF, the petitioners, and the other interested parties, we have determined, in accordance with 19 CFR 351.224(e), that we made the following ministerial errors in our calculations performed for the final determination:

- We inadvertently failed to convert third country variable costs to the same unit of measure as U.S. variable costs before calculating the difference–in-merchandise adjustment for CIDA.
- We inadvertently used incorrect programming to convert normal values to the same unit of measure as the United States price which resulted in an incomplete conversion of normal value for CIDA.
- We inadvertently used an incorrect dataset (CEPTOT) in the final margin program for EMPAF that was not created by the comparison market program.
- We inadvertently allocated the entire amount of the unreconciled difference between the financial statements and the submitted cost to the cost of fresh shrimp for EMPAF.

Correcting these errors results in revised margins for CIDA and EMPAF. In addition, we have revised the calculation of the ''all others'' rate accordingly.

For a detailed discussion of the ministerial errors alleged by the petitioners and the respondents, as well as the Department's analysis, *see* the January 24, 2005, memorandum to Louis Apple from the Team entitled ''Ministerial Error Allegations in the Final Determination of the Antidumping Duty Investigation of Certain Frozen Warmwater Shrimp from Brazil.''

Therefore, in accordance with 19 CFR 351.224(e), we are amending the final determination of sales at LTFV in the

[1] On January 21, 2005, the International Trade Commission (ITC) notified the Department of Commerce (the Department) of its final determination that two domestic like products exist for the merchandise covered by the Department's investigation: 1) certain non-canned warmwater shrimp and prawns; and 2) canned warmwater shrimp and prawns. The ITC determined that imports of canned warmwater shrimp and prawns from Brazil were negligible; therefore, canned warmwater shrimp and prawns will not be covered by the antidumping duty order.

antidumping duty investigation of certain frozen warmwater shrimp from Brazil. The revised weighted–average dumping margins are in the ''Antidumping Duty Order'' section, below.

Antidumping Duty Order

In accordance with section 735(a) of the Act, the Department made its final determination that certain frozen and canned warmwater shrimp from Brazil is being, or is likely to be, sold in the United States at LTFV. *See Final Determination*. On January 21, 2005, the 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 LTFV imports of subject merchandise from Brazil. In its final determination, however, the ITC determined that two domestic like products exist for the merchandise covered by the Department's investigation: 1) certain non–canned warmwater shrimp and prawns; and 2) canned warmwater shrimp and prawns. The ITC determined pursuant to section 735(b)(1)(B) of the Act that imports of canned warmwater shrimp from Brazil are negligible. Therefore, the ITC's affirmative determination of material injury covered all non–canned warmwater shrimp and prawns other than those specifically excluded in the ''Scope of Order'' section, below. Accordingly, the scope of the antidumping duty investigation has been amended as described above to reflect the ITC's distinction between certain non–canned warmwater shrimp and prawns and canned warmwater shrimp and prawns. Specifically, canned warmwater shrimp and prawns are excluded from the scope of the order.

In cases where the ITC specifically excludes a product in its final injury determination, the Department may exclude that product from its final margin calculation. *See Antidumping Duty Orders; Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 64 FR 27756 (May 21, 1999). However, because the respondents did not export or sell canned warmwater shrimp and prawns to the United States during the period of investigation (POI), no recalculation of the dumping margins is warranted, and therefore we are not amending the final determination calculations to exclude any sales of canned warmwater shrimp and prawn products.

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 or the constructed export price of the merchandise for all relevant entries of certain frozen warmwater shrimp from Brazil. These antidumping duties will be assessed on all unliquidated entries of certain frozen warmwater shrimp from Brazil entered, or withdrawn from warehouse, for consumption on or after August 4, 2004, the date on which the Department published its *Notice of Preliminary Determination of Sales at Less that Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from Brazil*, 69 FR 47081 (Aug. 4, 2004), or in the case of EMPAF, on or after August 30, 2004, the date on which the Department published its *Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil*, 69 FR 52860 (August 30, 2004).

On or after the date of publication of this antidumping duty order in the **Federal Register**, CBP will require, at the same time that importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the estimated weighted–average dumping margins as listed below. The ''all others'' rate applies to all exporters of subject merchandise not listed specifically. We determine that the following weighted–average margin percentages exist for the POI:

Exporter/Manufacturer	Original Final Margin	Amended Final Margin
Empresa de Armazenagem Frigorifica Ltda./Maricultura Netuno S.A.	10.70	7.94
Central de Industrialização e Distribuição de Alimentos Ltda./Cia. Exportadora de Produtos do Mar (Produmar)	9.69	4.97
Norte Pesca, S.A.	67.80	67.80
All Others	10.40	7.05

Scope of Order

The scope of this order includes certain warmwater shrimp and prawns, whether frozen, wild–caught (ocean harvested) or farm–raised (produced by aquaculture), head–on or head–off, shell–on or peeled, tail–on or tail–off,[2] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the Penaeidae family. Some examples of the farmed and wild–caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: 1) breaded shrimp and prawns (HTS subheading 1605.20.10.20); 2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell–on or peeled (HTS subheadings 0306.23.00.20 and 0306.23.00.40); 4) shrimp and prawns in prepared meals (HTS subheading

[2] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

1605.20.05.10); 5) dried shrimp and prawns; 6) canned warmwater shrimp and prawns (HTS subheading 1605.20.10.40); 7) certain dusted shrimp; and 8) certain battered shrimp. Dusted shrimp is a shrimp–based product: 1) that is produced from fresh (or thawed–from-frozen) and peeled shrimp; 2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; 3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; 4) with the non–shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and 5) that is subjected to individually quick frozen (IQF) freezing immediately after application of the dusting layer. Battered shrimp is a shrimp–based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par–fried.

The products covered by this order are currently classified under the following HTS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we are directing CBP to continue to suspend liquidation of all entries of certain frozen warmwater shrimp from Brazil. CBP shall require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price as indicated in the chart above. CBP shall discontinue the suspension of liquidation on canned shrimp products and refund any cash deposits made or bonds posted with respect to this merchandise. These instructions suspending liquidation will remain in effect until further notice. This amended determination and order is issued and published pursuant to sections 735(d), 736(a) of the Act, and 19 CFR 351.211.

Dated: January 26, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–368 Filed 1–31–02; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–549–822)

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand[1]

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: February 1, 2005.

FOR FURTHER INFORMATION CONTACT: Irina Itkin or Alice Gibbons, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0656 or (202) 482–0498, respectively.

SUPPLEMENTARY INFORMATION:

Amendment to Final Determination

In accordance with sections 735(a) and 777(i)(1) of the Tariff Act of 1930, as amended, (the Act), on December 23, 2004, the Department published its notice of final determination of sales at less than fair value (LTFV) in the investigation of certain frozen and canned warmwater shrimp from Thailand. *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 FR 76918 (Dec. 23, 2004) (*Final Determination*). On December 23, 2004, we received an allegation, timely filed pursuant to 19 CFR 351.224(c)(2), from the petitioners (*i.e.*, the Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company) that the Department made a ministerial error with respect to its exclusion of ''dusted'' shrimp from the scope of this investigation. On December 28, 2004, Eastern Fish Company, Inc., and Long John Silver's, Inc., interested parties in this investigation, submitted a response to the petitioners' December 23, 2004, ministerial error allegation. In addition, on December 30, 2004, we received allegations, timely filed pursuant to 19 CFR 351.224(c)(2), from the petitioners and the respondents (*i.e.*, Andaman Seafood Co., Ltd., Chanthaburi Seafoods Co., Ltd., and Thailand Fishery Cold Storage Public Co., Ltd. (collectively, the Rubicon Group); Thai I–Mei Frozen Foods Co., Ltd. (Thai I–Mei); and the Union Frozen Products Co., Ltd. (UFP)) that the Department also made ministerial errors in the final margin calculations. On January 6, 2004, we received submissions containing rebuttal comments from the petitioners, the Rubicon Group, and UFP.

After analyzing the Rubicon Group's, Thai I–Mei's, UFP's, and the petitioners' submissions, we have determined, in accordance with 19 CFR 351.224(e), that we made the following ministerial errors in our calculations performed for the final determination:

- We unintentionally calculated more than one cost for the same control number (CONNUM) for the Rubicon Group in several instances;
- We inadvertently compared Thai baht–denominated commission expenses to those denominated in U.S. dollars for Thai I–Mei;
- We incorrectly applied weighted–average costs to merchandise for which the CONNUM was revised in the final determination, rather than using the actual verified costs for certain sales for Thai I–Mei. In correcting this error, we discovered that Thai I–Mei failed to report costs for certain of these re–coded products. Therefore, we based the costs for these products on facts available. As facts available, we used the average total cost of manufacturing of all CONNUMs;
- We recalculated the weighted–average selling expenses and constructed value profit rate for Thai I–Mei using the revised figures for the Rubicon Group and UFP; and
- We revised the calculation of general and administrative and interest expenses for UFP to exclude packaging costs (*i.e.*, reported in the field PACK).

Correcting these errors results in revised margins for the Rubicon Group and Thai I–Mei. In addition, we have revised the calculation of the ''all others'' rate accordingly.

For a detailed discussion of the ministerial errors alleged by the petitioners and respondents, as well as the Department's analysis, see the January 24, 2005, memorandum to Louis Apple from the Team entitled ''Ministerial Error Allegations in the Final Determination of the Antidumping Duty Investigation on Certain Frozen Warmwater Shrimp from Thailand.''

Therefore, in accordance with 19 CFR 351.224(e), we are amending the final

[1] On January 21, 2005, the International Trade Commission (ITC) notified the Department of Commerce (the Department) of its final determination that two domestic like products exist for the merchandise covered by the Department's investigation: 1) certain non-canned warmwater shrimp and prawns; and 2) canned warmwater shrimp and prawns. The ITC determined that there is no injury or threat thereof to the U.S. domestic industry regarding imports of canned warmwater shrimp and prawns from Thailand; therefore, canned warmwater shrimp and prawns will not be covered by the antidumping duty order.

determination of sales at LTFV in the antidumping duty investigation of certain frozen warmwater shrimp from Thailand. The revised weighted–average dumping margins are in the ''Antidumping Duty Order'' section, below.

Antidumping Duty Order

In accordance with section 735(a) of the Act, the Department made its final determination that certain frozen and canned warmwater shrimp from Thailand is being, or is likely to be, sold in the United States at LTFV. *See Final Determination*. On January 21, 2005, the 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 LTFV imports of subject merchandise from Thailand. In its final determination, however, the ITC determined that two domestic like products exist for the merchandise covered by the Department's investigation: 1) certain non–canned warmwater shrimp and prawns; and 2) canned warmwater shrimp and prawns. The ITC determined pursuant to section 735(b)(1) of the Act that a domestic industry in the United States is not materially injured or threatened with material injury by reason of imports of canned warmwater shrimp and prawns from Thailand. Therefore, the ITC's affirmative determination of material injury covered all non–canned warmwater shrimp and prawns other than those specifically excluded in the ''Scope of Order'' section, below. Accordingly, the scope of the antidumping duty investigation has been amended as described above to reflect the ITC's distinction between certain non–canned warmwater shrimp and prawns and canned warmwater shrimp and prawns. Specifically, canned warmwater shrimp and prawns are excluded from the scope of the order.

In cases where the ITC specifically excludes a product in its final injury determination, the Department may exclude that product from its final margin calculation. *See Antidumping Duty Orders; Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 64 FR 27756 (May 21, 1999). However, because the respondents did not export or sell canned warmwater shrimp and prawns to the United States during the period of investigation (POI), no recalculation of the dumping margins is warranted, and therefore we are not amending the final determination calculations to exclude any sales of canned warmwater shrimp and prawn products.

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 or constructed export price of the merchandise for all relevant entries of certain frozen warmwater shrimp from Thailand. These antidumping duties will be assessed on all unliquidated entries of certain frozen warmwater shrimp from Thailand entered, or withdrawn from the warehouse, for consumption on or after August 4, 2004, the date on which the Department published its *Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp From Thailand*, 69 FR 47100 (Aug. 4, 2004).

On or after the date of publication of this antidumping duty order in the **Federal Register**, CBP will require, at the same time that 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 ''all others'' rate applies to all exporters of subject merchandise not listed specifically. We determine that the following weighted–average margin percentages exist for the POI:

Manufacturer/exporter	Original Final Margin	Amended Final Margin
Andaman Seafood Co., Ltd.	5.79	5.91
Chanthaburi Seafoods Co., Ltd.	5.79	5.91
Chanthaburi Frozen Food Co., Ltd.	5.79	5.91
Phattana Seafood Co., Ltd.	5.79	5.91
S.C.C. Frozen Seafood Co., Ltd.	5.79	5.91
Thai I–Mei Frozen Foods Co., Ltd.	6.20	5.29
Thailand Fishery Cold Storage Public Co., Ltd.	5.79	5.91
Thai International Seafood Co., Ltd.	5.79	5.91
The Union Frozen Products Co., Ltd.	6.82	6.82
Wales & Company Universe, Ltd.	5.79	5.91
Y2K Frozen Food Co., Ltd.	5.79	5.91
All Others	6.03	5.95

Scope of Order

The scope of this order includes certain warmwater shrimp and prawns, whether frozen, wild–caught (ocean harvested) or farm–raised (produced by aquaculture), head–on or head–off, shell–on or peeled, tail–on or tail–off,[2] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild–caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

[2] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: 1) breaded shrimp and prawns (HTS subheading 1605.20.10.20); 2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell–on or peeled (HTS subheading 0306.23.00.20 and 0306.23.00.40); 4) shrimp and prawns in prepared meals (HTS subheading 1605.20.05.10); 5) dried shrimp and prawns; 6) canned warmwater shrimp and prawns (HTS subheading 1605.20.10.40); 7) certain dusted shrimp; and 8) certain battered shrimp. Dusted shrimp is a shrimp–based product: 1) that is produced from fresh (or thawed–from-frozen) and peeled shrimp; 2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; 3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; 4) with the non–shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and 5) that is subjected to individually quick frozen (''IQF'') freezing immediately after application of the dusting layer. Battered shrimp is a shrimp–based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par–fried.

The products covered by this order are currently classifiable under the following HTS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we are directing CBP to continue to suspend liquidation of all entries of certain frozen warmwater shrimp from Thailand. CBP shall require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price as indicated in the chart above. CBP shall discontinue the suspension of liquidation on canned shrimp products and refund any cash deposits made or bonds posted with respect to this merchandise. These instructions suspending liquidation will remain in effect until further notice. This amended determination and order is issued and published pursuant to section 735(d), 736(a) of the Act, and 19 CFR 351.211.

Dated: January 26, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–369 Filed 1–31–05; 8:45 am]

BILLING CODE: 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

(A–533–840)

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India[1]

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: February 1, 2005.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood or Jill Pollack, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3874 or (202) 482–4593, respectively.

SUPPLEMENTARY INFORMATION:

Amendment to Final Determination

In accordance with sections 735(a) and 777(i)(1) of the Tariff Act of 1930, as amended, (the Act), on December 23, 2004, the Department published its notice of final determination of sales at less than fair value (LTFV) in the investigation of certain frozen and canned warmwater shrimp from India. *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India*, 69 FR 76916 (Dec. 23, 2004) (*Final Determination*). On December 23, 2004, we received an allegation, timely filed pursuant to 19 CFR 351.224(c)(2), from the petitioners (*i.e.*, the Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company) that the Department made a ministerial error with respect to its exclusion of ''dusted'' shrimp from the scope of this investigation. On December 28, 2004, Eastern Fish Company, Inc., and Long John Silver's, Inc., interested parties in this investigation, submitted a response to the petitioners' December 23, 2004, ministerial error allegation. In addition, on December 30, 2004, we received allegations, timely filed pursuant to 19 CFR 351.224(c)(2), from the petitioners and the respondents (*i.e.*, Devi Sea Foods Limited (Devi), and Hindustan Lever Limited (HLL)) that the Department also made ministerial errors in the final margin calculations. On January 6, 2004, we received submissions containing rebuttal comments from the petitioners and HLL.

After analyzing Devi's, HLL's, and the petitioners' submissions, we have determined, in accordance with 19 CFR 351.224(e), that we made the following ministerial errors in our calculations performed for the final determination:

- We inadvertently calculated packing expenses on a per–kilogram basis rather than a per–pound basis for Devi;
- We inadvertently failed to use the revised packaging costs submitted at verification in the calculation of Devi's total cost of production;
- We inadvertently subtracted HLL's marine insurance revenue from U.S. price, instead of treating it as an offset to movement expenses; and
- We inadvertently excluded direct labor costs from our calculation of HLL's variable manufacturing costs.

Correcting these errors results in revised margins for Devi and HLL. In addition, we have revised the calculation of the ''all others'' rate accordingly.

For a detailed discussion of all of the ministerial errors alleged by the petitioners and the respondents, as well as the Department's analysis, see the January 24, 2005, memorandum to Louis Apple from the team entitled, ''Ministerial Error Allegations in the Final Determination of the Antidumping Duty Investigation on Certain Frozen Warmwater Shrimp from India.''

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

[1] On January 21, 2005, the International Trade Commission (ITC) notified the Department of Commerce (the Department) of its final determination that two domestic like products exist for the merchandise covered by the Department's investigation: 1) certain non-canned warmwater shrimp and prawns; and 2) canned warmwater shrimp and prawns. The ITC determined that imports of canned warmwater shrimp and prawns from India were negligible; therefore, canned warmwater shrimp and prawns will not be covered by the antidumping duty order.

certain frozen warmwater shrimp from India. The revised weighted–average dumping margins are in the ''Antidumping Duty Order'' section, below.

Antidumping Duty Order

In accordance with section 735(a) of the Act, the Department made its final determination that certain frozen and canned warmwater shrimp from India is being, or is likely to be, sold in the United States at LTFV. *See Final Determination*. On January 21, 2005, the 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 LTFV imports of subject merchandise from India. In its final determination, however, the ITC determined that two domestic like products exist for the merchandise covered by the Deparment's investigation: 1) certain non–canned warmwater shrimp and prawns; and 2) canned warmwater shrimp and prawns. The ITC determined pursuant to section 735(b)(1)(B) of the Act that imports of canned warmwater shrimp from India are negligible. Therefore, the ITC's affirmative determination of material injury covered all non–canned warmwater shrimp and prawns other than those specifically excluded in the ''Scope of Order'' section, below. Accordingly, the scope of the antidumping duty investigation has been amended as described above to reflect the ITC's distinction between certain non–canned warmwater shrimp and prawns and canned warmwater shrimp and prawns. Specifically, canned warmwater shrimp and prawns are excluded from the scope of the order.

In cases where the ITC specifically excludes a product in its final injury determination, the Department may exclude that product from its final margin calculation. *See Antidumping Duty Orders; Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 64 FR 27756 (May 21, 1999). However, because the respondents did not export or sell canned warmwater shrimp and prawns to the United States during the period of investigation (POI), no recalculation of the dumping margins is warranted, and therefore we are not amending the final determination calculations to exclude any sales of canned warmwater shrimp and prawn products.

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 certain frozen warmwater shrimp from India. These antidumping duties will be assessed on all unliquidated entries of certain frozen warmwater shrimp from India entered, or withdrawn from warehouse, for consumption on or after August 4, 2004, the date on which the Department published its *Notice of Preliminary Determination of Sales at Less that Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from India*, 69 FR 47111 (Aug. 4, 2004).

On or after the date of publication of this antidumping duty order in the **Federal Register**, CBP will require, at the same time that importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the estimated weighted–average dumping margins as listed below. The ''all others'' rate applies to all exporters of subject merchandise not listed specifically. We determine that the following weighted–average percentages exist for the POI:

Manufacturer/exporter	Original Final Margin	Amended Final Margin
Devi Sea Foods Ltd.	5.02	4.94
Hindustan Lever Ltd.	13.42	15.36
Nekkanti Seafoods Ltd.	9.71	9.71
All Others	9.45	10.17

Scope of Order

The scope of this order includes certain warmwater shrimp and prawns, whether frozen, wild–caught (ocean harvested) or farm–raised (produced by aquaculture), head–on or head–off, shell–on or peeled, tail–on or tail–off,[2] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild–caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: 1) breaded shrimp and prawns (HTS subheading 1605.20.10.20); 2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell–on or peeled (HTS subheadings 0306.23.00.20 and 0306.23.00.40); 4) shrimp and prawns in prepared meals (HTS subheading 1605.20.05.10); 5) dried shrimp and prawns; 6) canned warmwater shrimp and prawns (HTS subheading1605.20.10.40); 7) certain dusted shrimp; and 8) certain battered shrimp. Dusted shrimp is a shrimp–based product: 1) that is produced from fresh (or thawed–from-frozen) and peeled shrimp; 2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; 3) with

[2] Tails''in this context means the tail fan, which includes the telson and the uropods.

the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; 4) with the non–shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and 5) that is subjected to individually quick frozen (IQF) freezing immediately after application of the dusting layer. Battered shrimp is a shrimp–based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par–fried.

The products covered by this order are currently classifiable under the following HTS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we are directing CBP to continue to suspend liquidation of all entries of certain frozen warmwater shrimp from India. CPB shall require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price as indicated in the chart above. CBP shall discontinue the suspension of liquidation on canned shrimp products and refund any cash deposits made or bonds posted with respect to this merchandise. These instructions suspending liquidation will remain in effect until further notice. This amended determination and order is issued and published pursuant to section 735(d) and 736(a) of the Act, and 19 CFR 351.211.

Dated: January 26, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–370 Filed 1–31–05; 8:45 am]

BILLING CODE: 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–893]

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China [1]

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* February 1, 2005.

FOR FURTHER INFORMATION CONTACT: Alex Villanueva, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3208.

Amendment to the Final Determination

In accordance with sections 735(d) and 777(i)(1) of the Tariff Act of 1930, as amended, (''the Act''), on December 8, 2004, the Department of Commerce (''the Department'') published its final determination of sales at less than fair value (''LTFV'') in the investigation of certain frozen and canned warmwater shrimp from the People's Republic of China (''PRC''). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China*, 69 FR 70997 (December 8, 2004) (''*Final Determination*'') and corresponding ''Issues and Decision Memorandum'' dated November 29, 2004; *see also Memorandum from Julia Hancock, Case Analyst, through Alex Villanueva, Program Manager, to James Doyle, Office Director, Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China: Section A Respondents' Issue Memorandum*, dated November 29, 2004 (''*Section A Respondents Issue Memorandum*'').

Between December 7, 2004, and December 13, 2004, the following parties filed timely allegations that the Department made various ministerial errors in the *Final Determination*. On December 7, 2004, 16 of the 18 Section A Respondents that had been denied a separate rate by the Department in *Final Determination*, filed timely comments alleging ministerial errors in the *Final Determination*: Shantou Sez Xuhao Fastness Freeze Aquatic Factory Co., Ltd., with respect to its denial of a separate rate on the basis of an untranslated sample sales package; ZJ CNF Sea Products Engineering Ltd., Zhoushan Xifeng Aquatic Co., Ltd., Zhejiang Daishan Baofa Aquatic Product Co., Ltd., Zhejiang Taizhou Lingyang Aquatic Products Co., Zhoushan Zhenyang Developing Co., Ltd., Zhejiang Cereals, Oils & Foodstuff Import & Export Co., Ltd., Zhoushan Diciyuan Aquatic Products Co., Ltd., Zhejiang Zhenlong Foodstuffs Co., Ltd., Jinfu Trading Co., Ltd., Taizhou Zhonghuan Industrial Co., Ltd., Zhoushan Haichang Food Co., Zhoushan Putuo Huafa Sea Products Co., Ltd., Zhoushan Industrial Co., Ltd., and Shanghai Linghai Fisheries Economic and Trading Co., with respect to their denial for separate rates on the basis of insufficient evidence of price negotiation; and Zhejiang Evernew Seafood Co., Ltd., with respect to its denial of a separate rate for insufficient evidence of price negotiation and discrepancies with its corporate affiliations.

Also on December 7, 2004, Allied Pacific (H.K.) Co., Ltd., Allied Pacific Aquatic Products (Zhangjiang) Co., Ltd., Allied Pacific Food (Dalian) Co., Ltd., Allied Pacific Aquatic Products (Zhongshan) Co., Ltd., and King Royal Investments, Ltd. (collectively, ''Allied Pacific''), and Yelin Enterprise Co. Hong Kong (''Yelin'') filed timely allegations that the Department made ministerial errors in the *Final Determination* in the margin calculation of each respondent. On December 8, 2004, Shantou Red Garden Foodstuff Co., Ltd. (''Red Garden'') filed a timely allegation that the Department made ministerial errors in the *Final Determination* with respect to its margin calculation and the use of partial adverse facts available.

From December 7, 2004, to December 14, 2004, the Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation, and Indian Shrimp Company (collectively ''Petitioners'') filed timely allegations that the Department made ministerial errors in the *Final Determination* and rebuttal comments to ministerial error allegations made by the interested parties.

On December 13, 2004, Allied Pacific, Yelin, Red Garden, and Zhanjiang Guolian Aquatic Products Co., Ltd. (''Zhanjiang Guolian''), hereinafter

[1] On January 21, 2005, the International Trade Commission (''ITC'') notified the Department of its final determination that two domestic like products exist for the merchandise covered by the Department's investigation: (i) Certain non-canned warmwater shrimp and prawns, as defined above, and (ii) canned warmwater shrimp and prawns. The ITC determined that there is no injury regarding imports of canned warmwater shrimp and prawns from the PRC, therefore, canned warmwater shrimp and prawns will not be covered by the antidumping order.

referred to collectively as ''the Mandatory Respondents,'' filed rebuttal comments to ministerial error allegations submitted by the Petitioners.

On December 16, 2004, Eastern Fish Company, Inc. (''Eastern Fish''), an importer of frozen shrimp and interested party in these investigations, and Long John Silver's, Inc. (''LJS''), a purchaser of shrimp imported by Eastern Fish filed reply comments rebutting Petitioners' ministerial error allegations. On December 17, 2004, Petitioners filed a letter requesting the Department to reject Eastern Fish and LJS's untimely filing. On December 21, 2004, Eastern Fish and LJS filed additional reply comments to Petitioners' ministerial error allegations. Eastern Fish and LJS's December 16, 2004, and the December 21, 2004, submissions were rejected as replies to comments ''must be filed within five days after the date on which the comments were filed with the Secretary.'' *See* Section 351.224(c)(3) of the Department's Regulations. *See Letter from Alex Villanueva, Program Manager, China/NME Unit, Office IX to Eastern Fish and LJS Regarding Ministerial Error Allegation Rebuttal Comments*, dated January 26, 2005.

A ministerial error is defined as an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Department considers ministerial. *See* 19 CFR 351.224(f).

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, as well as the Department's analysis, see *Antidumping Duty Investigation of Certain Frozen Warmwater Shrimp from the People's Republic of China: Analysis of Allegations of Ministerial Error from the Mandatory Respondents and Section A Respondents*, dated January 26, 2005. Additionally, in the *Final Determination*, we determined that several companies qualified for a separate-rate. The margin we calculated in the *Final Determination* for these companies was 55.23 percent. Because the rates of the selected Mandatory Respondents have changed since the *Final Determination*, we have recalculated the rate for the Section A Respondents which the Department determined to be entitled to a separate rate. The rate for Section A Respondents is now 53.68 percent. *See Memorandum to the File from John D. A. LaRose through Alex Villanueva Regarding the Calculation of Section A Rate*, dated January 26, 2005.

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 certain frozen warmwater shrimp from the PRC. The revised weighted-average dumping margins are in the ''Antidumping Duty Order'' section, below.

Antidumping Duty Order

In accordance with section 735(a) of the Act, the Department made its final determination that certain frozen and canned warmwater shrimp from the PRC is being, or is likely to be, sold in the United States at LTFV as provided in section 735 of the Act. *See Final Determination*. On January 21, 2005, the ITC notified the Department of its final determination pursuant to 735(b)(1)(A)(i) of the Act that an industry in the United States is materially injured by reason of LTFV imports of subject merchandise from the PRC. In its final determination, however, the ITC determined that two domestic like products exist for the merchandise covered by the Department's investigation: (i) Certain non-canned warmwater shrimp and prawns, as defined below, and (ii) canned warmwater shrimp and prawns. The ITC determined pursuant to section 735(b)(1) that a domestic industry in the United States is not materially injured or threatened with material injury by reason of imports of canned warmwater shrimp and prawns from the PRC. Therefore, the ITC's affirmative determination of material injury covered all certain non-canned warmwater shrimp and prawns other than those specifically excluded under the ''Scope of the Order'' section below. Accordingly, the scope of the antidumping duty order has been amended to reflect the ITC's distinction between certain non-canned warmwater shrimp and canned prawns warmwater shrimp and prawns. Specifically, canned warmwater shrimp and prawns are excluded from the scope of the order.

In cases where the ITC specifically excludes a product in its final injury determination, the Department may exclude that product from its final margin calculation. *See Antidumping Duty Orders; Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 64 FR 27756 (May 21, 1999). However, because the Mandatory Respondents did not export or sell canned warmwater shrimp and prawns to the United States during the period of investigation (''POI''), no recalculation of the antidumping margins is warranted, and therefore we are not amending the final determination calculations to exclude any sales of canned warmwater shrimp and prawn products.

In addition, the ITC notified the Department of its final determination that critical circumstances do not exist with respect to imports of subject merchandise from all producers and exporters from the PRC. Therefore, the Department will instruct U.S. Customs and Border Protection (''CBP'') to lift suspension and to release any bond or other security, and refund any cash deposit made, to secure the payment of antidumping duties with respect to entries of the merchandise entered, or withdrawn from warehouse, for consumption prior to the date of publication of the preliminary determination in the **Federal Register**. *See Notice of Preliminary Determination of Sales at Less than Fair Value and Postphonement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China*, 69 FR 42654 (July 16, 2004) (''*Preliminary Determination*'').

In accordance with section 736(a)(1) of the Act, the Department will direct 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 certain frozen warmwater shrimp from the PRC. These antidumping duties will be assessed on all unliquidated entries of certain frozen warmwater shrimp and prawns from the PRC entered, or withdrawn from the warehouse, for consumption on or after July 16, 2004, the date on which the Department published its *Preliminary Determination*, 69 FR 42672 (July 16, 2004).

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 certain frozen and canned warmwater shrimp, 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* ended on January 12, 2005. Definitive duties are to begin on the date of publication of the ITC's final injury determination. *See* Section 737 of the Act. 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 certain frozen and canned warmwater shrimp from the PRC entered, or withdrawn from warehouse, for consumption on or after January 12, 2005, 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. Imports of the noted canned warmwater shrimp and prawns will not be covered by this order. We determine that the following percentage weighted-average margins exist for the POI:

CERTAIN FROZEN AND CANNED WARMWATER SHRIMP FROM CHINA

Manufacturer/exporter	Weighted-average margin (percent)
Mandatory Respondents	
Allied Pacific Group	80.19
Yelin Enterprise Co. Hong Kong	82.27
Shantou Red Garden Foodstuff Co., Ltd.	27.89
Zhanjiang Guolian Aquatic Products Co., Ltd.	0.07
PRC-Wide Margin	112.81
Section A—Respondents Receiving Separate Rate	
Asian Seafoods (Zhanjiang) Co., Ltd.	53.68
Beihai Zhengwu Industry Co., Ltd.	53.68
Chaoyang Qiaofeng Group Co., Ltd.; (Shantou Qiaofeng (Group) Co., Ltd.); (Shantou/Chaoyang Qiaofeng)	53.68
Chenghai Nichi Lan Food Co., Ltd.	53.68
Dalian Ftz Sea-Rich International Trading Co., Ltd.	53.68
Dongri Aquatic Products Freezing Plants	53.68
Fuqing Dongwei Aquatic Products Industry Co., Ltd.	53.68
Gallant Ocean (Liangjiang) Co., Ltd.	53.68
Hainan Fruit Vegetable Food Allocation Co., Ltd.	53.68
Hainan Golden Spring Foods Co., Ltd./Hainan Brich Aquatic Products Co., Ltd.	53.68
Jinfu Trading Co., Ltd.	53.68
Kaifeng Ocean Sky Industry Co., Ltd.	53.68
Leizhou Zhulian Frozen Food Co., Ltd.	53.68
Pingyang Xinye Aquatic Products Co., Ltd.	53.68
Savvy Seafood Inc.	53.68
Shanghai Taoen International Trading Co., Ltd	53.68
Shantou Wanya Food Factory Co., Ltd.	53.68
Shantou Jinyuan District Mingfeng Quick-Frozen Factory	53.68
Shantou Long Feng Foodstuffs Co., Ltd. (Shantou Longfeng Foodstuffs Co., Ltd.)	53.68
Shantou Ocean Freezing Industry and Trade General Corporation	53.68
Shantou Shengping Oceanstar Business Co., Ltd.	53.68
Shantou Yuexing Enterprise Company	53.68
Shantou Ruiyuan Industry Co., Ltd.	53.68
Shantou Freezing Aquatic Product Food Stuffs Co.	53.68
Shantou Jinhang Aquatic Industry Co., Ltd.	53.68
Xuwen Hailang Breeding Co., Ltd.	53.68
Yantai Wei-Cheng Food Co., Ltd.	53.68
Zhangjiang Bobogo Ocean Co., Ltd.	53.68
Zhangjiang Newpro Food Co., Ltd.	53.68
Zhanjiang Go-Harvest Aquatic Products Co., Ltd.	53.68
Zhanjiang Runhai Foods Co., Ltd.	53.68
Zhanjiang Evergreen Aquatic Product Science and Technology Co., Ltd.	53.68
Zhanjiang Universal Seafood Corp.	53.68
Zhejiang Cereals, Oils & Foodstuff Import & Export Co., Ltd.	53.68
Zhoushan Xifeng Aquatic Co., Ltd.	53.68
Zhoushan Huading Seafood Co., Ltd.	53.68
Zhoushan Cereals, Oils and Foodstuffs Import and Export Co., Ltd.	53.68
Zhoushan Lizhou Fishery Co., Ltd.	53.68
Zhoushan Diciyuan Aquatic Products Co., Ltd.	53.68

Scope of the Order

The scope of this order includes certain warmwater shrimp and prawns, whether frozen, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[2] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this investigation, regardless of definitions in the Harmonized Tariff Schedule of the United States (''HTS''), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this investigation. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this investigation.

Excluded from the scope are: (1) Breaded shrimp and prawns (HTS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) Lee Kum Kee's shrimp sauce; (7) canned warmwater shrimp and prawns (HTS subheading 1605.20.10.40); (8) certain dusted shrimp; and (9) certain battered shrimp. Dusted shrimp is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (''IQF'') freezing immediately after application of the dusting layer. Battered shrimp is a shrimp-based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this investigation are currently classified under the following HTS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this investigation is dispositive.

Continuation of Suspension of Liquidation

Pursuant to 735(c)(1)(B) of the Act, we will instruct CBP to suspend liquidation of all entries of certain frozen warmwater shrimp and prawns from the PRC (except merchandise produced and exported by Zhanjiang Guolian because this company has a *de minimis* margin) entered, or withdrawn from warehouse, for consumption on or after July 16, 2004, the date of publication of the *Preliminary Determination*. CBP shall continue to require a cash deposit or the posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as shown above. These instructions suspending liquidation will remain in effect until further notice.

With regard to canned warmwater shrimp and prawns, CBP shall discontinue suspension of liquidation of all shipments of this merchandise entered, or withdrawn from warehouse, for consumption on or after July 16, 2004. All estimated antidumping duties deposited on entries of the canned warmwater shrimp and prawns from the PRC shall be refunded and the bonds or other security released at the time of liquidation.

This order is published in accordance with section 736(a) of the Act and 19 CFR 351.211.

January 26, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

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[2] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–802]

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam [1]

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* February 1, 2004.

FOR FURTHER INFORMATION CONTACT: Alex Villanueva, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3208.

Amendment to the Final Determination

In accordance with sections 735(d) and 777(i)(1) of the Tariff Act of 1930, as amended, (''the Act'') on December 8, 2004, the Department of Commerce (''the Department'') published its final determination of sales at less than fair value (''LTFV'') in the investigation of certain frozen and canned warmwater shrimp from the Socialist Republic of Vietnam (''Vietnam''). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 FR 71005 (December 8, 2004) (''*Final Determination*''). *See Final Determination* and corresponding ''Issues and Decision Memorandum''

[1] On January 21, 2005, the International Trade Commission (''ITC'') notified the Department of its final determination that two domestic like products exist for the merchandise covered by the Department's investigation: (i) Certain non-canned warmwater shrimp and prawns, and (ii) canned warmwater shrimp and prawns. The ITC determined that there is no injury regarding imports of canned warmwater shrimp and prawns from Vietnam, therefore, canned warmwater shrimp and prawns will not be covered by the antidumping order.

dated November 29, 2004; *see also Memorandum from Nicole Bankhead, Case Analyst, through Alex Villanueva, Program Manager, to James Doyle, Office Director, Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam: Final Determination Separate Rates Memorandum for Section A Respondents*, dated November 29, 2004 (''Final Separate Rates Memo'').

Between December 7, 2004, and December 13, 2004, the following parties filed timely allegations that the Department made various ministerial errors in the *Final Determination*. On December 7, 2004, five Section A Respondents, Truc An Company (''Truc An''), Hai Thuan Export Seaproducts Processing Co., Ltd. (''Hai Thuan''), Nha Trang Fisheries Co., Ltd. (''Nha Trang Fisheries''), Ngoc Sinh Seafoods (''Ngoc Sinh''), and Phuong Nam Co., Ltd. (''Phuong Nam''), which had been denied a separate rate by the Department in the *Final Determination,* filed timely requests pursuant to 19 CFR 351.224(e)(1) and (2) requesting that the Department correct alleged ministerial errors in the *Final Determination.* Also on December 7, 2004, the VASEP Shrimp Committee filed ministerial errors regarding additional names to provide in the Department's instructions to the U.S. Customs and Border Protection (''CBP'') to be issued after the final determination. Camau Frozen Seafood Processing Import Export Corporation (''Camimex''), Minh Phu Seafood Corporation (''Min Phu'') and Minh Hai Joint Stock Seafoods Processing Company (''Seaprodex Minh Hai''), hereinafter collectively referred to as ''the Mandatory Respondents,'' also filed timely allegations that the Department made ministerial errors in the *Final Determination*. The Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation and Indian Ridge Shrimp Company, hereinafter referred to collectively as ''Petitioners,'' filed timely allegations that the Department made ministerial errors in the *Final Determination*.

Additionally, on December 7, 2004, Red Chamber on behalf of Phuong Nam filed timely allegations that the Department made ministerial errors in the *Final Determination*. However, because Red Chamber submitted new information in its error allegation, the Department sent Red Chamber a letter requesting that it retract the new information from its December 7, 2004, filing in accordance with section 351.302(d) of the Department's regulations and re-submit it without the new information on December 13, 2004. On December 17, 2004, Red Chamber re-submitted its ministerial error allegation without the new information.

On December 13, 2004, Petitioners filed comments rebutting the Section A Respondents' and Mandatory Respondents' ministerial error allegations. The Mandatory Respondents also submitted comments on December 13, 2004, rebutting Petitioners' ministerial error allegations.

On December 16, 2004, Eastern Fish Company, Inc. (''Eastern Fish''), an importer of frozen shrimp and interested party in these investigations, and Long John Silver's, Inc. (''LJS''), a purchaser of shrimp imported by Eastern Fish filed reply comments rebutting Petitioners' ministerial error allegations. On December 17, 2004, Petitioners filed a letter requesting the Department to reject Eastern Fish and LJS's untimely filing. On December 21, 2004, Eastern Fish and LJS filed additional reply comments to Petitioners' ministerial error allegations. Eastern Fish and LJS's December 16, 2004, and the December 21, 2004, submissions were rejected as replies to comments ''must be filed within five days after the date on which the comments were filed with the Secretary.'' *See* Section 351.224(c)(3) of the Department's regulations. *See Letter from Alex Villanueva, Program Manager, China/NME Unit, Office IX to Eastern Fish and LJS Regarding Ministerial Error Allegation Rebuttal Comments*, dated January 26, 2005.

A ministerial error is defined as an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Department considers ministerial. *See* 19 CFR 351.224(f).

After analyzing all interested party comments and rebuttals, we have determined, in accordance with 19 CFR 351.224(e), that we made ministerial errors in our calculations performed for the final determination. For a detailed discussion of these ministerial errors, as well as the Department's analysis, *see Antidumping Duty Investigation of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Analysis of Allegations of Ministerial Error from the Mandatory Respondents and Section A Respondents*, dated January 26, 2005. Additionally, in the *Final Determination*, we determined that several companies qualified for a separate-rate. The margin we calculated in the Final Determination for these companies was 4.38 percent. Because the rates of the selected mandatory respondents have changed since the *Final Determination*, we have recalculated the rate for Section A respondents. The rate is 4.57 percent. *See Memorandum to the File from Paul Walker, Amended Calculation of Section A Rate*, dated January 26, 2005.

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 certain frozen warmwater shrimp from Vietnam. The revised weighted-average dumping margins are in the ''Antidumping Duty Order'' section, below.

Antidumping Duty Order

In accordance with section 735(a) of the Act, the Department made its final determination that certain frozen and canned warmwater shrimp from Vietnam is being, or is likely to be, sold in the United States at LTFV as provided in section 735 of the Act. See Final Determination. On January 21, 2005, the 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 LTFV imports of subject merchandise from Vietnam. In its final determination, however, the ITC determined that two domestic like products exist for the merchandise covered by the Department's investigation: (i) Certain non-canned warmwater shrimp and prawns, as defined below, and (ii) canned warmwater shrimp and prawns. The ITC determined pursuant to section 735(b)(1) that a domestic industry in the United States is not materially injured or threatened with material injury by reason of imports of canned warmwater shrimp and prawns from Vietnam. Therefore, the ITC's affirmative determination of material injury covered all certain non-canned warmwater shrimp and prawns other than those specifically excluded under the ''Scope of the Order'' section below. Accordingly, the scope of the antidumping duty order has been amended as described below to reflect the ITC's distinction between canned warmwater shrimp and prawns and certain non-canned warmwater shrimp and prawns. Specifically, canned warmwater shrimp and prawns are excluded from the scope of the order.

In cases where the ITC specifically excludes a product in its final injury determination, the Department may exclude that product from its final margin calculation. *See Antidumping Duty Orders; Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan,* 64 FR 27756 (May

21, 1999). However, because the Mandatory Respondents did not export or sell canned warmwater shrimp and prawns to the United States during the POI, no recalculation of the antidumping margins is warranted, and therefore we are not amending the final determination calculations to exclude any sales of canned warmwater shrimp and prawn products.

In accordance with section 736(a)(1) of the Act, the Department will direct 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 certain frozen warmwater shrimp from Vietnam. These antidumping duties will be assessed on all unliquidated entries of certain frozen warmwater shrimp from Vietnam entered, or withdrawn from the warehouse, for consumption on or after July 16, 2004, the date on which the Department published its *Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam* (''*Preliminary Determination*'') 69 FR 42672 (July 16, 2004).

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 certain frozen and canned warmwater shrimp, 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* ended on January 12, 2005. Definitive duties are to begin on the date of publication of the ITC's final injury determination. *See* Section 737 of the Act. 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 certain frozen and canned warmwater shrimp from Vietnam entered, or withdrawn from warehouse, for consumption on or after January 12, 2005, 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 ''Vietnam-wide'' rate applies to all exporters of subject merchandise not listed specifically. Imports of the noted canned warmwater shrimp and prawns will not be covered by this order. We determine that the following percentage weighted-average margins exist for the POI:

CERTAIN FROZEN WARMWATER SHRIMP FROM VIETNAM

Manufacturer/exporter	Weighted-average margin (percent)
Mandatory Respondents	
Camau Frozen Seafood Processing Import Export Corporation [2]	5.24
Kim Anh Company Limited [3]	25.76
Minh Phu Seafood Corporation [4]	4.38
Minh Hai Joint Stock Seafoods Processing Company [5]	4.30
Vietnam-Wide Margin	25.76
Section A Respondents	
Amanda Foods (Vietnam) Ltd.[6]	4.57
Aquatic Products Trading Company [7]	4.57
Bac Lieu Fisheries Company Limited [8]	4.57
Coastal Fisheries Development Corporation [9]	4.57
Cai Doi Vam Seafood Import-Export Company [10]	4.57
Cam Ranh Seafoods Processing Enterprise Company [11]	4.57
Can Tho Agriculture and Animal Products Import Export Company [12]	4.57
Cantho Animal Fisheries Product Processing Export Enterprise [13]	4.57
C.P. Vietnam Livestock Co. Ltd.	4.57
Cuu Long Seaproducts Company [14]	4.57
Danang Seaproducts Import Export Corporation [15]	4.57
Hanoi Seaproducts Import Export Corporation [16]	4.57
Investment Commerce Fisheries Corporation [17]	4.57
Kien Giang Sea-Product Import-Export Company [18]	4.57
Minh Hai Export Frozen Seafood Processing Joint-Stock Company [19]	4.57
Minh Hai Seaproducts Import Export Corporation [20]	4.57
Ngoc Sinh Private Enterprise [21]	4.57
Nha Trang Fisheries Joint Stock Company [22]	4.57
Nha Trang Seaproduct Company [23]	4.57
Pataya Food Industries (Vietnam) Ltd.[24]	4.57
Phu Cuong Seafood Processing and Import-Export Company Limited [25]	4.57
Phuong Nam Co. Ltd.[26]	4.57
Sao Ta Foods Joint Stock Company [27]	4.57
Soc Trang Aquatic Products and General Import Export Company [28]	4.57
Song Huong ASC Import-Export Company Ltd.[29]	4.57
Thuan Phuoc Seafoods and Trading Corporation [30]	4.57

CERTAIN FROZEN WARMWATER SHRIMP FROM VIETNAM—Continued

Manufacturer/exporter	Weighted-average margin (percent)
UTXI Aquatic Products Processing Company [31]	4.57
Viet Foods Co., Ltd.[32]	4.57
Viet Nhan Company	4.57
Viet Hai Seafood Company Ltd.[33]	4.57
Vinh Loi Import Export Company [34]	4.57

[2] Also known as Camimex and Camau Seafood Factory No. 4.
[3] Not a separate rate.
[4] Also known as Minh Phu Seafood Export-Import Corporation, Minh Phu, Minh Phu Seafood Pte., Minh Qui Seafood Co. Ltd., Minh Qui, Minh Phat Seafood Co. Ltd. and Minh Phat.
[5] Also known as Seaprodex Minh Hai.
[6] Also known as Amanda VN and Amanda.
[7] Also known as APT and A.P.T. Co.
[8] Also known as Bac Lieu, BACLIEUFIS, Bac Lieu Fis, Bac Lieu Fisheries Co. Ltd., Bac Lieu Fisheries Limited Company and Bac Lieu Fisheries Company Ltd.
[9] Also known as COFIDEC.
[10] Also known as Cadovimex.
[11] Also known as Cam Ranh.
[12] Also known as Cataco, Duyen Hai Foodstuffs Processing Factory, Caseafood, Coseafex and Cantho Seafood Export.
[13] Also known as Cafatex, Cafatex Vietnam, Xi Nghiep Che Bien Thuy Suc San Xuat Khau Can Tho, CAS, CAS Branch, Cafatex Saigon, Cafatex Fishery Joint Stock Corporation, Cafatex Corporation and Taydo Seafood Enterprise.
[14] Also known as Cuu Long Seapro.
[15] Also known as Seaprodex Danang, Tho Quang Seafood Processing and Export Company and Tho Quang.
[16] Also known as Seaprodex Hanoi.
[17] Also known as INCOMFISH, Investment Commerce Fisheries Corp., INCOMFISH CORP. and INCOMFISH CORPORATION.
[18] Also known as KISIMEX, Kien Giang Seaproduct Import & Export Company, Kien Giang Seaproduct Import and Export Company, Kien Giang Seaproduct Import Export Co., Kien Giang Sea Product Import & Export Co., Kien Giang Sea Product Import and Export Company, Kien Giang Sea Product Import & Export Company, Kien Giang Sea Product Import & Export Co. and Kien Giang Sea Product Im. & Ex. Co.
[19] Also known as Minh Hai Jostoco.
[20] Also known as Seaprimexco.
[21] Also known as Ngoc Sinh Seafoods, Ngoc Sinh Fisheries, Ngoc Sinh Private Enterprises, Ngoc Sinh Seafoods Processing and Trading Enterprises and Ngoc Sinh.
[22] Also known as Nhatrang Fisheries Joint Stock Company, Nha Trang Fisco and Nhatrang Fisco.
[23] Also known as Nha Trang Seafoods.
[24] Also known as Pataya VN.
[25] Also known as Phu Cuong Seafood Processing Import-Export Company Ltd., Phu Cuong Co., Phu Cuong, Phu Cuong Seafood Processing & Import-Export Co. Ltd., Phu Cuong Seafood Processing, Phu Cuong Co. Ltd. and Phu Cuong Seafood Processing Import & Export Company Limited.
[26] Also known as Phuong Nam Company Limited and Phuong Nam.
[27] Also known as Fimex VN, Saota Seafood Factory and Sao Ta Seafood Factory.
[28] Also known as STAPIMEX.
[29] Also known as Song Huong ASC Joint Stock Company, SOSEAFOOD, ASC, Song Huong Import Export Seafood Joint Stock Company, Song Huong Import-Export Seafood Joint Stock Company, Song Huong Import Export Seafood Company, Song Huong Seafood Import-Export Company, Song Huong Seafood Import Export Co., Song Huong Seafood Im-Export Co., SongHuong and Songhuong Joint Stock Company.
[30] Also known as Frozen Seafoods Factory No. 32.
[31] Also known as UTXI, UTXI Co. Ltd., UT XI Aquatic Products Processing Company and UT–XI Aquatic Products Processing Company.
[32] Also known as Viet Foods, Nam Hai Exports Food Stuff Limited, Nam Hai Export Foodstuff Company Ltd., Vietfoods Co. Ltd., Viet Foods Company Limited and Vietfoods Company Limited.
[33] Also known as Vietnam FishOne, Vietnam Fish-One Company Co. Ltd., Vietnam Fish-One, Vietnam Fish-One Co. Ltd., Vietnam Fish One Co. Ltd., Vietnam Fish One Company Limited and Vietnam Fish-One Company Limited.
[34] Also known as VIMEXCO, Vinh Loi Import/Export Co., VIMEX, VinhLoi Import Export Company and Vinh Loi Import-Export Company.

Scope of the Order

The scope of this order includes certain warmwater shrimp and prawns, whether frozen, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[35] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this investigation, regardless of definitions in the Harmonized Tariff Schedule of the United States (''HTS''), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this investigation. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this investigation.

Excluded from the scope are: (1) Breaded shrimp and prawns (HTS

[35] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns (HTS subheading 1605.20.10.40); (7) certain dusted shrimp; and (8) certain battered shrimp. Dusted shrimp is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (''IQF'') freezing immediately after application of the dusting layer. Battered shrimp is a shrimp-based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this investigation are currently classified under the following HTS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this investigation is dispositive.

Continuation of Suspension of Liquidation

Pursuant to 735(c)(1)(B) of the Act, we will instruct CBP to continue to suspend liquidation of all entries of certain frozen warmwater shrimp and prawns from Vietnam entered, or withdrawn from warehouse, for consumption on or after July 16, 2004, the date of publication of the *Preliminary Determination.* CBP shall continue to require a cash deposit or the posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as shown above. These instructions suspending liquidation will remain in effect until further notice.

With regard to canned warmwater shrimp and prawns, CBP shall discontinue suspension of liquidation of all shipments of this merchandise entered, or withdrawn from warehouse, for consumption on or after July 16, 2004. All estimated antidumping duties deposited on entries of the canned warmwater shrimp and prawns from Vietnam shall be refunded and the bonds or other security released at the time of liquidation.

This order is published in accordance with section 736(a) of the Act and 19 CFR 351.211.

Dated: January 26, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–372 Filed 1–31–05; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

(A–331–802)

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Ecuador [1]

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: February 1, 2005.

FOR FURTHER INFORMATION CONTACT: David J. Goldberger or Terre Keaton, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4136, or (202) 482–1280, respectively.

SUPPLEMENTARY INFORMATION:

Amendment to Final Determination

In accordance with sections 735(a) and 777(i)(1) of the Tariff Act of 1930, as amended, (the Act), on December 23, 2004, the Department published its notice of final determination of sales at less than fair value (LTFV) in the investigation of certain frozen and canned warmwater shrimp (shrimp) from Ecuador. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Ecuador*, 69 FR 76913 (Dec. 23, 2004) (*Final Determination*). On December 23, 2004, we received an allegation, timely filed pursuant to 19 CFR 351.224(c)(2), from the petitioners (*i.e.*, Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company) that the Department made a ministerial error with respect to its exclusion of ''dusted'' shrimp from the scope if this investigation. On December 28, 2004, Eastern Fish Company, Inc., and Long John Silver's Inc., interested parties in this investigation, submitted a response to the petitioners' December 23, 2004, ministerial error allegation. In addition, on December 30, 2004, we received allegations, timely filed pursuant to 19 CFR 351.224(c)(2), from the petitioners and the respondents (*i.e.*, Exportadora de Alimentos S.A. and (Expalsa) and Promarisco S.A. (Promarisco)) that the Department also made ministerial errors in the final margin calculations.

On January 6, 2005, Exporklore S.A. (Exporklore) submitted rebuttal comments to the petitioners' December 30, 2004, ministerial error allegation. On January 10, 2005, the petitioners submitted rebuttal comments to Expalsa's allegations, and Expalsa submitted rebuttal comments to the petitioners' allegations.

After analyzing Expalsa's, Exporklore's, Promarisco's, and the petitioners' submissions, we have determined, in accordance with 19 CFR 351.224(e), that we made the following ministerial errors in our calculations performed for the final determination:

- We made a ministerial error by using the wrong packing expense variable for weight–averaging U.S. packing expenses in Expalsa's margin program;
- We made a typographical error in the computer programming language intended to exclude substandard merchandise in Expalsa's final determination comparison market and margin programs;
- We made a ministerial error in Expalsa's comparison market program by incorrectly applying the returned sales expenses to all Italian sales made after a certain date, rather than to sales made only to a specific customer after that date;
- We made a ministerial error in revising Expalsa's raw material costs for certain shrimp products by applying the wrong yield factors in our adjustments for these products, thereby overstating Expalsa's raw material costs;

[1] On January 21, 2005, the International Trade Commission (ITC) notified the Department of Commerce (the Department) of its final determination that two domestic like products exist for the merchandise covered by the Department's investigation: 1) certain non-canned warmwater shrimp and prawns; and 2) canned warmwater shrimp and prawns. The ITC determined that imports of canned warmwater shrimp and prawns from Ecuador were negligible; therefore, canned warmwater shrimp and prawns will not be covered by the antidumping duty order.

• We made a typographical error in the computer programming language intended to exclude substandard merchandise in Exporklore's final determination comparison market and margin programs;
• We made a ministerial error with respect to the programming language used in the comparison market and margin calculation programs to revise the count–size ranges for certain shrimp products Exporklore sold to Italian and U.S. customers;
• We made a ministerial error by incorrectly inputting an invoice number in Exporklore's comparison market program for the purpose of correcting a billing adjustment;
• We made a ministerial error by transposing two computer variable names for weight–averaging constructed value selling expenses in the Promarisco comparison market program;
• We made a ministerial error in the programming language for re–allocating U.S. commission and brokerage handling expenses on certain U.S. sales in the Promarisco margin calculation program;
• We made a ministerial error in the programming language in the Promarisco comparison market and margin calculation programs for re–coding the count size for certain products.

Correcting these errors results in revised margins for Expalsa, Exporklore, and Promarisco. The revised margin for Expalsa is *de minimis*; therefore, shrimp produced by Expalsa is excluded from the order. In addition, we have revised the calculation of the ''all others'' rate accordingly.

For a detailed discussion of the ministerial errors alleged by the petitioners and the respondents, as well as the Department's analysis, see the January 24, 2005, memorandum to Louis Apple from the Team entitled ''Ministerial Error Allegations in the Final Determination of the Antidumping Duty Investigation on Certain Frozen Warmwater Shrimp from Ecuador.''

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 certain frozen warmwater shrimp from Ecuador. The revised weighted–average dumping margins are in the ''Antidumping Duty Order'' section, below.

Antidumping Duty Order

In accordance with section 735(a) of the Act, the Department made its final determination that certain frozen and canned warmwater shrimp from Ecuador is being, or is likely to be, sold in the United States at LTFV. *See Final Determination*. On January 21, 2005, the 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 LTFV imports of subject merchandise from Ecuador. In its final determination, however, the ITC determined that two domestic like products exist for the merchandise covered by the Department's investigation:

1) certain non–canned warmwater shrimp and prawns; and 2) canned warmwater shrimp and prawns. The ITC determined pursuant to section 735(b)(1)(B) of the Act that imports of canned warmwater shrimp from Ecuador are negligible. Therefore, the ITC's affirmative determination of material injury covered all non–canned warmwater shrimp and prawns other than those specifically excluded in the ''Scope of Order'' section, below. Accordingly, the scope of the antidumping duty investigation has been amended as described above to reflect the ITC's distinction between certain non–canned warmwater shrimp and prawns and canned warmwater shrimp and prawns. Specifically, canned warmwater shrimp and prawns are excluded from the scope of the order.

In cases where the ITC specifically excludes a product in its final injury determination, the Department may exclude that product from its final margin calculation. *See Antidumping Duty Orders; Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 64 FR 27756 (May 21, 1999). However, because the respondents did not export or sell canned warmwater shrimp and prawns to the United States during the period of investigation (POI), no recalculation of the dumping margins is warranted, and therefore we are not amending the final determination calculations to exclude any sales of canned warmwater shrimp and prawn products.

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 certain frozen warmwater shrimp from Ecuador, except for entries of merchandise produced by Expalsa. These antidumping duties will be assessed on all unliquidated entries of certain frozen warmwater shrimp from Ecuador, except for entries of Expalsa merchandise, entered, or withdrawn from the warehouse, for consumption on or after August 4, 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: Certain Frozen and Canned Warmwater Shrimp from Ecuador*, (''*Preliminary Determination*''), 69 FR 47091 (August 4, 2004).

On or after the date of publication of this antidumping duty order in the **Federal Register**, CBP will require, at the same time that importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the estimated weighted–average dumping margins as listed below. The ''all others'' rate applies to all exporters of subject merchandise not listed specifically. We determine that the following weighted–average margin percentages exist for the POI:

Manufacturer/exporter	Original Final Margin	Amended Final Margin
Exportadora de Alimentos S.A. (Expalsa)	2.62%	1.97% (*de minimis*)
Exporklore S.A. (Exporklore)	2.35%	2.48%
Promarisco S.A. (Promarisco)	4.48%	4.42%
All Others Rate	3.26%	3.58%

Scope of Order

The scope of this order includes certain warmwater shrimp and prawns, whether frozen, wild–caught (ocean harvested) or farm–raised (produced by aquaculture), head–on or head–off, shell–on or peeled, tail–on or tail–off,[2] deveined or not deveined, cooked or

[2] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included under the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild–caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: 1) breaded shrimp and prawns (HTS subheading 1605.20.10.20); 2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell–on or peeled (HTS subheading 0306.23.00.20 and 0306.23.00.40); 4) shrimp and prawns in prepared meals (HTS subheading 1605.20.05.10); 5) dried shrimp and prawns; 6) canned warmwater shrimp and prawns (HTS subheading 1605.20.10.40); 7) certain dusted shrimp; and 8) certain battered shrimp. Dusted shrimp is a shrimp–based product: 1) that is produced from fresh (or thawed–from-frozen) and peeled shrimp; 2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; 3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; 4) with the non–shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and 5) that is subjected to individually quick frozen (IQF) freezing immediately after application of the dusting layer. Battered shrimp is a shrimp–based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par–fried.

The products covered by this investigation are currently classified under the following HTS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we are directing CBP to continue to suspend liquidation of all entries of certain frozen warmwater shrimp from Ecuador, except for entries of merchandise produced by Expalsa, which has a *de minimis* margin and thus is excluded from the antidumping duty order. CPB shall require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price as indicated in the chart above. CBP shall discontinue the suspension of liquidation on canned shrimp products, as well as on frozen warmwater shrimp produced by Expalsa, and refund any cash deposits made or bonds posted with respect to this merchandise. These instructions suspending liquidation will remain in effect until further notice. This amended determination and order is issued and published pursuant to sections 735(d), 736(a) of the Act, and 19 CFR 351.211.

Dated: January 26, 2005.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. E5–373 Filed 1–31–05; 8:45 am]

BILLING CODE: 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[Docket No. 050114011–5011–01]

Special American Business Internship Training Program (SABIT)

AGENCY: International Trade Administration (ITA), U.S. Department of Commerce.

ACTION: Notice.

SUMMARY: This Notice announces availability of funds for the Special American Business Internship Training Program (SABIT), for training business executives and scientists (also referred to as ''Interns'') from Eurasia (see program description for eligible countries). The amount of financial assistance available for the program is $500,000.

DATES: Applications must be received by 5 p.m. Eastern Time on April 1, 2005. Processing of complete applications takes approximately three to six months. All awards will be made by September 30, 2005.

ADDRESSES: Request for Applications: Competitive Application Kits will be available from ITA starting on the day this notice is published. To obtain a copy of the Application Kit please contact SABIT by: (1) E-mail at *SABITApply@ita.doc.gov*, providing your name, company name and address; (2) Telephone (202) 482–0073; (3) The World Wide Web at *http://www.mac.doc.gov/sabit/;* (4) Facsimile (202) 482–2443; (5) Mail: Send a written request with two self-addressed mailing labels to Application Request, The SABIT Program, U.S. Department of Commerce, 1401 Constitution Avenue NW., FCB 4100W, Washington, DC, 20230.

The telephone numbers are not toll free numbers. Only one copy of the Application Kit will be provided to each organization requesting it, but it may be reproduced by the requesters.

FOR FURTHER INFORMATION CONTACT: Tracy M. Rollins, Director, SABIT Program, U.S. Department of Commerce, phone—(202) 482–0073, facsimile—(202) 482–2443. These are not toll free numbers.

SUPPLEMENTARY INFORMATION: *Electronic Access:* The full funding opportunity announcement for the SABIT program is available via Web site: *http://www.fedgrants.gov/*or by contacting the program official identified above.

Funding Availability: Pursuant to section 632(a) of the Foreign Assistance Act of 1961, as amended (the ''Act'') funding to the U.S. Department of

Commerce (DOC) for the program will be provided by the United States Agency for International Development (AID). ITA will award financial assistance and administer the program pursuant to the authority contained in section 635(b) of the Act and other applicable grant rules. The amount of financial assistance available for the program is $500,000. Additional funding may become available at a future date. Financial assistance will be provided through cooperative agreements.

Statutory Authority: 22 U.S.C. 2395(b).

Catalog of Federal Domestic Assistance (CFDA): 11.114, Special American Business Internship Training Program.

Program Description: The ITA established the SABIT program in September 1990 to assist Eurasia's transition to a market economy. Since that time, SABIT has been supporting U.S. companies and organizations that wish to provide business executives and scientists from Eurasia three to six month programs of hands-on training in a U.S. market economy. Under the SABIT program, qualified U.S. firms (Host Firms) will receive funds through a cooperative agreement with ITA to help defray the cost of hosting Interns. The training must take place in the United States. ITA will approve Interns nominated by Host Firms, or assist in identifying eligible candidates. Interns may be citizens of any of the following countries in Eurasia: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. Some Eurasian countries may have certain restrictions with regard to U.S. funding. These restrictions, and any waivers of restrictions, are determined by the U.S. Department of State, not the SABIT program. Information on current restrictions is available upon request, but new restrictions may be put into place after a grant is awarded. The Host Firms will be expected to provide the Interns with a hands-on, non-academic, executive training program designed to maximize their exposure to management or commercially oriented scientific operations. At the end of the training program, the Intern must return to his/her home country. If there is any evidence of a conflict of interest between the nominated Intern and the Host Firm, the Intern is disqualified.

Managers: SABIT assists economic restructuring in Eurasia by providing mid-to-senior level business managers with practical training in American methods of innovation and management in areas such as strategic planning, financing, production, distribution, marketing, accounting, wholesaling, and/or labor relations. This first-hand experience in the U.S. economy enables Interns to become leaders in establishing and operating a market economy in Eurasia, and creates a unique opportunity for Host Firms to familiarize key executives from Eurasia with their products and services. Host Firms will benefit by establishing relationships with managers in similar industries who are uniquely positioned to assist their Host Firms in doing business in Eurasia.

Scientists: SABIT provides opportunities for gifted scientists to apply their skills to peaceful research and development in the civilian sector, in areas such as defense conversion, medical research, and the environment, and exposes them to the role of scientific research in a market economy where applicability of research relates to business success. Host Firms in the U.S. scientific community also benefit from exchanging information and ideas, and different approaches to new technologies.

All internships must last between three to six months; however, ITA reserves the right to allow an Intern to stay for a shorter period of time (not less than one month). ITA will reimburse Host Firms for the round trip international travel (coach class tickets) of each Intern from the Intern's home city in Eurasia to the U.S. internship site, a stipend of $34 per day to the Intern(s), and housing costs of up to $500.00 per month (excluding utilities or telephone services). For cities with higher costs of living, ITA will reimburse Host Firms up to $750.00 a month (excluding utilities or telephone services) for housing costs. Interns must return to their home countries immediately upon completion of their U.S. internships.

Host Firms wishing to utilize SABIT in order to be matched with an Intern without applying for financial assistance may do so. Such firms will be responsible for all costs, including travel expenses, related to sponsoring the Intern. However, prior to acceptance as a SABIT Intern, work plans and candidates must be approved by the SABIT program. Furthermore, program training will be monitored by SABIT staff and evaluated upon completion of training. ITA does not guarantee that it will match Host Firms with the Intern profile provided to SABIT.

Award Period: Recipient firms will have one year from the date listed on the Financial Assistance Award form, CD–450, to expend all funds. However, DOC reserves the right to extend the award period if the Host Firm can justify the need for extra time.

Eligibility: Eligible applicants for the SABIT program include all for-profit or non-profit U.S. corporations, associations, organizations or other public or private entities located in the United States. Agencies or divisions of the Federal Government are not eligible. However, state and local governments are eligible.

Matching Requirements: The SABIT program budget does not include matching requirements, however, Host Firms are expected to bear the costs beyond the $34 per day stipend, additional lodging costs (including utilities and local telephone service) beyond the reimbursed amount, any training-related travel within the United States, visa cost, emergency medical insurance, training manuals and provisions of the hands-on training for the Interns.

Project Funding Priorities: Applicants must indicate business sector(s). Although applicants operating in any industry sector may apply to the program, priority consideration is given to those operating in the following sectors: (a) Agribusiness (including food processing and distribution, and agricultural equipment), (b) Environment (including environmental clean up), (c) Financial services (including banking and accounting), (d) Construction and infrastructure development (including housing and transportation), (e) Medical equipment, supplies, pharmaceuticals, and health care management. Priority funding will also be given to applicants applying to host Interns from the following countries: Armenia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan.

Evaluation and Selection Procedures: Each application will receive an independent, objective review by one or more three or four-member review panels qualified to evaluate applications submitted under the program. Panels may include federal employees and non-federal individuals. No consensus advice will be given by the panel. Applications received before the deadline will be evaluated on a competitive basis in accordance with the selection evaluation criteria set forth below. Applications that have received a passing score of 70 or above, based on the weighted evaluation criteria, will be ranked and awards will be made by the selecting official based on the evaluation criteria and selection factors until funds are depleted. Applications receiving scores below 70 will not be considered. ITA reserves the right to

limit the award amount as well as the number of Interns per applicant.

Applicants must provide evidence of a satisfactory record of performance in grants, contracts and/or cooperative agreements with the Federal Government, if applicable. Applicants who are or have been deficient in current or recent performance in their grants, contracts, and/or cooperative agreements with the Federal Government shall be presumed to be unable to meet this requirement. If the applicant has a Federal Government Performance Record Statement, this must be specified in the Application Kit. If there is no record to date, the applicant should indicate this. Applicants who do not have a Federal Government Performance Record Statement will not be penalized.

Evaluation Criteria: Consideration for financial assistance will be given to those applications that provide the following (listed in order of decreasing importance so that criterion number 1 is most important, followed by criterion number 2, etc.):

(1) *Work Plan.* The applicant must provide a detailed work plan for the intended training. If the applicant is providing different training plans for different Interns, it MUST attach a separate work plan for each. If Interns will be trained on the same plan, only one plan needs to be attached. If an internship will take place at several organizations, a work plan for each organization must be provided. The work plan must include: (a) A detailed week-by-week description of internship activities; (b) a description of the Intern's duties and responsibilities; (c) complete contact information for the everyday internship coordinator; (d) locations of training within the company, if the internship(s) will be in different divisions; (e) locations of training outside the company. If the Intern will spend substantial amounts of time at one or more external organizations or companies (over one week) the applicant MUST provide a letter from each of those companies, indicating their willingness and ability to provide the planned training. Evaluation Scale: 0–40 points.

(2) *Training Objectives Statement.* The applicant must provide an objectives statement, clearly titled ''Training Objectives'' with the name of the applicant noted indicating the reason why the applicant wishes to provide a professional training experience to an Intern. The applicant must explain how the proposed training would further the intent and goals of the SABIT program to provide practical, on-the-job, non-academic, non-classroom training for a professional-level Intern. Evaluation Scale: 0–30 points.

(3) *Intern Description(s) and Resume(s):* The applicant should provide descriptions of the experience, education, and skills desired in an Intern for the training they intend to provide. If an applicant desires Interns from a specific region or country of Eurasia, it should be indicated in the application. If an applicant has nominated Interns for training, the Interns' resumes must be attached. Additionally, the applicant must describe the relationship that it has with each Intern. All Interns must meet SABIT criteria in order to participate. Evaluation Scale: 0–15 points.

(4) *Financial Resources Documentation:* Applicants must provide evidence of adequate financial resources to cover the costs involved in providing an internship(s). Evidence may include a published annual report, or a letter from the applicant's outside, independent accountant attesting to the applicant's financial ability to support the training program planned and the funds requested or a letter from the applicant's bank. All letters must be on the accountant's or bank's letterhead and addressed to the United States Department of Commerce. Evaluation Scale: 0–15 points.

Selection Factors: The selecting official reserves the right to select Host Firms based on U.S. geographic location, organization size as well as priority business sectors and country priorities (listed in Project Funding Priorities, above) and past performance. Host Firms may be eligible, pursuant to approval of an amendment of an active award, to host additional Interns under the program. The Director of the SABIT program is the selecting official for each award.

Intergovernmental Review: Applications under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Application Forms and Kit: To obtain an Application Kit, please refer to the section above marked **ADDRESSES**. An original and two copies of the application (including all relevant standard forms and supplemental material) are to be sent to the address designated in the Application Kit and must be received no later than 5 p.m. Eastern Time on the closing date. Applicants are encouraged to sign the original application (including forms) with blue ink.

Other Requirements: DOC's Pre-Award Notification Requirements for Grants and Cooperative Agreements, which are contained in **Federal Register** Notice of December 30, 2004 (69 FR 78389), are applicable to this solicitation.

All applicants are advised of the following:

1. Host Firms will be required to comply with all relevant U.S. tax and export regulations. Export controls may relate not only to licensing of products for export, but also to technical data transfer. DOC's Bureau of Industry and Security (BIS formerly BXA, the Bureau of Export Administration) reviews applications to determine whether export licenses are required. SABIT will not award a grant until any export license issue has been satisfied.

2. The following statutes apply to this program: Section 907 of the FREEDOM Support Act, Public Law 102–511, 22 U.S.C. 5812 note (Restriction on Assistance to the Government of Azerbaijan); Public Law 107–115 (Waiver of Section 907 of the FREEDOM Support Act); 7 U.S.C. 5201 *et seq.* (Agricultural Competitiveness and Trade—the Bumpers Amendment); The Foreign Assistance Act of 1961, as amended, including Chapter 11 of Part I, Section 498A(b), Public Law 102–511, 22 U.S.C. 2295a(b) (regarding ineligibility for assistance); 22 U.S.C. 2420(a), Section 660(a) of The Foreign Assistance Act of 1961, as amended (Police Training Prohibition); and provisions in the annual Foreign Operations, Export Financing, and Related Programs Appropriations Acts, concerning impact on jobs in the United States (*see, e.g.*, Section 536 of Pub. L. 106–113).

3. The collection of information is approved by the Office of Management and Budget (OMB), OMB Control Number 0625–0225. Public reporting for this collection of information is estimated to be eight hours per response, including the time for reviewing instructions, and completing and reviewing the collection of information. All responses to this collection of information are voluntary, and will be protected from disclosure to the extent allowed under the Freedom of Information Act.

The use of Standard Forms 270, 424 and 424B is approved under OMB Control Numbers 0348–0004, 0348–0043 and 0348–0040, respectively. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number. Send comments regarding the burden estimate or any

other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Clearance Officer, International Trade Administration, Department of Commerce, Room 4001, 14th and Constitution Avenue NW., Washington, DC 20230.

4. *Executive Order 13132:* It has been determined that this notice does not contain policies with Federalism implications as that term is defined in E.O. 13132.

5. *Administrative Procedure Act/ Regulatory Flexibility Act:* Because prior notice and opportunity for public comment are not required by the Administrative Procedure Act for rules concerning public property, loans, grants, benefits and contracts (5 U.S.C. 553(a)(2)), a Regulatory Flexibility Analysis is not required and has not been prepared for this notice (5 U.S.C. 601 *et seq.*).

Dated: January 26, 2005.

Tracy M. Rollins,

Director, SABIT Program.

[FR Doc. E5–362 Filed 1–31–05; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Manufacturing Extension Partnership National Advisory Board

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of partially closed meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, notice is hereby given that the Manufacturing Extension Partnership National Advisory Board (MEPNAB), National Institute of Standards and Technology (NIST), will meet Thursday, February 17, 2005, from 8:30 a.m. to 3:30 p.m. The MEPNAB is composed of eleven members appointed by the Director of NIST who were selected for their expertise in the area of industrial extension and their work on behalf of smaller manufacturers. The Board was established to fill a need for outside input on MEP. MEP is a unique program consisting of centers in all 50 states and Puerto Rico. The centers have been created by state, federal, and local partnerships. The Board works closely with MEP to provide input and advice on MEP's programs, plans, and policies. The purpose of this meeting is to update the board on the latest program developments including a NIST Update, a MEP Policy Overview, and a MEP Program Operations Update. Discussions scheduled to begin at 1 p.m. and to end at 3:30 p.m. on February 17, 2005, on MEP budget issues will be closed. All visitors to the National Institute of Standards and Technology site will have to pre-register to be admitted. Anyone wishing to attend this meeting must register 48 hours in advance in order to be admitted. Please submit your name, time of arrival, email address and phone number to Lillian Ware no later than Tuesday, February 15 and she will provide you with instructions for admittance. Ms. Ware's email address is *lillian.ware@nist.gov* and her phone number is 301/975–5454.

DATES: The meeting will convene February 17, 2005 at 8:30 a.m. and will adjourn at 3:30 p.m. on February 17, 2005.

ADDRESSES: The meeting will be held in the Employees' Lounge, Administration Building, at NIST, Gaithersburg, Maryland 20899. Please note admittance instructions under **SUMMARY** paragraph.

FOR FURTHER INFORMATION CONTACT: Carrie Hines, Manufacturing Extension Partnership, National Institute of Standards and Technology, Gaithersburg, Maryland 20899–4800, telephone number (301) 975–3360.

SUPPLEMENTARY INFORMATION: The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on December 27, 2004, that portions of the meeting which involve discussion of proposed funding of the MEP may be closed in accordance with 5 U.S.C. 552b(c)(9)(B), because that portion will divulge matters the premature disclosure of which would be likely to significantly frustrate implementation of proposed agency actions; and that portions of the meeting which involve discussion of the staffing of positions in MEP may be closed in accordance with 5 U.S.C. 552b(c)(6), because divulging information discussed in that portion of the meeting is likely to reveal information of a personal nature, where disclosure would constitute a clearly unwarranted invasion of personal privacy.

Dated: January 26, 2005.

Hratch G. Semerjian,

Acting Director.

[FR Doc. 05–1816 Filed 1–31–05; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 030602141–5010–14; I.D. 012505A]

RIN 0648–ZB55

Availability of Grant Funds for Fiscal Year 2005

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Omnibus notice announcing the availability of grant funds for fiscal year 2005.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) announces a third availability of grant funds for Fiscal Year 2005. The purpose of this notice is to provide the general public with a consolidated source of program and application information related to the Agency's competitive grant offerings, and it contains the information about those programs required to be published in the **Federal Register**. This omnibus notice is designed to replace the multiple **Federal Register** notices that traditionally advertised the availability of NOAA's discretionary funds for its various programs. It should be noted that additional program initiatives unanticipated at the time of the publication of this notice may be announced later in the year.

DATES: Applications must be received by the date and time indicated under each program listing in the **SUPPLEMENTARY INFORMATION** section.

ADDRESSES: Applications must be submitted to the addresses listed in the **SUPPLEMENTARY INFORMATION** section for each program. This **Federal Register** notice may be found at the Grants.gov website, *http://www.grants.gov*, and the NOAA website at *http://www.ofa.noaa.gov/amd/%SOLINDEX.HTML*.

FOR FURTHER INFORMATION CONTACT: For a copy of the full funding opportunity announcement and/or application kit, access it at Grants.gov, via NOAA's website, *http://www.ofa.noaa.gov/amd/%SOLINDEX.HTML*, or by contacting the person listed as the information contact under each program.

SUPPLEMENTARY INFORMATION: NOAA published its first omnibus notice announcing the availability of grant funds for both projects and fellowships/scholarships/internships for Fiscal Year 2005 in the **Federal Register** on June 30, 2004 (69 FR 39417). The evaluation

criteria and selection procedures contained in the June 30, 2004, omnibus notice are applicable to this solicitation. For a copy of the June 30, 2004, omnibus notice, please go to: *http://www.Grants.gov* or *http://www.ofa.noaa.gov/amd/%SOLINDEX.HTML*. This omnibus notice describes funding opportunities for the following NOAA discretionary grant programs:

NOAA Project Competitions

National Marine Fisheries Service (NMFS)

1. 2005 Atlantic Sea Scallop Research Set-Aside Program
2. Alaska Marine Resources Educational Partnership Program
3. Chesapeake Bay Integrated Research Program - Fisheries
4. Chesapeake Bay Integrated Research Program - Non-native oyster research
5. Chesapeake Bay Integrated Research Program - Submerged Aquatic Vegetation
6. New Bedford Harbor Restoration Projects Grants
7. Shellfish Growout Facility Development Grants
8. Western Demonstration Project

NOAA Fellowship, Scholarship and Internship Programs

Oceanic and Atmospheric Research (OAR)

1. Dean John A. Knauss Marine Policy Fellowship

Electronic Access

As has been the case since October 1, 2004, applicants can access, download and submit electronic grant applications for NOAA Programs through the Grants.gov website at *http://www.grants.gov*. These announcements will also be available at the NOAA web site *http://www.ofa.noaa.gov/amd/%SOLINDEX.HTML* or by contacting the program official identified below. However, applicants without internet access may still submit hard copies of their applications. The closing dates for applications filed through Grants.gov are the same as for the paper submissions noted in this announcement. For applicants filing through Grants.gov, NOAA strongly recommends that you do not wait until the application deadline date to begin the application process.

Getting started with Grants.gov is easy. Go to www.Grants.gov. There are two key features on the site: Find Grant Opportunities and Apply for Grants. Everything else on the site is designed to support these two features and your use of them. While you can begin searching for grant opportunities for which you would like to apply immediately, it is recommended that you complete the remaining Get Started steps sooner rather than later, so that when you find an opportunity for which you would like to apply, you are ready to go.

Get Started Step 1 B Find Grant Opportunity for Which You Would Like to Apply

Start your search for Federal government-wide grant opportunities and register to receive automatic email notifications of new grant opportunities or any modifications to grant opportunities as they are posted to the site by clicking the Find Grant Opportunities tab at the top of the page.

Get Started Step 2 B Register with Central Contractor Registry (CCR)

Your organization will also need to be registered with Central Contractor Registry. You can register with them online. This will take about 30 minutes. You should receive your CCR registration within 3 business days. Important: You must have a DUNS number from Dun & Bradstreet before you register with CCR. Many organizations already have a DUNS number. To determine if your organization already has a DUNS number or to obtain a DUNS number, contact Dun & Bradstreet at 1–866–705–5711. This will take about 10 minutes and is free of charge. Be sure to complete the Marketing Partner ID (MPIN) and Electronic Business Primary Point of Contact fields during the CCR registration process. These are mandatory fields that are required when submitting grant applications through Grants.gov.

Get Started Step 3 B Register with the Credential Provider

You must register with a Credential Provider to receive a username and password. This will be required to securely submit your grant application.

Get Started Step 4 B Register with Grants.gov

The final step in the Get Started process is to register with Grants.gov. This will be required to submit grant applications on behalf of your organization. After you have completed the registration process, you will receive email notification confirming that you are able to submit applications through Grants.gov.

Get Started Step 5 B Log on to Grants.gov

After you have registered with Grants.gov, you can log on to Grants.gov to verify if you have registered successfully, to check application status, and to update information in your applicant profile, such as your name, telephone number, email address, and title. In the future, you will have the ability to determine if you are authorized to submit applications through Grants.gov on behalf of your organization.

NOAA Project Competitions

National Marine Fisheries Service (NMFS)

1. 2005 Atlantic Sea Scallop Research Set-Aside Program

SUMMARY DESCRIPTION: For fishing year 2005 (March 1, 2005 - February 28, 2006), the New England Fishery Management Council (Council) has set aside portions of the total allowable catch (TAC) and Days-at-Sea (DAS) allowance in the sea scallop fishery to be used for sea scallop research endeavors under a research set-aside (RSA) program. The RSA program provides a mechanism to fund research and compensate vessel owners through the sale of fish harvested under the research quota. Vessels participating in an approved research project may be authorized by the Northeast Regional Administrator, NMFS, to harvest and to land species in excess of any imposed trip limit or during fishery closures. Landings from such trips would be sold to generate funds that would help defray the costs associated with research projects. No Federal funds would be provided for research under this notification.

FUNDING AVAILABILITY: No Federal funds are provided for research under this notification, but rather the opportunity to fish and sell the catch to generate income. The Federal Government's contribution to the project will be a Letter of Authorization (LOA) that will provide special fishing privileges in response to sea scallop research applications selected to participate in this program. In the past, 2–5 awards have been issued. During the 2004 fishing year, the income generated ranged from $64,140 to $200,460 with an average of $131,990.

STATUTORY AUTHORITY: 16 U.S.C. 1853(b)(11), 16 U.S.C. 1881a(e), and 16 U.S.C. 1881(c).

CATALOG of FEDERAL DOMESTIC ASSITANCE NUMBER: 11.454.

APPLICATION DEADLINE: Applications must be received by NMFS no later than 5 p.m. EST, March 3, 2005.

ADDRESS FOR SUBMITTING APPLICATIONS: Electronic submission online: *http://www.grants.gov*; Paper applications should be sent to NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930.

INFORMATION CONTACT(S): Andrew Applegate, New England Fishery Management Council, 50 Water Street, The Tannery, Mill 2, Newburyport, MA 01950, phone (978) 465–0492, or Peter Christopher NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930, phone (978) 281–9288, fax (978) 281–9135, or email *Peter.Christopher@noaa.gov*.

ELIGIBILITY: Eligible applicants are institutions of higher education, hospitals, other nonprofits, commercial organizations, individuals, State, local and Indian tribal governments. Federal agencies or institutions are not eligible to receive Federal assistance under this notice. Also, a person is not eligible to submit an application under this program if he/she is an employee of any Federal agency. Fishery Management Council members who are not Federal employees may submit an application.

COST SHARING REQUIREMENT: None.

INTERGOVERNMENTAL REVIEW: Applications under this program are subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

2. Alaska Marine Resources Educational Partnership Program

SUMMARY DESCRIPTION: The Alaska Marine Resources Educational Partnership Program is a competitively based program designed to: (1) build the capacity of Minority Serving Institutions (MSI) with knowledge of Alaska marine resources to support collaborative research with NOAA Fisheries and (2) nurture a strong and diverse Alaska marine resource education and training partnership program to advance environmental literacy and support NOAA's mission in the marine sciences. Through this program, NOAA is seeking to partner with MSIs that provide undergraduate degrees in environmental sciences and can demonstrate their ability to partner with NOAA Fisheries research or management entities in Alaska to enhance the preparation of students for careers in marine resource fields.

FUNDING AVAILABILITY: This solicitation announces that approximately $75K may be available in FY2005 in award amounts to be determined by the applications and available funds.

STATUTORY AUTHORITY: 16 U.S.C. 753a, 15 U.S.C. 1540.

CFDA: 11.455 Cooperative Science and Education Program.

Application Deadline: Applicants are strongly encouraged to submit applications electronically through *http://www.grants.gov*, however, you may also submit your application to NOAA in paper format.

For electronic submission - Applications must be received by 5 p.m. Eastern Time on March 1, 2005. Applications received after that time will not be considered for funding.

For paper submission - Applications must be received by 5 p.m. Eastern Time on March 1, 2005. Applications received after that time will not be considered for funding.

ADDRESS FOR SUBMITTING APPLICATIONS: Electronic submission online is strongly encouraged: *http://www.grants.gov*.

Paper submission: MSI-Alaska Program Coordinator, National Marine Fisheries Service, Alaska Region, 709 W 9th St., RM 420, Juneau, AK 99802–1668 ATTN: AMRSP Program.

INFORMATION CONTACT(S): MSI-Alaska Program coordinator, National Marine Fisheries Service, Alaska Region, 709 W 9th St., RM 420, Juneau, AK 99802–1668 at (907) 586–7280, or by e-mail at *derek.orner@noaa.gov*.

ELIGIBILITY: Minority Serving Institutions eligible to submit applications include institutions of higher education identified by the Department of Education as:

(i) Historically Black Colleges and Universities,

(ii) Hispanic-Serving Institutions,

(iii) Tribal Colleges and Universities, and

(iv) Alaska Native or Native Hawaiian Serving Institutions on the most recent ''2003 United States Department of Education Accredited Post-Secondary Minority Institutions'' list: *http://www.ed.gov/about/offices/list/ocr/edlite-minorityinst.html*. Applications will not be accepted from any other entity submitted on behalf of MSIs.

COST SHARING REQUIREMENTS: No cost sharing is required under this program, however, the NOAA Alaska Regional Office strongly encourages applicants to share as much of the costs of the awards as possible. Funds from other Federal awards may not be considered matching funds.

INTERGOVERNMENTAL REVIEW: Applications under this program are subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

3. Chesapeake Bay Integrated Research Program - Fisheries

SUMMARY DESCRIPTION: The Chesapeake Bay Integrated Research Program for Fisheries is a competitively based program that supports research, monitoring, modeling and management addressing various aspects of Chesapeake Bay fisheries. The Chesapeake Bay is a complex and dynamic ecosystem that supports many fisheries that are economically and ecologically important both regionally and nationally. Funded projects foster our knowledge and understanding of the Chesapeake Bay ecosystem by: (1) providing biological information and life history characteristics for many individual Chesapeake Bay fisheries stocks, and (2) broadening the multispecies knowledge base for development of fisheries ecosystem planning. All projects supported through this program will address recommendations of ''Fisheries Ecosystem Planning for the Chesapeake Bay'' (*http://noaa.chesapeakebay.net/fish*) and provide timely (real-time) information for making resource management decisions in an ecosystem context.

FUNDING AVAILABILITY: This solicitation announces that approximately $2 M may be available in FY2005 in award amounts to be determined by the applications and available funds. It is the intent of the NOAA Chesapeake Bay Office to renew funding for several projects currently being supported and to make awards with funding through this notice to these programs pending successful review of a new application package, and adequate progress reports and/or site visits.

STATUTORY AUTHORITY: 16 U.S.C. 753a; 16 U.S.C. 661.

CFDA: 11.457 Chesapeake Bay Studies.

APPLICATION DEADLINE: Applicants are strongly encouraged to submit applications electronically through *http://www.grants.gov*, however, you may also submit your applications to NOAA in paper format.

For electronic submission - Applications must be received by 5 p.m. Eastern Time on March 1, 2005. Applications received after that time will not be considered for funding.

For paper submission - Applications must be received by 5 p.m. Eastern Time on March 1, 2005. Applications received after that time will not be considered for funding.

ADDRESS FOR SUBMITTING APPLICATIONS: Electronic submission online is strongly encouraged: *http://www.grants.gov*.

Paper submission: NOAA Chesapeake Bay Office, 410 Severn Avenue, Suite 107A, Annapolis, MD 21403 ATTN: - CBIRP-Fisheries.

INFORMATION CONTACT(S): Derek Orner, NOAA Chesapeake Bay Office, 410 Severn Avenue, Suite 107A, Annapolis, MD 21403, (410) 267–5676, or by fax at (410) 267–5666, or by e-mail at *derek.orner@noaa.gov*.

ELIGIBILITY: Eligible applicants are institutions of higher education, other non-profits, commercial organizations, organizations under the jurisdiction of foreign governments, international organizations, state, local and Indian tribal governments. Federal agencies or institutions are not eligible to receive Federal assistance under this notice.

COST SHARING REQUIREMENTS: No cost sharing is required under this program, however, the NCBO strongly encourages applicants to share as much of the costs of the awards as possible. Funds from other Federal awards may not be considered matching funds. The nature of the contribution (cash versus in-kind) and the amount of matching funds will be taken into consideration in the review process. Priority selection will be given to applications that propose cash rather than in-kind contributions.

INTERGOVERNMENTAL REVIEW: Applications under this program are subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

4. Chesapeake Bay Integrated Research Program - Non-native Oyster Research

SUMMARY DESCRIPTION: The Chesapeake Bay Integrated Research Program for non-native oyster research is a competitively based program that provides information and research to support a programmatic Environmental Impact Statement (EIS) on the proposed introduction of a non-native oyster species to the Chesapeake Bay and other tidal waters of Maryland and Virginia. The EIS will evaluate the proposed introduction and seven identified alternatives. NOAA is serving as the science agency ensuring adequate scientific input is obtained to inform the EIS assessments and decision-making process. NOAA seeks applications for projects that will provide data and information in the following three areas: (1) Biological, (2) Economic, and (3) Analysis of EIS alternatives.

FUNDING AVAILABILITY: This solicitation announces that approximately $2M may be available in FY2005 in award amounts to be determined by the applications and available funds. It is the intent of the NOAA Chesapeake Bay Office to renew funding for several projects currently being supported and to make awards with funding through this notice to these programs pending successful review of a new application package, and adequate progress reports and/or site visits.

STATUTORY AUTHORITY: 16 U.S.C. 753a; 16 U.S.C. 661.

CFDA: 11.457 Chesapeake Bay Studies.

APPLICATION DEADLINE: Applicants are strongly encouraged to submit applications electronically through *http://www.grants.gov*, however, you may also submit your applications to NOAA in paper format.

For electronic submission - Applications must be received by 5 p.m. eastern time on March 1, 2005. Applications received after that time will not be considered for funding.

For paper submission - Applications must be received by 5 p.m. Eastern Time on March 1, 2005. Applications received after that time will not be considered for funding.

ADDRESS FOR SUBMITTING APPLICATIONS: Electronic submission online is strongly encouraged: *http://www.grants.gov*.

Paper submission: NOAA Chesapeake Bay Office, 410 Severn Avenue, Suite 107A, Annapolis, MD 21403 ATTN: CBIRP-oyster.

INFORMATION CONTACT(S): Jamie King, at (410) 267–5655 or Derek Orner, at (410) 267–5676, NOAA Chesapeake Bay Office, 410 Severn Avenue, Suite 107A, Annapolis, MD 21403, or by fax at (410) 267–5666, or by e-mail at *jamie.king@noaa.gov* or *derek.orner@noaa.gov*.

ELIGIBILITY: Eligible applicants are institutions of higher education, other non-profits, commercial organizations, organizations under the jurisdiction of foreign governments, international organizations, state, local and Indian tribal governments. Federal agencies or institutions are not eligible to receive Federal assistance under this notice.

COST SHARING REQUIREMENTS: No cost sharing is required under this program, however, the NCBO strongly encourages applicants to share as much of the costs of the awards as possible. Funds from other Federal awards may not be considered matching funds. The nature of the contribution (cash versus in-kind) and the amount of matching funds will be taken into consideration in the review process. Priority selection will be given to applications that propose cash rather than in-kind contributions.

INTERGOVERNMENTAL REVIEW: Applications under this program are subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

5. Chesapeake Bay Integrated Research Program - Submerged Aquatic Vegetation

SUMMARY DESCRIPTION: The Chesapeake Bay Integrated Research Program for Submerged Aquatic Vegetation Culture and Restoration is a competitively based program designed to enhance and increase this important fisheries habitat in Chesapeake Bay and its tidal tributaries. Applications should follow and refer to the guidance in the Chesapeake Bay Program's ''Strategy to Accelerate the Protection and Restoration of Submerged Aquatic Vegetation in the Chesapeake Bay'' which is available at *http://www.chesapeakebay.net/pubs/subcommittee/lrsc/thwg/Final__SAV__restoration.PDF* or via the Program Coordinator.

FUNDING AVAILABILITY: This solicitation announces that approximately $700K may be available in FY2005 in award amounts to be determined by the applications and available funds. It is the intent of the NOAA Chesapeake Bay Office to renew funding for several projects currently being supported and to make awards with funding through this notice to these programs pending successful review of a new application package, and adequate progress reports and/or site visits.

STATUTORY AUTHORITY: 16 U.S.C. 753a; 16 U.S.C. 661.

CFDA: 11.457 Chesapeake Bay Studies.

APPLICATION DEADLINE: Applicants are strongly encouraged to submit applications electronically through *http://www.grants.gov*, however, you may also submit your applications to NOAA in paper format.

For electronic submission - Applications must be received by 5 p.m. Eastern Time on March 1, 2005. Applications received after that time will not be considered for funding.

For paper submission - Applications must be received by 5 p.m. Eastern Time on March 1, 2005. Applications received after that time will not be considered for funding.

ADDRESS FOR SUBMITTING APPLICATIONS: Electronic submission online is strongly encouraged: *http://www.grants.gov*.

Paper submission: NOAA Chesapeake Bay Office, 410 Severn Avenue, Suite 107A, Annapolis, MD 21403 ATTN: CBIRP- SAV

INFORMATION CONTACT(S) Peter Bergstrom, at (410) 267–5665 or Derek Orner, at (410) 267–5676, NOAA

Chesapeake Bay Office, 410 Severn Avenue, Suite 107A, Annapolis, MD 21403, or by fax at (410) 267–5666, or by e-mail at *peter.bergstrom@noaa.gov* or *derek.orner@noaa.gov*.

ELIGIBILITY: Eligible applicants are institutions of higher education, other non-profits, commercial organizations, organizations under the jurisdiction of foreign governments, international organizations, state, local and Indian tribal governments. Federal agencies or institutions are not eligible to receive Federal assistance under this notice.

COST SHARING REQUIREMENT: No cost sharing is required under this program, however, the NCBO strongly encourages applicants to share as much of the costs of the awards as possible. Funds from other Federal awards may not be considered matching funds. The nature of the contribution (cash versus in-kind) and the amount of matching funds will be taken into consideration in the review process. Priority selection will be given to applications that propose cash rather than in-kind contributions.

INTERGOVERNMENTAL REVIEW: Applications under this program are subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

6. New Bedford Harbor Restoration Projects Grants

SUMMARY DESCRIPTION: NMFS, serving as the Administrative Trustee on behalf of the New Bedford Harbor Trustee Council (Trustee Council or Council) is inviting the public to submit applications for available funding provided for projects that will restore natural resources that were injured by the release of hazardous substances, including polychlorinated biphenyls (PCBs), in the New Bedford Harbor environment. The Trustee Council is responsible for restoration of natural resources injured through the release of polychlorinated biphenyls (PCBs) and other hazardous substances into the New Bedford Harbor, Massachusetts Environment. The Council consists of the: (1) Massachusetts Executive Office of Environmental Affairs; (2) U.S. Department of Commerce represented by NMFS; and (3) U.S. Department of the Interior represented by the U.S. Fish and Wildlife Service. Funding will be provided through grants or cooperative agreements issued through NOAA. Depending on the level of Federal involvement, selected recipients will enter into either a cooperative agreement or grant. NOAA reserves the right to utilize a different vehicle, such as a contract, if a grant or cooperative agreement is determined not to be the appropriate vehicle for funding.

FUNDING AVAILABILITY: The Council intends to fund up to $5.5 million for restoration projects addressing the natural resource injury within the New Bedford Harbor Environment.

STATUTORY AUTHORITY: 16 U.S.C. 661–667e, 42 U.S.C. 9601–9626.

CFDA: 11.463. Habitat Conservation.

APPLICATION DEADLINE: All applications for funding must be received by 5 p.m. Eastern Time, March 18, 2005. Applications received after that time will not be considered for funding.

ADDRESS FOR SUBMITTING APPLICATIONS: Electronic submission online: *http://www.grants.gov*; Paper applications should be sent to New Bedford Harbor Trustee Council, c/o National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930, Attn: Jack Terrill.

INFORMATION CONTACT(S): Jack Terrill, Coordinator, New Bedford Harbor Trustee Council, c/o National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930, or by phone at 978–281–9136 or on the internet at *Jack.Terrill@noaa.gov*; or Steven Block, New Bedford Harbor Trustee Council, c/o National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930, or by phone at 978–281–9127 or on the internet at *Steve.Block@noaa.gov*.

ELIGIBILITY: Eligible applicants include state, local and Indian tribal governments, institutions of higher education, other nonprofit and commercial organizations, and individuals.

COST SHARING: It is not required that applications contain cost sharing. However, the Trustee Council does encourage respondents to think about cost sharing, and if it is appropriate for a project, to discuss within the application the degree to which cost sharing may be possible. If cost sharing is proposed, the respondent is asked to account for both the Council and non-Council amounts. This information will allow the Council to better plan future expenditures.

INTERGOVERNMENTAL REVIEW: Applications under this program are subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

7. Shellfish Growout Facility Development Grants

SUMMARY DESCRIPTION: On behalf of the New Bedford Harbor Trustee Council (Council), NMFS, serving as the Administrative Trustee to the Council, announces the availability of funds for projects that will construct and operate a shellfish growout facility or facilities that will provide the New Bedford Harbor Regional Shellfish Restoration Committee with quahog (*Mercenaria mercenaria*) seed annually for a minimum of five years to enhance shellfish populations in the New Bedford Harbor Environment. The shellfish growout facility or facilities must be located in the City of New Bedford or the Towns of Fairhaven or Dartmouth, Massachusetts. Depending on the level of Federal involvement in these projects, selected recipients will enter into either a cooperative agreement or a grant. Multiple grants may be awarded under this solicitation. Funds are available to state, local and Indian tribal governments, institutions of higher education, and other non-profit and commercial organizations. This notice describes the conditions under which project applications will be accepted and the criteria under which applications will be evaluated.

FUNDING AVAILABILITY: Funding up to $500,000 is expected to be available for successful applications by the Trustee Council through the New Bedford Harbor restoration program.

STATUTORY AUTHORITY: 16 U.S.C. 661.

CFDA: 11.463 Habitat Conservation.

APPLICATION DEADLINE: All applications must be received by 5 p.m. Eastern Time, March 18, 2005. Applications received after that time will not be considered for funding.

ADDRESS FOR SUBMITTING APPLICATIONS: Electronic submission online: *http://www.grants.gov*. Paper applications should be sent to: New Bedford Harbor Trustee Council, c/o National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930, Attn: Steve Block.

INFORMATION CONTACT(S): Steven Block, New Bedford Harbor Trustee Council, c/o National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930, (978) 281–9127 or e-mail *Steve.Block@noaa.gov*.

ELIGIBILITY: Eligible applicants include state, local, and Indian tribal governments, institutions of higher education, other nonprofit organizations and commercial organizations.

COST SHARING REQUIREMENTS: Although not required, the Trustee Council strongly encourages applicants responding to this solicitation to share as much of the costs of the award as possible. Funds from other Federal awards may not be considered matching funds. The nature of the contribution (cash versus in-kind) and the amount of matching funds will be taken into

consideration in the final selection process.

INTERGOVERNMENTAL REVIEW: Applications under this program are subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

8. Western Pacific Demonstration Projects

SUMMARY DESCRIPTION: NMFS is soliciting applications for financial assistance for Western Pacific Demonstration Projects. Eligible applicants are encouraged to submit projects intended to foster and promote the use of traditional indigenous fishing practices and/or to develop or enhance western Pacific community-based fishing opportunities that benefit the island communities in American Samoa, Guam, Hawaii, and the Northern Mariana Islands. Projects may also request support for research and the acquisition of materials and equipment necessary to carry out such project applications.

FUNDING AVAILABILITY: The maximum total available funding under this announcement is expected to be $500,000. NMFS will select not fewer than three and not more than five applicants for Fiscal Year 2005.

STATUTORY AUTHORITY: The Secretary is authorized to make direct grants to eligible western Pacific communities pursuant to section 111(b) of Pub. L. 104–297, as amended, and published within 16 U.S.C. 1855 note.

CFDA: 11.452, Unallied Industry Projects.

APPLICATION DEADLINE: For electronic submissions, applications must be received by 5 p.m. Hawaii Standard Time on March 15, 2005. All paper applications must be postmarked or received by 5p.m. Hawaii Standard Time on March 15, 2005. In addition, applicants should use August 1, 2005, as the proposed start date.

ADDRESSES FOR SUBMITTING APPLICATIONS: Applicants are strongly encouraged to submit applications electronically through grants.gov at *http://www.grants.gov*, however, you may also submit your application to NOAA in paper format. Project applications must be sent to: Federal Program Officer for Western Pacific Demonstration Projects, Pacific Islands Region, National Marine Fisheries Service, 1601 Kapiolani Boulevard, Suite 1110, Honolulu, HI 96814.

INFORMATION CONTACT: Scott Bloom, National Marine Fisheries Service, 1601 Kapiolani Boulevard, Suite 1110, Honolulu, HI 96814, at 808–973–2937, or by e-mail at *Scott.Bloom@noaa.gov*; or Charles Ka'ai'ai, Western Pacific Fishery Management Council, 1601 Kapiolani Boulevard, Suite 1110, Honolulu, HI 96814, 808- 522–8220 or by e-mail at *Charles.Kaaiai@noaa.gov*.

ELIGIBILITY: Eligible applicants are limited to communities in the Western Pacific Regional Fishery Management Area, as defined at section 305(i)(2)(D) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1855(i)(2)(D). Applicants also must meet the standards for determining eligibility set forth in section 305(i)(2)(B) of the Act, 16 U.S.C. 1855(i)(2)(B). The eligibility criteria developed by the Council and approved by the Secretary to participate in western Pacific community development programs was published in the **Federal Register** on April 16, 2002 (67 FR 18512 and 18513).

COST SHARING REQUIREMENTS: None

INTERGOVERNMENTAL REVIEW: Applications under this program are subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

NOAA Fellowship, Scholarship and Internship Programs

Oceanics and Atmospheric Research (OAR)

1. Dean John A. Knauss Marine Policy Fellowship (Knauss Fellowship Program)

SUMMARY DESCRIPTION: The Dean John A. Knauss Marine Policy Fellowship matches graduate students who have an interest in ocean, coastal and Great Lakes resources and in the national policy decisions affecting these resources with hosts in the legislative and executive branches of government for a one year paid fellowship.

FUNDING AVAILABILITY: Not less than 30 applicants will be selected, of which the selected applicants assigned to the Congress will be limited to 10. The overall cooperative agreement is $41,500 per student.

STATUTORY AUTHORITY: 33 U.S.C. 1127(b).

CATALOG OF FEDERAL DOMESTIC ASSTANCE NUMBER: 11.417, Sea Grant Support.

APPLICATION DEADLINE: Eligible graduate students must submit applications to state Sea Grant college programs, whose deadlines vary (contact individual states for due dates). Selected applications from the sponsoring Sea Grant program are to be received in the National Sea Grant Office no later than 5:00 pm EDT on April 6, 2005. Hard copy applications that arrive after the closing date will be accepted for review only if the applicant can document that the application was provided to a delivery service that guaranteed delivery prior to the specified closing date and time; in any event, hard copy applications received by the NSGO later than two business days following the closing date will not be accepted.

ADDRESSES FOR SUBMITTING APPLICATIONS: Applications from Sea Grant programs should be submitted through www.Grants.gov, unless an applicant does not have internet access. In that case, hard copy may be submitted to the NSGO and should be addressed to: National Sea Grant Office, R/SG, Attn: Dr. Nikola Garber, Knauss Program Manager, Room 11718, NOAA, 1315 East-West Highway, Silver Spring, MD 20910 (telephone number for express mail applications is 301–713–2431). Facsimile transmissions and electronic mail submission of applications will not be accepted.

INFORMATION CONTACT(S): Dr. Nikola Garber, National Sea Grant College Program, 1315 East-West Highway, Silver Spring, MD 20910; tel: (301) 713–2431 ext. 124; e-mail: *nikola.garber@noaa.gov*; or any state Sea Grant Program.

ELIGIBILITY: Any student, regardless of citizenship, who, on April 6, 2005, is in a graduate or professional program in a marine or aquatic-related field at a United States accredited institution of higher education in the United States may apply.

COST SHARING REQUIREMENT: There will be the one-third required cost share for those applicants selected as legislative fellows.

INTERGOVERNMENTAL REVIEW: Applications under this program are not subject to Executive Order 12372, Intergovernmental Review of Federal Programs.

Limitation of Liability

Funding for programs listed in this notice is contingent upon the availability of Fiscal Year 2005 appropriations. In no event will NOAA or the Department of Commerce be responsible for application preparation costs if these programs fail to receive funding or are cancelled because of other agency priorities. Publication of this announcement does not oblige NOAA to award any specific project or to obligate any available funds.

Universal Identifier

Applicants should be aware that, they are required to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number during the

application process. See the October 30, 2002, (67 FR 66177) **Federal Register** for additional information. Organizations can receive a DUNS number at no cost by calling the dedicated toll-free DUNS Number request line at 1–866–705–5711 or via the internet (*http://www.dunandbradstreet.com*).

National Environmental Policy Act (NEPA)

NOAA must analyze the potential environmental impacts, as required by the National Environmental Policy Act (NEPA), for applicant projects or applications which are seeking NOAA federal funding opportunities, including special fishing privileges. Detailed information on NOAA compliance with NEPA can be found at the following NOAA NEPA website: *http://www.nepa.noaa.gov*, including our NOAA Administrative Order 216–6 for NEPA, *http://www.nepa.noaa.gov/NAO216_6_TOC.pdf*, and the Council on Environmental Quality implementation regulations, *http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm*).

Consequently, as part of an applicant's package, and under their description of their program activities, applicants are required to provide detailed information on the activities to be conducted, locations, sites, species and habitat to be affected, possible construction activities, and any environmental concerns that may exist (e.g., the use and disposal of hazardous or toxic chemicals, introduction of non-indigenous species, impacts to endangered and threatened species, aquaculture projects, and impacts to coral reef systems). In addition to providing specific information that will serve as the basis for any required impact analyses, applicants may also be requested to assist NOAA in drafting of an environmental assessment, if NOAA determines an assessment is required. Applicants will also be required to cooperate with NOAA in identifying and implementing feasible measures to reduce or avoid any identified adverse environmental impacts of their application. The failure to do so shall be grounds for the denial of an application.

Pre-Award Notification Requirements for Grants and Cooperative Agreements

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of December 30, 2004 (69 FR 78389), are applicable to this solicitation.

Paperwork Reduction Act

This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424, 424A, 424B, SF-LLL, and CD–346 has been approved by the Office of Management and Budget (OMB) under the respective control numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

Executive Order 12866

This notice has been determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism)

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

Administrative Procedure Act/ Regulatory Flexibility Act

Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: January 25, 2005.

Helen Hurcombe

Director Acquisition and Grants Office, National Oceanic and Atmospheric Administration.

[FR Doc. 05–1803 Filed 1–31–05; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 012605B]

Mid-Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (Council) Atlantic Mackerel, Squid, and Butterfish Committee and its Industry Advisory Panel will hold a public meeting.

DATES: The meeting will be held on February 18, 2005, from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at The Grand Hotel of Victorian Cape May, 1045 Beach Drive, Cape May, NJ 08204; telephone: 800-257-8550.

Council address: Mid-Atlantic Fishery Management Council; 300 S. New Street, Room 2115, Dover, DE 19904.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; 300 S. New Street, Room 2115, Dover, DE 19904, telephone: 302–674–2331, ext. 19.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to discuss limited access management alternatives for the Atlantic mackerel fishery that may be included in Amendment 9 to the Atlantic mackerel, Squid, and Butterfish Fishery Management Plan. Specific management alternatives recommended by the Committee will be included in the supplemental scoping document for Amendment 9. The complete range of mackerel limited access alternatives that will be included in Amendment 9 will be established during the development of the public hearing document after the close of the scoping period. The time frame for that scoping period will be specified in an upcoming Federal Register notice.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305 (C) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Debbie Donnangelo at the Mid-Atlantic Council Office (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: January 27, 2005.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E5–364 Filed 1–31–05; 8:45 am]

BILLING CODE 3510–DS–S

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation''), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, the Corporation is soliciting comments concerning the proposed collection entitled: AmeriCorps Annual Progress Reporting Modules. Copies of the document can be obtained by contacting the office listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section by April 4, 2005.

ADDRESSES: You may submit written input to the Corporation by any of the following methods:

(1) Electronically through the Corporation's e-mail address system to Kimberly Mansaray at *kmansaray@cns.gov*.

(2) By fax to (202) 565–2791, Attention Ms. Kimberly Mansaray.

(3) By mail sent to: Corporation for National and Community Service, AmeriCorps State and National, 9th Floor, Attn: Ms. Kimberly Mansaray, 1201 New York Avenue NW., Washington, DC 20525.

(4) By hand delivery or by courier to the Corporation's mailroom at Room 6010 at the mail address given in paragraph (3) above, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Mansaray, (202) 606–5000, ext. 249.

SUPPLEMENTARY INFORMATION: The Corporation is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

I. Background

The Corporation for National and Community Service, through its national service programs and projects: (1) Provides opportunities for all Americans to serve; (2) affords members with meaningful, valuable, and enriching experiences; and (3) supports a continued ethic of volunteer service. The Progress Reporting Modules provide programs, grantees and the Corporation with useful output and outcome information about member enrollment and member service activities. They help track whether a program has met or is on track to meet its goals.

II. Current Action

Type of Review: Extension of a currently approved collection.

Agency: Corporation for National and Community Service.

Title: AmeriCorps Annual Progress Reporting Modules.

OMB Number: 3045–0101.

Agency Number: None.

Affected Public: Eligible applicants to the Corporation for grant funds.

Total Respondents: 857.

Frequency: Quarterly.

Average Time Per Response: .35 hour.

Estimated Total Burden Hours: 16,147.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: January 26, 2005.

Rosie K. Mauk,

Director of AmeriCorps.

[FR Doc. 05–1849 Filed 1–31–05; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0062]

Federal Acquisition Regulation; Information Collection; Material and Workmanship

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning material and workmanship. The clearance currently expires on May 31, 2005.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments or before April 4, 2005.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect

of this collection of information, including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (VIR), 1800 F Street, NW, Room 4035, Washington, DC 20405. Please cite OMB Control No.9000–0062, material and workmanship, in all correspondence.

FOR FURTHER INFORMATION CONTACT

Cecelia Davis, Contract Policy Division, GSA (202) 219–0202.

SUPPLEMENTARY INFORMATION:

A. Purpose

Under Federal contracts requiring that equipment (e.g., pumps, fans, generators, chillers, etc.) be installed in a project, the Government must determine that the equipment meets the contract requirements. Therefore, the contractor must submit sufficient data on the particular equipment to allow the Government to analyze the item.The Government uses the submitted data to determine whether or not the equipment meets the contract requirements in the categories of performance, construction, and durability. This data is placed in the contract file and used during the inspection of the equipment when it arrives on the project and when it is made operable.

B. Annual Reporting Burden

Respondents: 3,160.

Responses Per Respondent: 1.5.

Annual Responses: 4,740.

Hours Per Response: .25.

Total Burden Hours: 1,185.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VIR), Room 4035, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0062, Material and Workmanship, in all correspondence.

Dated: January 19, 2005

Laura Auletta

Director, Contract Policy Division.

[FR Doc. 05–1783 Filed 1–31–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0064]

Federal Acquisition Regulation; Information Collection; Organization and Direction of Work

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning organization and direction of work. The clearance currently expires May 31, 2005.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before April 4, 2005.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (VIR), 1800 F Street, NW, Room 4035, Washington, DC 20405. Please cite OMB Control No. 9000–0064, Organization and Direction of Work, in all correspondence.

FOR FURTHER INFORMATION CONTACT

Cecelia Davis, Contract Policy Division, GSA (202) 219–0202.

SUPPLEMENTARY INFORMATION:

A. Purpose

When the Government awards a cost-reimbursement construction contract, the contractor must submit to the contracting officer and keep current a chart showing the general executive and administrative organization, the personnel to be employed in connection with the work under the contract, and their respective duties. The chart is used in administration of the contract and as an aid in determining cost. The chart is used by contract administration personnel to assure the work is being properly accomplished at reasonable prices.

B. Annual Reporting Burden

Respondents: 50.

Responses Per Respondent: 1.

Annual Responses: 50.

Hours Per Response: .75.

Total Burden Hours: 38.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VIR), Room 4035, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0064, Organization and Direction of Work, in all correspondence.

Dated: January 19, 2005

Laura Auletta

Director, Contract Policy Division.

[FR Doc. 05–1784 Filed 1–31–04; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

AGENCY: Department of Defense.

ACTION: Notice of Advisory Committee meeting.

SUMMARY: The Defense Science Board Task Force on Manufacturing Technology will meet in open session on February 16, 2005, and March 23–24, 2005, at SAI, 3601 Wilson Boulevard, Arlington, VA.

This Task Force will review the Department of Defense Manufacturing Technology (ManTech) Program.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings, the Defense Science Board Task Force will review the extent to which ManTech investments and

funding plans for each Military Service and the Defense Logistics Agency support near-term, warfighting operations, the industrial base, and long-range/revolutionary technologies. Assess the adequacy of technical investments across manufacturing process disciplines and support for both Joint Warfighting Capabilities and revolutionary technologies. The Task Force will also appraise funding for manufacturing research and development, including mechanisms to support both Service/Agency requirements and cross-cutting initiatives.

FOR FURTHER INFORMATION CONTACT: LTC Scott Dolgoff, USA, Defense Science Board, 3140 Defense Pentagon, Room 3D865, Washington, DC 20301–3140, via e-mail at *scott.dolgoff@osd.mil,* or via phone at (703) 695–4158.

SUPPLEMENTARY INFORMATION: Members of the public who wish to attend the meeting must contact LTC Dolgoff no later than February 7, 2005, and March 7, 2005, for further information about admission as seating is limited. Additionally, those who wish to make oral comments or deliver written comments should also request to be scheduled, and submit a written text of the comments by February 11, 2005, and March 16, 2005, to allow time for distribution to Task Force members prior to the meeting. Individual oral comments will be limited to five minutes, with the total oral comment period not exceeding 30 minutes.

Dated: January 25, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–1856 Filed 1–31–05; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Strategic Environmental Research and Development Program, Scientific Advisory Board

AGENCY: Department of Defense.

ACTION: Notice.

SUMMARY: In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following Committee meeting:

DATES: March 15, 2005 from 9000 to 1700 and March 16, 2005 from 0800 to 1525.

ADDRESSES: Quality Inn Jacksonville, 701 N. Marine Blvd., Jacksonville, NC 28540.

FOR FURTHER INFORMATION CONTACT: Ms. Taunya King, SERDP Program Office, 901 North Stuart Street, Suite 303, Arlington, VA or by telephone at (703) 696–2124.

SUPPLEMENTARY INFORMATION:

Matters To Be Considered

Research and Development proposals and continuing projects requesting Strategic Environmental Research and Development Program funds in excess of $1M will be reviewed.

This meeting is open to the public. Any interested person may attend, appear before, or file statements with the Scientific Advisory Board at the time and in the manner permitted by the Board.

Dated: January 26, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 05–1857 Filed 1–31–05; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Revised Non-Foreign Overseas Per Diem Rates

AGENCY: DoD, Per Diem, Travel and Transportation Allowance Committee.

ACTION: Notice of revised non-foreign overseas *per diem* rates.

SUMMARY: The Per Diem, Travel and Transportation Allowance Committee is publishing Civilian Personnel Per Diem Bulletin Number 237. This bulletin lists revisions in the *per diem* rates prescribed for U.S. Government employees for official travel in Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands and Possessions of the United States. AEA changes announced in Bulletin Number 194 remain in effect. Bulletin Number 237 is being published in the **Federal Register** to assure that travelers are paid *per diem* at the most current rates.

EFFECTIVE DATE: February 1, 2005.

SUPPLEMENTARY INFORMATION: This document gives notice of revisions in per diem rates prescribed by the Per Diem Travel and Transportation Allowance Committee for non-foreign areas outside the continental United States. It supersedes Civilian Personnel Per Diem Bulletin Number 236. Distribution of Civilian Personnel Per Diem Bulletins by mail was discontinued. Per Diem Bulletins published periodically in the **Federal Register** now constitute the only notification of revisions of *per diem* rates to agencies and establishments outside the Department of Defense. For more information or questions about per diem rates, please contact your local travel office. The text of the Bulletin follows:

Dated: January 26, 2005.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–M

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A) +	M&IE RATE (B) =	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE

THE ONLY CHANGE IN CIVILIAN BULLETIN 237 ARE UPDATES TO THE RATES FOR KOTZEBUE AND SLANA, ALASKA.

ALASKA				
ADAK	120	79	199	07/01/2003
ANCHORAGE [INCL NAV RES]				
05/01 - 09/15	170	89	259	06/01/2004
09/16 - 04/30	95	81	176	06/01/2004
BARROW	159	95	254	05/01/2002
BETHEL	119	77	196	06/01/2004
BETTLES	135	62	197	10/01/2004
CLEAR AB	80	55	135	09/01/2001
COLD BAY	90	73	163	05/01/2002
COLDFOOT	135	71	206	10/01/1999
COPPER CENTER				
05/16 - 09/15	109	63	172	07/01/2003
09/16 - 05/15	99	63	162	07/01/2003
CORDOVA	110	75	185	06/01/2004
CRAIG	100	68	168	06/01/2004
DEADHORSE	95	67	162	05/01/2002
DELTA JUNCTION	89	75	164	06/01/2004
DENALI NATIONAL PARK				
06/01 - 08/31	114	65	179	06/01/2004
09/01 - 05/31	80	61	141	06/01/2004
DILLINGHAM	114	69	183	06/01/2004
DUTCH HARBOR-UNALASKA	119	72	191	06/01/2004
EARECKSON AIR STATION	80	55	135	09/01/2001
EIELSON AFB				
05/01 - 09/15	159	88	247	06/01/2004
09/16 - 04/30	75	79	154	06/01/2004
ELMENDORF AFB				
05/01 - 09/15	170	89	259	06/01/2004
09/16 - 04/30	95	81	176	06/01/2004
FAIRBANKS				
05/01 - 09/15	159	88	247	06/01/2004
09/16 - 04/30	75	79	154	06/01/2004
FOOTLOOSE	175	18	193	06/01/2002
FT. GREELY	89	75	164	06/01/2004
FT. RICHARDSON				
05/01 - 09/15	170	89	259	06/01/2004
09/16 - 04/30	95	81	176	06/01/2004
FT. WAINWRIGHT				
05/01 - 09/15	159	88	247	06/01/2004
09/16 - 04/30	75	79	154	06/01/2004
GLENNALLEN				
05/01 - 09/30	137	75	212	06/01/2004
10/01 - 04/30	89	70	159	06/01/2004
HEALY				
06/01 - 08/31	114	65	179	06/01/2004

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A) +	M&IE RATE (B) =	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
09/01 - 05/31	80	61	141	06/01/2004
HOMER				
05/15 - 09/15	145	77	222	06/01/2004
09/16 - 05/14	99	72	171	06/01/2004
JUNEAU	120	84	204	06/01/2004
KAKTOVIK	165	86	251	05/01/2002
KAVIK CAMP	150	69	219	05/01/2002
KENAI-SOLDOTNA				
04/01 - 10/31	110	83	193	04/01/2003
11/01 - 03/31	69	75	144	04/01/2003
KENNICOTT	179	83	262	06/01/2004
KETCHIKAN				
05/01 - 09/30	113	80	193	06/01/2004
10/01 - 04/30	98	78	176	06/01/2004
KING SALMON				
05/01 - 10/01	225	91	316	05/01/2002
10/02 - 04/30	125	81	206	05/01/2002
KLAWOCK	100	68	168	06/01/2004
KODIAK	99	81	180	06/01/2004
KOTZEBUE				
05/15 - 09/30	141	86	227	02/01/2005
10/01 - 05/14	135	85	220	02/01/2005
KULIS AGS				
05/01 - 09/15	170	89	259	06/01/2004
09/16 - 04/30	95	81	176	06/01/2004
MCCARTHY	179	83	262	06/01/2004
METLAKATLA				
05/30 - 10/01	98	48	146	05/01/2002
10/02 - 05/29	78	47	125	05/01/2002
MURPHY DOME				
05/01 - 09/15	159	88	247	06/01/2004
09/16 - 04/30	75	79	154	06/01/2004
NOME	120	89	209	06/01/2004
NUIQSUT	180	53	233	05/01/2002
PETERSBURG	90	64	154	06/01/2004
POINT HOPE	130	70	200	03/01/1999
POINT LAY	105	67	172	03/01/1999
PORT ALSWORTH	135	88	223	05/01/2002
PRUDHOE BAY	95	67	162	05/01/2002
SEWARD				
05/01 - 09/30	145	82	227	06/01/2004
10/01 - 04/30	89	72	161	06/01/2004
SITKA-MT. EDGECUMBE				
05/01 - 09/30	119	74	193	06/01/2004
10/01 - 04/30	99	72	171	06/01/2004
SKAGWAY				
05/01 - 09/30	113	80	193	06/01/2004
10/01 - 04/30	98	78	176	06/01/2004
SLANA				
05/01 - 09/30	139	55	194	02/01/2005

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A) +	M&IE RATE (B) =	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
10/01 - 04/30	99	55	154	02/01/2005
SPRUCE CAPE	99	81	180	06/01/2004
ST. GEORGE	129	55	184	06/01/2004
TALKEETNA	100	89	189	07/01/2002
TANANA	120	89	209	06/01/2004
TOGIAK	100	39	139	07/01/2002
TOK				
05/01 - 09/30	90	66	156	06/01/2004
10/01 - 04/30	60	63	123	06/01/2004
UMIAT	150	98	248	04/01/2003
UNALAKLEET	79	80	159	04/01/2003
VALDEZ				
05/01 - 10/01	129	77	206	06/01/2004
10/02 - 04/30	79	72	151	06/01/2004
WASILLA				
05/01 - 09/30	134	82	216	06/01/2004
10/01 - 04/30	80	77	157	06/01/2004
WRANGELL				
05/01 - 09/30	113	80	193	06/01/2004
10/01 - 04/30	98	78	176	06/01/2004
YAKUTAT	110	68	178	03/01/1999
[OTHER]	80	55	135	09/01/2001
AMERICAN SAMOA				
AMERICAN SAMOA	135	67	202	06/01/2004
GUAM				
GUAM (INCL ALL MIL INSTAL)	135	89	224	09/01/2004
HAWAII				
CAMP H M SMITH	129	91	220	06/01/2004
EASTPAC NAVAL COMP TELE AREA	129	91	220	06/01/2004
FT. DERUSSEY	129	91	220	06/01/2004
FT. SHAFTER	129	91	220	06/01/2004
HICKAM AFB	129	91	220	06/01/2004
HONOLULU (INCL NAV & MC RES CTR)	129	91	220	06/01/2004
ISLE OF HAWAII: HILO	100	80	180	06/01/2003
ISLE OF HAWAII: OTHER	150	79	229	06/01/2003
ISLE OF KAUAI	158	93	251	06/01/2004
ISLE OF MAUI	159	95	254	06/01/2004
ISLE OF OAHU	129	91	220	06/01/2004
KEKAHA PACIFIC MISSILE RANGE FAC	158	93	251	06/01/2004
KILAUEA MILITARY CAMP	100	80	180	06/01/2003
LANAI	400	148	548	06/01/2004
LUALUALEI NAVAL MAGAZINE	129	91	220	06/01/2004
MCB HAWAII	129	91	220	06/01/2004
MOLOKAI	93	91	184	06/01/2004
NAS BARBERS POINT	129	91	220	06/01/2004
PEARL HARBOR [INCL ALL MILITARY]	129	91	220	06/01/2004
SCHOFIELD BARRACKS	129	91	220	06/01/2004
WHEELER ARMY AIRFIELD	129	91	220	06/01/2004
[OTHER]	72	61	133	01/01/2000
JOHNSTON ATOLL				

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A) +	M&IE RATE (B) =	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
JOHNSTON ATOLL	0	14	14	05/01/2002
MIDWAY ISLANDS				
MIDWAY ISLANDS [INCL ALL MILITAR	150	47	197	02/01/2000
NORTHERN MARIANA ISLANDS				
ROTA	129	90	219	09/01/2004
SAIPAN	121	92	213	09/01/2004
TINIAN	85	70	155	09/01/2004
[OTHER]	55	72	127	04/01/2000
PUERTO RICO				
BAYAMON				
04/11 - 12/23	155	71	226	01/01/2000
12/24 - 04/10	195	75	270	01/01/2000
CAROLINA				
04/11 - 12/23	155	71	226	01/01/2000
12/24 - 04/10	195	75	270	01/01/2000
FAJARDO [INCL CEIBA & LUQUILLO]	82	54	136	01/01/2000
FT. BUCHANAN [INCL GSA SVC CTR,				
04/11 - 12/23	155	71	226	01/01/2000
12/24 - 04/10	195	75	270	01/01/2000
HUMACAO	82	54	136	01/01/2000
LUIS MUNOZ MARIN IAP AGS				
04/11 - 12/23	155	71	226	01/01/2000
12/24 - 04/10	195	75	270	01/01/2000
MAYAGUEZ	85	59	144	01/01/2000
PONCE	96	69	165	01/01/2000
ROOSEVELT RDS & NAV STA	82	54	136	01/01/2000
SABANA SECA [INCL ALL MILITARY]				
04/11 - 12/23	155	71	226	01/01/2000
12/24 - 04/10	195	75	270	01/01/2000
SAN JUAN & NAV RES STA				
04/11 - 12/23	155	71	226	01/01/2000
12/24 - 04/10	195	75	270	01/01/2000
[OTHER]	62	57	119	01/01/2000
VIRGIN ISLANDS (U.S.)				
ST. CROIX				
04/15 - 12/14	98	83	181	08/01/2003
12/15 - 04/14	135	87	222	08/01/2003
ST. JOHN				
04/15 - 12/14	110	91	201	08/01/2003
12/15 - 04/14	185	98	283	08/01/2003
ST. THOMAS				
04/15 - 12/14	163	95	258	08/01/2003
12/15 - 04/14	220	99	319	08/01/2003
WAKE ISLAND				
WAKE ISLAND	60	32	92	09/01/1998

[FR Doc. 05–1855 Filed 1–31–05; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF EDUCATION

Recognition of Accrediting Agencies, State Agencies for the Approval of Public Postsecondary Vocational Education, and State Agencies for the Approval of Nurse Education

Agency: National Advisory Committee on Institutional Quality and Integrity, Department of Education (The Advisory Committee).

What Is the Purpose of This Notice?

The purpose of this notice is to invite written comments on accrediting agencies and State approval agencies whose applications to the Secretary for renewed recognition or whose reports will be reviewed at the Advisory Committee meeting to be held on June 13, 2005.

Where Should I Submit My Comments?

Please submit your written comments by mail, fax, or e-mail no later than March 3, 2005 to Ms. Robin Greathouse, Accreditation and State Liaison. You may contact her at the U.S. Department of Education, room 7105, MS 8509, 1990 K Street, NW., Washington, DC 20006, telephone: (202) 219–7011, fax: (202) 219–7005, or e-mail: *Robin.Greathouse@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339.

What Is the Authority for the Advisory Committee?

The National Advisory Committee on Institutional Quality and Integrity is established under Section 114 of the Higher Education Act (HEA), as amended, 20 U.S.C. 1011c. One of the purposes of the Advisory Committee is to advise the Secretary of Education on the recognition of accrediting agencies and State approval agencies.

Will This Be My Only Opportunity To Submit Written Comments?

Yes, this notice announces the only opportunity you will have to submit written comments. However, a subsequent **Federal Register** notice will announce the meeting and invite individuals and/or groups to submit requests to make oral presentations before the Advisory Committee on the agencies that the Committee will review. That notice, however, does not offer a second opportunity to submit written comment.

What Happens to the Comments That I Submit?

We will review your comments, in response to this notice, as part of our evaluation of the agencies' compliance with Section 496 of the Higher Education Act of 1965, as amended and the Secretary's Criteria for Recognition of Accrediting Agencies and State Approval Agencies. The Criteria are regulations found in 34 CFR Part 602 (for accrediting agencies) and in 34 CFR Part 603 (for State approval agencies) and are found at the following site: *http://www.ed.gov/admins/finaid/accred/index.html.*

We will also include your comments with the staff analyses we present to the Advisory Committee at its June 2005 meeting. Therefore, in order for us to give full consideration to your comments, it is important that we receive them by March 3, 2005.

In all instances, your comments about agencies seeking initial or continued recognition must relate to the Criteria for Recognition. In addition, your comments for any agency whose interim report is scheduled for review must relate to the issues raised and the Criteria for Recognition cited in the Secretary's letter that requested the interim report.

What Happens to Comments Received After the Deadline?

We will review any comments received after the deadline. If such comments, upon investigation, reveal that the accrediting agency is not acting in accordance with the Criteria for Recognition, we will take action either before or after the meeting, as appropriate.

What Agencies Will the Advisory Committee Review at the Meeting?

The Secretary of Education recognizes accrediting agencies and State approval agencies for public postsecondary vocational education and nurse education if the Secretary determines that they meet the Criteria for Recognition. Recognition means that the Secretary considers the agency to be a reliable authority as to the quality of education offered by institutions or programs it accredits that are encompassed within the scope of recognition he grants to the agency.

The following agencies will be reviewed during the June 2005 meeting of the Advisory Committee:

Nationally Recognized Accrediting Agencies

Petitions for Renewal of Recognition

1. Commission on English Language Program Accreditation (Current and requested scope of recognition: the accreditation of postsecondary, non-degree-granting English language programs and institutions in the United States).

2. Council on Naturopathic Medical Education (Current and requested scope of recognition: The accreditation and pre-accreditation throughout the United States of graduate-level, four-year naturopathic medical education programs leading to the Doctor of Naturopathic Medicine (N.M.D.) or Doctor of Naturopathy (N.D.)).

3. National Accrediting Commission of Cosmetology Arts and Sciences (Current scope of recognition: The accreditation of postsecondary schools and departments of cosmetology arts and sciences and massage therapy). (Requested scope of recognition: The accreditation throughout the United States of postsecondary schools, including those granting occupational associate degrees, and departments of cosmetology arts and sciences and massage therapy).

4. Teacher Education Accreditation Council, Accreditation Committee (Current scope of recognition: The accreditation of professional teacher education programs in institutions offering baccalaureate and graduate degrees for the preparation of K–12 teachers). (Requested scope of recognition: The accreditation and preaccreditation throughout the United States of professional teacher education programs in institutions offering baccalaureate and graduate degrees for the preparation of K–12 teachers).

Interim Report (An interim report is a follow-up report on an accrediting agency's compliance with specific criteria for recognition that was requested by the Secretary when the Secretary granted renewed recognition to the agency).

1. Association of Theological Schools in the United States and Canada, Commission on Accrediting.

Progress Report (A report describing the agency's implementation of its new standards and accreditation process).

1. Southern Association of Colleges and Schools, Commission on Colleges.

State Agency Recognized for the Approval of Public Postsecondary Vocational Education

Petition for Renewal of Recognition

1. New York State Board of Regents (Public Postsecondary Vocational Education).

Where Can I Inspect Petitions and Third-Party Comments Before and After the Meeting?

All petitions and those third-party comments received in advance of the meeting, will be available for public inspection and copying at the U.S. Department of Education, room 7105, MS 8509, 1990 K Street, NW., Washington, DC 20006, telephone (202) 219–7011 between the hours of 8 a.m. and 3 p.m., Monday through Friday, until May 9, 2005. They will be available again after the June 13, 2005 Advisory Committee meeting. An appointment must be made in advance of such inspection or copying.

How May I Obtain Electronic Access to This Document?

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/legislation/FedRegister*.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/index.html.*

Authority: 5 U.S.C. Appendix 2.

Dated: January 26, 2005.

Sally L. Stroup,

Assistant Secretary for Postsecondary Education.

[FR Doc. E5–366 Filed 1–31–05; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–50–000]

Jersey Central Power & Light Company v. Atlantic City Electric Company, Delmarva Power & Light Company, PECO Energy Company and Public Service Electric and Gas Company; Notice of Complaint

January 5, 2005.

Take notice that on December 30, 2004, pursuant to section 206 of the Federal Power Act, Jersey Central Power & Light Company, (Jersey Central) a subsidiary of FirstEnergy Corp., filed a complaint against Atlantic City Electric Company, Delmarva Power & Light Company, PECO Energy Company and Public Service Electric and Gas Company. Jersey Central requests that the Commission terminate the Smithburg and East Windsor Agreements, and eliminate Jersey Central's requirement to construct the Seashore Loop under the Lower Delaware Valley Transmission System Agreement.

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, 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 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.

Comment Date: 5 p.m. eastern time on January 31, 2005.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–365 Filed 1–31–05; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC05–40–000, et al.]

Northern Iowa Windpower, LLC, et al.; Electric Rate and Corporate Filings

January 25, 2005.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Northern Iowa Windpower, LLC; Zilkha MREC Iowa Partners, LLC; Entergy Services, Inc.; Entergy Power Gas Operations Corporation; EWO Wind II, LLC; Shell WindEnergy Inc.

[Docket No. EC05–40–000]

Take notice that on January 18, 2005, Northern Iowa Windpower, LLC, (NIW); Zilkha MREC Iowa Partners, LLC (Zilkha); Entergy Services, Inc. (Entergy Services), as agent for its affiliates, Entergy Power Gas Operations Corporation (EPGOC) and EWO Wind II, LLC (EWO II), each of which hold investments in non-utility generating companies (EPGOC and EWO II, collectively, Entergy Non-Utility Generation); and Shell WindEnergy Inc. (Shell WindEnergy) (collectively, Applicants) filed with the Commission an application for authorization under section 203 of the Federal Power Act for NIW's redemption of Zilkha's 1 percent membership interest in NIW. Applicants state, that as a result of the proposed transaction, Shell WindEnergy and the Entergy Non-Utility Generation will each indirectly own 50 percent of NIW. Applicants, further state that NIW owns an 80 MW wind-powered electric generating facility located in Worth County, Iowa and is authorized by the Commission to sell electricity at market-based rates. Applicants have requested confidential treatment of Exhibit I to the application.

Comment Date: 5 p.m. eastern time on February 8, 2005.

2. Wisconsin Electric Power Company

[Docket No. ER98–855–005]

Take notice that on January 18, 2005, Wisconsin Electric Power Company (Wisconsin Electric) submitted an amendment to its September 27, 2004 filing in response to the Commission's deficiency letter issued December 17, 2004 in Docket No. ER98–855–004.

Wisconsin Electric states that copies of the filing were served on parties on the official service list in Docket No. ER98–855.

Comment Date: 5 p.m. eastern time on February 8, 2005.

3. The Detroit Edison Company

[Docket Nos. ER04–14–005 and EL04–29–005]

Take notice that on January 21, 2005, The Detroit Edison Company (Detroit Edison) submitted a refund report in compliance with the Commission's order issued November 23, 2004 in Docket Nos. ER04–14–000 and EL04–29–000.

Comment Date: 5 p.m. eastern time on February 11, 2005.

4. Mirant Delta, LLC and Mirant Potrero, LLC

[Docket No. ER04–227–001]

Take notice that on January 24, 2005, Mirant Delta LLC and Mirant Potrero, LLC (collectively Mirant) submitted a refund report in compliance with the Commission's letter order issued October 28, 2004 in Docket No. ER04–227–000.

Comment Date: 5 p.m. eastern time on February 14, 2005.

5. New England Power Pool

[Docket No. ER04–433–004]

Take notice that on January 18, 2005, the New England Power Pool (NEPOOL) Participants Committee submitted the one hundred eleventh agreement amending New England Power Pool Agreement to modify NEPOOL's standardized generator interconnection procedures and standardized generator interconnection agreement contained in Schedule 22 of the NEPOOL Tariff in compliance with the order issued by the Commission on November 8, 2004 in Docket No. ER04–433–000, *et al.* NEPOOL requests an effective date of November 8, 2004.

The NEPOOL Participants Committee states that copies of these materials were sent to the NEPOOL Participants and the New England state governors and regulatory commissions.

Comment Date: 5 p.m. eastern time on February 8, 2005.

6. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER04–458–006]

Take notice that on January 18, 2005, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) filed an amendment to its November 8, 2004 filing in Docket No. ER04–458–004 of proposed Attachments Y and Z to its open access transmission tariff in accordance with the instructions provided by the Commission in its December 17, 2004 deficiency letter to the Midwest ISO.

The Midwest ISO states that it has electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, as well as all state commissions within the region. In addition, the Midwest ISO states that the filing has been electronically posted on the Midwest ISO's Web site at *http://www.midwestiso.org* under the heading ''Filings to FERC'' for other interested parties in this matter. The Midwest ISO indicates that it will provide hard copies to any interested parties upon request.

Comment Date: 5 p.m. eastern time on February 8, 2005.

7. Oregon Electric Utility Company; Portland General Electric Company; Portland General Term Power; Procurement Company.

[Docket No. ER04–1206–002]

Take notice that on January 18, 2005, Oregon Electric Utility Company (OEUC), Portland General Electric Company (PGE) and Portland General Term Power Procurement Company (PPC), in response to the deficiency letter issued December 17, 2004 in Docket Nos. ER04–1206–000 and 001, submitted an amendment to their September 8, 2004 and September 29, 2004 filings of an application to allow PPC to engage in sales to third parties at market-based rates.

Comment Date: 5 p.m. eastern time on February 4, 2005.

8. Kansas City Power & Light Company

[Docket No. ER05–177–002]

Take notice that on January 18, 2005, Kansas City Power & Light Company (KCPL) submitted a compliance filing pursuant to the Commission's Order issued December 28, 2004 in Docket No. ER05–177–000. KCPL states that this filing pertains to service schedules for the City of Carrollton, Missouri.

KCPL states that copies of the filing were served upon the City of Carrollton, Missouri as well as the Missouri Public Service Commission and the Kansas State Corporation Commission.

Comment Date: 5 p.m. eastern time on February 8, 2005.

9. Kansas City Power & Light Company

[Docket No. ER05–177–003]

Take notice that on January 18, 2005, Kansas City Power & Light Company (KCPL) submitted a compliance filing pursuant to the Commission's order issued December 28, 2004 in Docket No. ER05–177–000. KCPL states that this filing pertains to service schedules for the City of Gardner, Kansas. KCPL requests an effective date of March 30, 2005.

KCPL states that copies of the filing were served upon the City of Gardner, Kansas as well as the Missouri Public Service Commission and the Kansas State Corporation Commission.

Comment Date: 5 p.m. eastern time on February 8, 2005.

10. New England Power Pool

[Docket No. ER05–459–000]

Take notice that on January 18, 2005, the New England Power Pool (NEPOOL) Participants Committee submitted the One Hundred Twelfth Agreement Amending New England Power Pool Agreement to modify NEPOOL's standardized generator interconnection procedures and standardized generator interconnection agreement contained in Schedule 22 of the NEPOOL Tariff. NEPOOL requests an effective date of April 1, 2005.

The NEPOOL Participants Committee states that copies of these materials were sent to the NEPOOL Participants and the New England state governors and regulatory commissions.

Comment Date: 5 p.m. eastern time on February 8, 2005.

11. NorthWestern Corporation

[Docket No. ER05–460–000]

Take notice that on January 18, 2005, NorthWestern Corporation, doing business as NorthWestern Energy, (NorthWestern Energy) tendered for filing an executed generation interconnection agreement between NorthWestern Energy (Montana) and Thompson River Cogen, LLC. NorthWestern Energy requests an effective date of December 17, 2004.

Comment Date: 5 p.m. eastern time on February 8, 2005.

12. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER05–461–000]

Take notice that on January 18, 2005, the Midwest Independent Transmission

System Operator, Inc. (Midwest ISO) submitted a Large Generator Interconnection Agreement among the Electric Generation Function of Northern States Power Company d/b/a Xcel Energy, the Transmission Function of Northern States Power Company d/b/a Xcel and the Midwest ISO. Midwest ISO requests an effective date of January 11, 2005.

Midwest ISO states that a copy of this filing was served on the parties to this Interconnection Agreement.

Comment Date: 5 p.m. eastern time on February 8, 2005.

13. PJM Interconnection, L.L.C

[Docket No. ER05–462–000]

Take notice that on January 18, 2005, PJM Interconnection, L.L.C. (PJM) submitted for filing amendments to the PJM open access transmission tariff to provide that small generation interconnections for generator facilities with a maximum generating capacity of 2 MW or less shall be subject to certain technical requirements and standards which shall be posited on PJM's Internet Web site. PJM requests an effective date of March 19, 2005.

PJM states that copies of this filing have been served on all PJM members and the utility regulatory commissions in the PJM region.

Comment Date: 5 p.m. eastern time on February 8, 2005.

14. H.Q. Energy Services (U.S.) Inc

[Docket No. ER05–464–000]

Take notice that, on January 18, 2005, H.Q. Energy Services (U.S.) Inc. (HQUS) submitted an updated market power analysis and revised tariff sheets incorporating the Market Behavior Rules adopted by the Commission in the order issued November 17, 2003 in Docket No. EL01–118–000, 107 FERC ¶ 61,018 (2004).

HQUS states that copies of the filing were served on parties on the official service list in Docket No. ER97–851.

Comment Date: 5 p.m. eastern time on February 8, 2005.

15. ISO New England Inc., et al.; Bangor Hydro-Electric Company, et al,; The Consumers of New England v. New England Power Pool

[Docket Nos. RT04–2–010; ER04–116–010; ER04–157–012; EL01–39–010]

Take notice that on January 14, 2005, ISO New England Inc., (ISO) and the New England transmission owners (consisting of Bangor Hydro-Electric Company; Central Maine Power Company; New England Power Company; Northeast Utilities Service Company on behalf of its operating companies: The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, Holyoke Power and Electric Company, and Holyoke Water Power Company; NSTAR Electric & Gas Corporation on behalf of its operating affiliates: Boston Edison Company, Commonwealth Electric Company, Canal Electric Company, and Cambridge Electric Light Company; The United Illuminating Company; Vermont Electric Power Company, Inc.; Fitchburg Gas and Electric Light Company; and Unitil Energy Systems, Inc.) submitted a report in compliance with the November 3, 2004 order of the Federal Energy Regulatory Commission, 109 FERC ¶ 61,147 (2004).

ISO states that copies of the filing have been served on all parties to this proceeding, on all NEPOOL Participants (electronically), non-Participant Transmission Customers, and the governors and regulatory agencies of the six New England states.

Comment Date: 5 p.m. eastern time on February 4, 2005.

Standard Paragraph

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 comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all parties to this proceeding.

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.

Linda Mitry,

Deputy Secretary.

[FR Doc. E5–363 Filed 1–31–05; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OAR–2004–0491, FRL–7865–9]

Agency Information Collection Activities: Proposed Collection; Comment Request; General Conformity of Federal Actions to State Implementation Plans, EPA ICR Number 1637.06, OMB Control Number 2060–0279

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 proposed and 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 April 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 April 4, 2005.

ADDRESSES: Submit your comments, referencing docket ID number OAR–2004–0491, to EPA online using EDOCKET (our preferred method), by e-mail to *a-and-r-Docket@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket, 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Annie Nikbakht, Ozone Policy and Strategies Group, Mail Drop C539–02, Environmental Protection Agency, 109 T.W. Alexander Drive, RTP, North Carolina 27711; telephone number: (919) 541–5246 ; fax number: (919) 541–0824 ; e-mail address: *nikbakht.annie@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has established a public docket for this ICR under Docket ID number OAR–2004–0491, which is available for public viewing at the Air and Radiation 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 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 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 those which take Federal actions, or are subject to Federal actions, and emit pollutants above *de minimis* levels.

Title: General Conformity of Federal Actions to State Implementation Plans.

Abstract: Before any agency, department, or instrumentality of the Federal government engages in, supports in any way, provides financial assistance for, licenses, permits, approves any activity, that agency has the affirmative responsibility to ensure that such action conforms to the State Implementation Plan (SIP) for the attainment and maintenance of the national ambient air quality standards (NAAQS). 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 in 40 CFR are listed in 40 CFR part 9. Section 176(c) of the Clean Air Act (42 U.S.C. 7401 *et seq.*) requires that all Federal Actions conform with the SIPs to attain and maintain the NAAQS. The EPA's implementing regulations require Federal entities to make a conformity determination for all actions which will impact areas designated as nonattainment or maintenance for the NAAQS and which will result in total direct and indirect emissions in excess of *de minimis* levels. The Federal entities must collect information themselves, hire consultants to collect the information or require applicants/sponsors of the Federal action to provide the information.

The type and quantity of information required will depend on the circumstances surrounding the action. First, the entity must make an applicability determination. If the net total direct and indirect emissions do not exceed *de minimis* levels established in the regulations or if the action meets certain criteria for an exemption, a conformity determination is not required. Actions requiring conformity determinations vary from straightforward, requiring minimal information to complex, requiring significant amounts of information. The Federal entity must determine the type and quantity of information on a case-by-case basis. State and local air pollution control agencies are usually requested to provide information to the Federal entities making a conformity determination and are provided opportunities to comment on the proposed determinations. The public is also provided an opportunity to comment on the proposed determinations.

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: The estimated total annual projected burden to respondents of Federal Agencies is 64,174 hours, with a cost of $2,327,690. The estimated total annual projected burden to non-Federal agency respondents is 9,000 hours and $538,829. The estimated total annual projected burden for the EPA is 5,355 hours and $264,480. The estimated total annual projected burden for States and local agencies is 1,246 hours and $61,579. The total annual burden is estimated to be 79,775 hours and $3,192,578. For the 3 years covered by this ICR, the total burden is estimated to be 239,324 hours and $9,577,734. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Dated: January 25, 2005.

Gregory A. Green,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 05–1863 Filed 1–31–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ORD–2004–0022, FRL–7866–1]

Agency Information Collection Activities: Proposed Collection; Comment Request; Technology Performance and Product Information To Support Vendor Information Summaries, EPA ICR Number 2154.02, OMB Control Number 2050–0194; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; extension of comment period.

SUMMARY: On December 21, 2004 (69 FR 76464), EPA published for public comment a notice that the Agency 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. The original comment period was to expire on February 10, 2005. Today's action extends the comment period to February 18, 2005.

DATES: Comments must be submitted on or before February 18, 2005.

ADDRESSES: Submit your comments, referencing docket ID number ORD–2004–0022, to EPA online using EDOCKET (our preferred method), by e-mail to *ord.docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, ORD Docket, 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Eric N. Koglin, Environmental Protection Agency, P.O. Box 93478, Las Vegas, Nevada 89193–3478; telephone number: (702) 798–2332; fax number: (702) 798–2291; e-mail address: *koglin.eric@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has established a public docket for this ICR under Docket ID number ORD–2004–0022, which is available for public viewing at the ORD 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 ORD Docket is (202) 566–1752. 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.

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, confidential business information (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.*

Andrew P. Avel,

Acting Director, National Homeland Security Research Center.

[FR Doc. 05–1864 Filed 1–31–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7866–2]

Good Neighbor Environmental Board Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: The next meeting of the Good Neighbor Environmental Board, a Federal advisory committee that reports to the President and Congress on environmental and infrastructure projects along the U.S. border with Mexico, will take place in Eagle Pass, Texas, on February 16th and 17th, 2005. It is open to the public.

DATES: On February 16th, the meeting will begin at 8:30 a.m. (registration at 8 a.m.) and end at 3 p.m. Interested parties will then proceed to a nearby location to hear from additional speakers until 5:30 p.m. On February 17th, the Board will hold a routine business meeting from 8 a.m. until 2 p.m. (registration at 7:30 a.m.).

ADDRESSES: The meeting site is the Middle Rio Grande Workforce Center, 1200 Ferry St, Eagle Pass Texas. The phone number is (830) 773–1191.

FOR FURTHER INFORMATION CONTACT: Elaine M. Koerner, Designated Federal Officer for the Good Neighbor Environmental Board, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Tel: (202) 233-0069. E-mail: *koerner.elaine@epa.gov.*

SUPPLEMENTARY INFORMATION: *Agenda:* On the first day of the meeting, which begins at 8:30 a.m. (registration at 8 a.m.), the Board has invited local officials from Eagle Pass and Piedras Negras to address attendees at the onset, followed by presentations from local experts throughout the day on community success stories and colonias. The first day also will include a public comment session from 11:30 a.m. until 12 noon. At 3 p.m., the Board and other interested parties will depart for a nearby location to hear from additional speakers. The first day of the meeting will conclude at 5:30 p.m. The second day of the meeting, February 17th, will take the form of a routine business meeting plus a strategic planning session. It also will include an update from Board members about their organizations' recent activities and a report-out from a Mexican counterpart advisory group. The second day of the meeting will begin at 8 a.m., with registration at 7:30 a.m. It will end at 2 p.m.

Public Attendance: The public is welcome to attend all portions of the meeting. Members of the public who plan to file written statements and/or make brief (suggested 5-minute limit) oral statements at the public comment session on the first day are encouraged to contact the Designated Federal Officer (DFO) for the Board prior to the meeting.

Meeting Access: Individuals requiring special accommodation at this meeting, including wheelchair access to the conference room, should contact the DFO at least five business days prior to the meeting so that appropriate arrangements can be made.

Background: The Good Neighbor Environmental Board meets three times each calendar year at different locations along the U.S.-Mexico border and in Washington, DC. It was created by the Enterprise for the Americas Initiative Act of 1992. An Executive Order delegates implementing authority to the Administrator of EPA. The Board is

responsible for providing advice to the President and the Congress on environmental and infrastructure issues and needs within the States contiguous to Mexico in order to improve the quality of life of persons residing on the United States side of the border. The statute calls for the Board to have representatives from U.S. Government agencies; the governments of the States of Arizona, California, New Mexico and Texas; and private organizations with expertise on environmental and infrastructure problems along the southwest border.

The U.S. Environmental Protection Agency gives notice of this meeting of the Good Neighbor Environmental Board pursuant to the Federal Advisory Committee Act (Pub. L. 92–463).

Dated: January 14, 2005.

Elaine M Koerner,

Designate Federal Officer.

[FR Doc. 05–1866 Filed 1–31–05; 8:45 am]

BILLING CODE 6560–50–P

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

Workshop on Manufacturing Research and Development in Three Priority Areas: Nanomanufacturing, Manufacturing for the Hydrogen Economy, and Intelligent and Integrated Manufacturing Systems; Sponsored by the National Science and Technology Council, Committee on Technology, Interagency Working Group on Manufacturing Research and Development

ACTION: Notice of open meeting.

SUMMARY: A public forum sponsored by the Manufacturing Research and Development Interagency Working Group (IWG) of the Committee on Technology, National Science and Technology Council (NSTC) will be held to review the current state of manufacturing research and development in three priority areas: nanomanufacturing, manufacturing for the hydrogen economy, and intelligent and integrated manufacturing systems.

DATES AND ADDRESSES: The Manufacturing Research and Development Interagency Working Group (IWG) will hold a one-day public forum on Thursday, March 3, 2005, from 8:30 a.m. to 4 p.m. The public forum will be held in the auditorium at the Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20418.

FOR FURTHER INFORMATION CONTACT: For information regarding this Notice, please contact Susan Skemp, Office of Science and Technology Policy, Washington, DC. Telephone: (202) 456–6043. Email: *sskemp@ostp.eop.gov*.

SUPPLEMENTARY INFORMATION: The Manufacturing Research and Development Interagency Working Group (R&D IWG) was established based on a recommendation of the January 2004 Department of Commerce report, *Manufacturing in America: A Comprehensive Strategy to Address the Challenges to U.S. Manufacturers*.

The purpose of this public forum is to provide feedback to the Manufacturing R&D IWG regarding the current state of manufacturing research and development in the three focus areas of nanomanufacturing, manufacturing for the hydrogen economy, and intelligent and integrated manufacturing systems. The IWG will consider this information in making recommendations aimed at guiding Federal manufacturing R&D programs for the next five to ten years. Following presentations on research progress in the three focus areas, workshop participants will be asked to review current research areas and to identify challenges and gaps.

Public Participation: This meeting is open to the public. Time has been reserved for public comments; written statements may be submitted at 4 p.m. on March 3, 2005, or via the Web site at *http://www.ostp.gov/mfgiwg*. Registration for the public forum for interested persons is required and will be via the Web site. In addition, non-participants will have the opportunity to review the workshop material and provide feedback via the Web site. The agenda for the workshop will be posted on the Web site.

The NSTC was established under Executive Order 12881.

Ann F. Mazur,

Assistant Director for Budget and Administration.

[FR Doc. 05–1750 Filed 1–31–05; 8:45 am]

BILLING CODE 3170–W5–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

January 21, 2005.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before April 4, 2005. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Cathy.Williams@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918 or via the Internet at *Cathy.Williams@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0215.

Title: Section 73.3527, Local Public Inspection File of Noncommercial Educational Stations.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Not-for-profit institutions.

Number of Respondents: 2,900.

Estimated Time per Response: 104 hours per year.

Frequency of Response: Recordkeeping requirement; third party disclosure requirement.

Total Annual Burden: 301,615 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Needs and Uses: 47 CFR 73.3527 requires that each licensee/permittee of

a noncommercial educational broadcast station maintain a file for public inspection at its main studio or at another accessible location in its community of license. The contents of the file vary according to type of service and status. The contents include, but are not limited to, copies of certain applications tendered for filing, a statement concerning petitions to deny filed against such applications, copies of ownership reports and annual employment reports, statements certifying compliance with filing announcements in connection with renewal applications, a list of donors supporting specific programs, *etc.*

In addition, 47 CFR 73.3527(e)(8) requires that each broadcast licensee of a noncommercial educational station place in a public inspection file a list of community issues addressed by the station's programming. This list is kept on a quarterly basis and contains a brief description of how each issue was treated. This rule also specifies the length of time, which varies by document type, that each record must be retained in the public file. The public and FCC use the data to evaluate information about the licensee's performance and to ensure that station is addressing issues concerning the community to which it is licensed to serve.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–1858 Filed 1–31–05; 8:45 am]

BILLING CODE 6712–10–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than February 15, 2005.

A. Federal Reserve Bank of Atlanta (Andre Anderson, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. CM/FS Reeves Investment, L.P., Frances Skinner Reeves, Charles Monroe Reeves, Craig Jody Berlin, all of West Point Georgia; Steven de Ralph Townson, Chelsea, Alabama; Steven Jeffrey Eisen, Nashville, Tennessee; Harold Beryl Kushner, Birmingham, Alabama; and Christopher Noel Zodrow, Auburn, Alabama; to acquire voting shares of Frontier National Corporation, Sylacauga, Alabama, and thereby indirectly acquire voting shares of Frontier Bank, LaGrange, Georgia.

Board of Governors of the Federal Reserve System, January 26, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–1767 Filed 1–31–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than February 16, 2005.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. Nicholas, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. William E. Blomster, Fairmont, Minnesota; to acquire voting shares of B & M Bancshares, Inc., Fairmont, Minnesota, and thereby indirectly acquire voting shares of State Bank of Fairmont, Fairmont, Minnesota.

Board of Governors of the Federal Reserve System, January 27, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–1853 Filed 1–31–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 25, 2005.

A. Federal Reserve Bank of Atlanta (Andre Anderson, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Wilson Bank Holding Company, Lebanon, Tennessee; to acquire 50 percent of the voting shares of Community Bank of Smith County, Carthage, Tennessee, and Dekalb Community Bank, Smithville, Tennessee.

B. Federal Reserve Bank of Kansas City (Donna J. Ward, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

1. First Centralia Bancshares, Inc., Centralia, Kansas; to acquire 100 percent of the voting shares of Corning Investment Company, Inc., Atchison, Kansas, and thereby indirectly acquire voting shares of Farmers State Bank, Corning, Kansas.

2. Morrill Bancshares, Inc., Merriam, Kansas; to acquire 100 percent of the voting shares of Nemaha Investment Company, Inc., Atchison, Kansas, and thereby indirectly acquire voting shares of First State Bank of Goff, Goff, Kansas.

Board of Governors of the Federal Reserve System, January 26, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–1766 Filed 1–31–05; 8:45 am]

BILLING CODE 6210–01–S

Federal Reserve System

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:30 a.m., Monday, February 7, 2005.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

FOR FURTHER INFORMATION CONTACT: Michelle A. Smith, Director, Office of Board Members; 202–452–2955.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Board of Governors of the Federal Reserve System, January 28, 2005.

Robert dev. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–1958 Filed 1–28–05; 2:27 pm]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of Public Health Emergency Preparedness Statement of Organization, Functions, and Delegations of Authority

Part A, Office of the Secretary, Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (HHS) is being amended at Chapter AN, Office of Public Health Emergency Preparedness, as last amended at 69 FR 51679–51680, dated August 20, 2004. This organizational change is primarily to realign the functions of OPHEP to more clearly delineate responsibilities for the various activities associated with emergency preparedness and response. This includes the designation by the President that HHS is the principal Federal agency for planning and coordinating response to mass casualty incidents. Also, on behalf of HHS, OPHEP will develop and implement policies and procedures with respect to physical and information security. The changes are as follows.

I. Under Part A, Chapter AN, ''Office of Public Health Emergency Preparedness (AN),'' delete in its entirety and replace with the following:

Section AN.00 Mission: On behalf of the Secretary, the Office of Public Health Emergency Preparedness (OPHEP) directs and coordinates HHS-wide efforts with respect to preparedness for and response to bioterrorism and other public health and medical emergencies. OPHEP is an office of the Public Health Service (PHS) and is responsible for ensuring a ''One-Department'' approach to developing such preparedness and response capabilities and directing and coordinating the relevant activities of the HHS Operation Divisions (OPDIV). The principal areas of program emphasis are (1) enhancement of State and local preparedness—primarily health departments and hospitals; (2) development and use of National and Departmental policies and plans relating to the response to public health and medical threats and emergencies (*e.g.,* Emergency Support Function (ESF) #8 of the National Response Plan (NRP), Homeland Security Presidential Directives (HSPD) #5 and #10, HHS's Concept of Operations Plan for Public Health and Medical Emergencies (CONOPS) and the Secretary's Emergency Response Team (SERT) System Description); (3) coordination with relevant entities inside and outside HHS such as State, local and Tribal public health and medical officials, the Departments of Homeland Security (DHS), Defense (DOD), Veterans Affairs (VA), Justice (DOJ), the Homeland Security Council (HSC), other ESF #8 partner organizations and others within the National security community; and (4) rapid public health and medical support to Federal, State, local and Tribal governments who may be responding to incidents of national significance or public health emergencies.

Section 10. AN Organization: OPHEP is headed by the Assistant Secretary for Public Health Emergency Preparedness (ASPHEP), who reports directly to the Secretary, and includes the following components:

- Immediate Office of the ASPHEP (ANA).
- Office of Research and Development Coordination (ANB).
- Office of Mass Casualty Planning (ANC).
- Office of Emergency Operations and Security Programs (ANE).
- Office of Medicine, Science and Public Health (ANF).

Section 20.AN Functions:

1. *Immediate Office of the ASPHEP (ANA).* The Immediate Office of the ASPHEP (IO/ASPHEP) provides executive and administrative direction to all OPHEP components; coordinates and assists in the development of training programs and standards to prepare Federal agencies to deal with the public health and medical response to emergencies; and represents the ASPHEP at interagency and HSC policy coordination meetings. The ASPHEP is the principal advisor to the Secretary on matters relating to bioterrorism and other public health and medical emergencies. The ASPHEP coordinates interagency interfaces between HHS and other Federal Departments and Agencies, State, local and Tribal public health and medical entities. The ASPHEP directs the Department's activities relating to protecting the U.S. population from acts of bioterrorism and other public health and medical threats and emergencies. The ASPHEP provides leadership in the coordination of activities for public health and medical emergency preparedness matters internal to the Office of the Secretary and represents the Department in working closely with DHS and other Federal Departments and Agencies.

2. *Office of Research and Development Coordination (ANB).* The Office of Research and Development Coordination (ORDC) is headed by a Director and is responsible for

coordinating research and development toward new vaccines, diagnostics, and drug related to the pathogenic organisms most likely to be used in a terrorist attack on the U.S. homeland. A key function of ORDC is to direct and coordinate Project BioShield activities related to the advanced development and acquisition of vaccines and other pharmaceuticals to be included in the Strategic National Stockpile (SNS). ORDC supports the ASPHEP by working with all scientific agencies of the Department, including the National Institutes of Health (NIH), the Center for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), as well as other Government, private, and non-profit scientific entities.

3. *Office of Mass Casualty Planning (ANC).* The Office of Mass Casualty Planning (OMCP) is headed by a Director and is responsible for developing policies, plans, and analytical products that ensure the readiness of the office, the Department and the Government to respond to public health and medical threats and emergencies. OMCP leads the planning activities required to fulfill HHS responsibilities under ESF #8 of the NRP and HSPD 10. OMCP manages the continuing development of Public Health Service Catastrophe Contingency Care (PHSC3) mobile medical units. OMCP also acquires physical response assets (*e.g.,* medical equipment and supplies) for Federal Government public health and medical preparedness and response activities relevant to catastrophic public health and medical emergency preparedness. OMCP works to integrate mass casualty preparedness activities, through its surge capacity efforts, across local, State and Federal levels consistent with the National Incident Management System (NIMS). OMCP is the primary OPHEP liaison with the Health Resources and Services Administration (HRSA) regarding its programs for hospital bioterrorism preparedness, volunteer health professionals, and terrorism-related education and training for health care professionals.

4. *Office of Emergency Operations and Security Programs (ANE).* The Office of Emergency and Security Programs. (OEOSP) is headed by a Director and is responsible for ensuring that OPHEP has the systems and processes necessary to coordinate the Department's response to bioterrorism and other public health and medical threats and emergencies. OEOSP leads the response activities required to fulfill HHS responsibilities under ESF #8 of the NRP. OEOSP develops and directs the Secretary's Operations Center (SOC); trains and manages the Secretary's Emergency Response Team (SERT); coordinates and executes the HHS Continuity of Operations (COOP) and Continuity of Government (COG) programs; plans, implements and evaluates Departmental and interagency response exercises; and develops security related policies establishing procedures to manage the Department's risks, threats and vulnerabilities. OEOSP also is the primary operational liaison to emergency response entities within HHS (*e.g.,* the Substance Abuse and Mental Health Services Administration (SAMHSA) CDC, FDA, and HRSA) and within the interagency community (*e.g.,* DHS, DOD, VA).

5. *Office of Medicine, Science and Public Health (ANF).* The Office of Medicine, Science and Public Health (OMSPH) is headed by a director and is responsible for providing leadership and direction with respect to the analysis, review and advice on medical preparedness programs, policies, initiatives, and activities of OPHEP. OMSPH serves as the OPHEP focal point for all international activities related to public health emergency preparedness. OMSPH coordinates OPHEP's overall influenza pandemic effort and works closely with HHS components (*e.g.,* CDC, NIH, FDA), the Department of State, the U.S. Department of Agriculture (USDA) and the World Health Organization (WHO) to ensure that programs for dealing with avian influenza and plans for dealing with pandemic influenza are as effective as possible. OMSPH oversees the development of medical policies related to providing access to medical products that have not been approved for marketing in the U.S. but must be made available on an emergency basis as medical countermeasures to counteract terrorism or naturally occurring biological, chemical or radiological/nuclear threats. These policies and their implementation include using procedures associated with the investigational new drug (IND) and Emergency Use Authorization authorities. OMSPH also carries out special scientific and public health oriented projects directly and works with others to establish activities, programs, and standards to protect the public from bioterrorism and naturally occurring infectious disease threats. OMSPH works with other nations and multilateral organizations in combating public health threats, emergencies, and bioterrorism by establishing bilateral and multi-national international partnerships to develop early warning surveillance capability for infectious disease outbreaks, including those involving potential bioterrorism agents. OMSPH also provides HHS leadership in the activities of the Biological Weapon Convention and the Global Health Security Action Group. In coordination with the Office of Global Health Affairs (OGHA), OMSPH provides leadership in coordinating U.S. government activities related to the WHO International Health Regulations (IHR).

II. *Continuation of Policy:* Except as inconsistent with this reorganization, all statements of policy and interpretations with respect to the Office of Public Health Emergency Preparedness heretofore issued and in effect prior to the date of this reorganization are continued in full force and effect.

III. *Delegations of Authority:* All delegations and redelegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further redelegation, provided they are consistent with this reorganization.

IV. *Funds, Personnel and Equipment:* Transfer of organizations and functions affected by this reorganization shall be accompanied in each instance by direct and support funds, positions, personnel, records, equipment and other resources.

Dated: January 25, 2005.

Ed Sontag,

Assistant Secretary for Administration.

[FR Doc. 05–1813 Filed 1–31–05; 8:45 am]

BILLING CODE 4150–03–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General; Program Exclusions: Correction

AGENCY: Office of Inspector General, HHS.

ACTION: Notice of program exclusions, correction.

Published document in the **Federal Register** of January 21, 2005, imposed exclusions. The document contained the incorrect monthly exclusions.

FOR FURTHER INFORMATION CONTACT: Jacqueline Freeman (410) 786–5197.

Correction

In the **Federal Register** of January 21, 2005, FR Doc. 05–1081, starting on page 3205, the list was for the August 2003 exclusions. The correction exclusions for December 2004 should read:

Subject name and address	Effective date
PROGRAM-RELATED CONVICTIONS	
ALBERTO, SHELAH SAN DIEGO, CA	1/19/2005
ANDERSON, STACEY FAIRFIELD, CA	1/19/2005
AVILA, JUAN BELL, CA	1/19/2005
AYMAN, TOORAJ VISTA, CA	1/19/2005
BECK, HEATHER CUMMING, GA	1/19/2005
BIGORNIA, SUSANA ROWLAND HEIGHTS, CA	1/19/2005
BRANCH, ANDREW SEATTLE, WA	1/19/2005
CHAVIRA, ARMIDA SAN DIMAS, CA	1/19/2005
CORN, MARIA TUCSON, AZ	1/19/2005
CRAGER, CATHY STATE LINE, MS	1/19/2005
DIZON, LINDA MALIBU, CA	1/19/2005
DUNCAN, NOAH CARY, NC	1/19/2005
ECHEVERRIA, ALISON GOODYEAR, AZ	1/19/2005
FARINAS, MARCELO TORRANCE, CA	1/19/2005
GALLARDO, AMANDA PETALUMA, CA	1/19/2005
GOMEZ, GUADALUPE ANAHEIM, CA	1/19/2005
GONZALEZ, JOSE MIAMI, FL	1/19/2005
GREEN, ETHEL JACKSON, MS	1/19/2005
GREER, STANLEY DETROIT, MI	1/19/2005
HARWOOD, CAROL KEMMERER, WY	1/19/2005
HEALTH SYSTEM TRANSPORTATION, INC OAK PARK, MI	1/19/2005
HERRERA, FRANCISCA YAKIMA, WA	1/19/2005
MARKS, CRAIG FT LAUDERDALE, FL	1/19/2005
MKRYAN, VARDAN N. HOLLYWOOD, CA	1/19/2005
MOSCU, DORA TALLAHASSEE, FL	1/19/2005
NASTASI, ANTHONY BROOKLYN, NY	1/19/2005
ORTIZ, CARMEN MIAMI, FL	1/19/2005
PENAFLORIDA, ERNESTO TAFT, CA	1/19/2005
SANDERS, MELISSA SANDERSVILLE, MS	1/19/2005
SEATON, GUY HAYWARD, CA	1/19/2005
SIBRIAN, MARTIN LOS ANGELES, CA	1/19/2005
SIPLER, CHARLES BIG SANDY, MT	1/19/2005
SODERBERG, PAUL ROUNDUP, MT	1/19/2005
ST LUKE'S SUBACUTE HOSPITAL & NURSING CTR SAN LEANDRO, CA	1/19/2005
VALDEZ, ROMULO AMHERST, NH	11/12/2004
VEITIA, RAMON MIAMI, FL	1/19/2005
WALLEY, BRUCE LAC DU FLAMBEAU, WI	1/19/2005
WATTS, SUSAN EMPIRE, AL	1/19/2005
WETSMAN, HERMAN NORTH LAS VEGAS, NV	1/19/2005
FELONY CONVICTION FOR HEALTH CARE FRAUD	
ALBRIGHT, CAROLYN MARYSVILLE, OH	1/19/2005
CYMERINT, JOHN LAKE FOREST, CA	1/19/2005
GATLIN, LISA TALLAHASSEE, FL	1/19/2005
HELDEMAN, MARVIN BUTNER, NC	1/19/2005
POOLAW, ETHELEEN LAWTON, OK	1/19/2005
THOMAS, CURTIS OKLAHOMA CITY, OK	1/19/2005
FELONY CONTROL SUBSTANCE CONVICTION	
COOPER, PAMELA DAWSON, TX	1/19/2005
DIAZ, JOHNNY SAN ANTONIO, TX	1/19/2005
HUTCHINS, SHERRY POLK CITY, IA	1/19/2005
HYMAN, RONALD FAIRTON, NJ	1/19/2005
KAISER, ALAN COVINGTON, GA	1/19/2005
LAFOND, ANITA CHEYENNE, WY	1/19/2005
LUCE, RONDA LUFKIN, TX	1/19/2005
MCKOWN, MICHAEL RINGLING, OK	1/19/2005
MILLER, KIMBERLY GRANGER, TX	1/19/2005
PABLO, FAITH SELLS, AZ	1/19/2005
SCHNEIDER, MARC LOUISVILLE, KY	1/19/2005
SECORD, JANINE SCOTTSDALE, AZ	1/19/2005
SLATON, MARY KAILUA, HI	1/19/2005
SMITH, LISA PORT CHARLOTTE, FL	1/19/2005
PATIENT ABUSE/NEGLECT CONVICTIONS	
BLAIR, STEPHANIE OXNARD, CA	1/19/2005
CARINO, IMELDA CHULA VISTA, CA	1/19/2005
DAWSON, SHARON MILWAUKEE, WI	1/19/2005
FEE, KELLY BELLINGHAM, WA	1/19/2005
HAWTHORNE, ALLAN RUTH, MS	1/19/2005
HOWELL, MICHELLE EUPORA, MS	1/19/2005
JIMENEZ, DANIEL MIAMI, FL	1/19/2005
JOHNSON, MARVIN TAMPA, FL	1/19/2005
KINCAIDE, LINDA COFFEEVILLE, MS	1/19/2005
LARGE, CEDRICK HATTIESBURG, MS	1/19/2005
LESSMILLER, JEAN ALGOMA, WI	1/19/2005
MARION, ROBERT BALTIMORE, MD	1/19/2005
MCELWEE, TYWANNA NORWOOD, LA	1/19/2005
PAIGE, SANDRA HATTIESBURG, MS	1/19/2005
PILCHER, KATHLEEN FLORENCE, VT	1/19/2005
PURVIS, ANTONIS BRANDON, MS	1/19/2005
RARICK, JOSEPH LEXINGTON, OK	1/19/2005
RESENDIZ, ROLAN HOLLISTER, CA	1/19/2005
ROBINSON, RICKY LOUISVILLE, KY	1/19/2005
SNELL, BOBBY DEL CITY, OK	1/19/2005
TOVAR, VALERIE DENVER, CO	1/19/2005
CONVICTION FOR HEALTH CARE FRAUD	
FAIRLEY, DETRA BATON ROUGE, LA	1/19/2005
MARTINEZ, LUGARDHA BRYAN, TX	1/19/2005
MIRELES, MARY OKOBOJI, IA	1/19/2005
STEWART, LUCILLE HILLSBORO, OR	1/19/2005
CONVICTION-OBSTRUCTION OF AN INVESTIGATION	
BANGALI, MICHAEL OZONE PARK, NY	1/19/2005
CONTROLLED SUBSTANCE CONVICTIONS	
DUERSON, GINA RICHMOND, KY	1/19/2005
LICENSE REVOCATION/SUSPENSION/SURRENDERED	
ALEXANDER, RAMONA SUISUN, CA	1/19/2005
ALEXANDER, ZANDRINA ST PETERSBURG, FL	1/19/2005
ANDERSON, DONNA CHOWCHILLA, CA	1/19/2005
AYER, MARY MONTPEILER, VT	1/19/2005
BAIRD, STACI GASTON, NC	1/19/2005
BAKER, NINA WOODVILLE, TX	1/19/2005
BANKS, TONYA FALLON, NV	1/19/2005
BARNES, LAURA CHANDLER, AZ	1/19/2005
BARRAGAN, IRMA LOS ANGELES, CA	1/19/2005

Subject name and address	Effective date
BATTEY, PETER LAS VEGAS, NV	1/19/2005
BAYLESS, SHERMAN LAS VEGAS, NV	1/19/2005
BEDFORD, MELISSA PROVIDENCE, RI	1/19/2005
BEVAN, WARREN HILLSBORO, OR	1/19/2005
BITTNER, MELISSA WESTVILLE, NJ	1/19/2005
BLALOCK, DEBORAH NORWOOD, NC	1/19/2005
BOADU, NANCY PROVIDENCE, RI	1/19/2005
BROOKE, KATHLEEN LITTLETON, CO	1/19/2005
BROOKS, JAMES HENDERSON, NV	1/19/2005
BURLEY, ANNA CHINO VALLEY, AZ	1/19/2005
CHOPIN, SERGIO SANTA ROSA, CA	1/19/2005
CHRISTIANSEN, YVONNE FLORAL CITY, FL	1/19/2005
CHRISTMAN, KELLY EVERETT, WA	1/19/2005
COLBY, DEBORAH EAST PROVIDENCE, RI	1/19/2005
COLE, LINDA HURRICANE, UT	1/19/2005
COOPER, BONNIE MONTEREY, CA	1/19/2005
COVEY, WILLIAM PHOENIX, AZ	1/19/2005
CRANE, TAMMY BEAVERTON, OR	1/19/2005
CRAPANZANO, LOUIS PALM COAST, FL	1/19/2005
DADISMAN, AMY MORGANTOWN, WV	1/19/2005
DALY, BARBARA HAMDEN, CT	1/19/2005
DAVIS, JAMES TAMPA, FL	1/19/2005
DAVIS, ROSEMARY SACRAMENTO, CA	1/19/2005
DEWBERRY, TINA PITTSBURG, TX	8/19/2004
DOBBS, RANDELL FLAGSTAFF, AZ	1/19/2005
EDMONDS, DEMETHRUS VIRGINIA BEACH, VA	1/19/2005
EDWARDS-BANKS, CAROL BAYSIDE, CA	1/19/2005
FERNANDO, JANET CLEMMONS, NC	1/19/2005
FIFE, CHERYL IDAHO FALLS, ID	1/19/2005
FIORENZO, LESLIE PITTSBURGH, PA	1/19/2005
FOSS, JOHN DELRAY BEACH, FL	1/19/2005
FRANKLIN, CYNTHIA YUMA, AZ	1/19/2005
FULLMAN, LISA BIRMINGHAM, AL	1/19/2005
GADDIS, GINA BROOMFIELD, CO	1/19/2005
GARCIA, DAVID SANTA FE, NM	1/19/2005
GATES, AMANDA OWENS CROSS ROAD, AL	1/19/2005
GAUNT, RUENEE LAS VEGAS, NV	1/19/2005
GILCHRIST, CHRISTA PHOENIX, AZ	1/19/2005
GILLESPIE, JAMES FT PIERCE, FL	1/19/2005
GILLILAND, TIMOTHY MONTROSE, CO	1/19/2005
GODSEY, ROBERT LINDSAY, CA	1/19/2005
GOLDSTEIN, ROBERT SEMINOLE, FL	1/19/2005
GRAHAM, DAVID SOMERS, MT	1/19/2005
GREENE, GARLAND HAMPTON, VA	1/19/2005
GREGG, KARLA MAGNA, UT	1/19/2005
GUERRERO, VICENTE SANTA ROSA, CA	1/19/2005
HAGERMAN, DAVID CHARLOTTE, NC	1/19/2005
HARDIN, TRACY BAKERSFIELD, CA	1/19/2005
HARRINGTON, MARY FRESNO, CA	1/19/2005
HAWKINS, DRANE GREEN VALLEY, AZ	1/19/2005
HAYNES, PAUL YADKINVILLE, NC	1/19/2005
HENDERSON, KATINA ST PETERSBURG, FL	1/19/2005
HUCKINS, BARBARA ATHOL, ID	1/19/2005
HUNT, AIMEE BARTOW, FL	1/19/2005
HUNTER, LINDA BOISE, ID	1/19/2005
ISAACKS, VICKIE BEEVILLE, TX	1/19/2005
JACOBSON, GLENNA SPOKANE, WA	1/19/2005
JAIKARAN, JACQUES KINGWOOD, TX	1/19/2005
JENKINS, ZENNA BESSEMER, AL	1/19/2005
JEPSEN, KELLY SEATTLE, WA	1/19/2005
JOHNSON, JOHN HOLLADAY, UT	1/19/2005
JONES, ARTHUR CANON CITY, CO	1/19/2005
JONES, SHERITA WILLIAMSBURG, VA	1/19/2005
JOSEPH, SHARON COOLIDGE, AZ	1/19/2005
JULIAN, SELENA KANNAPOLIS, NC	1/19/2005
KEPHART, JOHN LAS VEGAS, NV	1/19/2005
KJAR-DEBOWER, FONDA AUDUBON, IA	1/19/2005
KOONITSKY, CHRISTINE PROSPECT, CT	1/19/2005
LANCASTER, HAROLD THOMASVILLE, GA	1/19/2005
LAPP, ROBERT MORRISON, CO	1/19/2005
LEDFORD, KATHLEEN BOWLING GREEN, KY	1/19/2005
LEWIS, JOYCE SPRING LAKE, NC	1/19/2005
LOOKINGBACK, JASON PHOENIX, AZ	1/19/2005
LOUNSBURY, SHERRI WOLCOTT, CT	1/19/2005
MADDEN, JANE LANSDOWNE, PA	1/19/2005
MADDINENI, SUJATA WALTHAM, MA	1/19/2005
MANGUM, LUCINDA SANDY, UT	1/19/2005
MARRIOTT, JEANETTE REDDING, CA	1/19/2005
MAYNARD, BARRY MAYWOOD, IL	1/19/2005
MCBAIN, KATIE WALLA WALLA, WA	1/19/2005
MCCAIN, LEE ANN PRATTVILLE, AL	1/19/2005
MCCANN, DAVID ORANGEVALE, CA	1/19/2005
MCCULLEY, SANDRA NASHVILLE, TN	1/19/2005
MCLAIN, MARY MOBILE, AL	1/19/2005
MELHADO, JUSTIN TUCSON, AZ	1/19/2005
MESSIER, JOSEPH MIAMI, FL	1/19/2005
MILLER, TRACY PHOENIX, AZ	1/19/2005
MIRACLE, ANNA WHITESBURG, KY	1/19/2005
MONROE, LYNN SPOKANE, WA	1/19/2005
MOORE, JANE MADISON, NJ	1/19/2005
MOORE, LYNDA LAKEVILLE, MN	1/19/2005
MOOTOO, SARAH BOCA RATON, FL	1/19/2005
MORITZ, ALICIA NEW CUMBERLAND, PA	1/19/2005
MYERS, JENNIFER ATTICA, NY	1/19/2005
NEUMANN, TINA SPRINGHILL, FL	1/19/2005
NEWCOMB, MARILYN ROCHESTER, NY	1/19/2005
NICHOLS, JAMES CLEARLAKE, CA	1/19/2005
NITTO, PATRICIA LADY LAKE, FL	1/19/2005
NOLEN, MATTHEW CHANDLER, AZ	1/19/2005
OLES, LAVON BENSON, AZ	1/19/2005
OMEA, GRETCHEN WYLIE, TX	1/19/2005
OTTEY, VIRGINIA LAKELAND, FL	1/19/2005
OWENS, NICKOLE DENVER, CO	1/19/2005
PARKER, MARIA DENVER, CO	1/19/2005
PARRISH, JACQUELIN GALLUP, NM	1/19/2005
PATINO, DAVID PORTERVILLE, CA	1/19/2005
PERSON, STEPHANIE MEMPHIS, TN	1/19/2005
PETERSON, TERESA MOBILE, AL	1/19/2005
PICKRELL, SUSAN COSTA MESA, CA	1/19/2005
PIMENTAL, PAMELA	1/19/2005

Subject name and address	Effective date
PAWTUCKET, RI	
PINKERTON, LINDA ONEIDA, NY	1/19/2005
RADOMSKI, JULIENNE LEESBURG, VA	1/19/2005
RAYMOND, JERRY SPRINGFIELD, MO	1/19/2005
RENICK, LISA BOISE, ID	1/19/2005
RENKEN, CAREY DENVER, CO	1/19/2005
RIVERA, ANGEL HONDO, TX	1/19/2005
ROBERTS, FAITH MIAMI, FL	1/19/2005
SACCONE, MARGUERITE FT LAUDERDALE, FL	1/19/2005
SALTER, DEBORAH COLUMBIA, AL	1/19/2005
SANFORD, CYNTHIA ENGLEWOOD, CO	1/19/2005
SANTIAGO, JAMIE CLEVELAND, OH	1/19/2005
SCOTT, CLINTON LONG BEACH, CA	1/19/2005
SHAH, KAMLESH ONTARIO, CA	1/19/2005
SIMMONS, CAROLYN BRISTOL, VA	1/19/2005
SMITH, KAREN SALT LAKE CITY, UT	1/19/2005
SMITH, RAMONA CAROLINA BEACH, NC	1/19/2005
SOARES, KIM SWANSEA, RI	1/19/2005
SOWLES, CHARLENE PHOENIX, AZ	1/19/2005
STROBLE, LAURA WEST DOVER, VT	1/19/2005
STUDLEY, KATHLEEN RUMFORD, RI	1/19/2005
SWAIN, JEREMY COVENTRY, RI	1/19/2005
TAYLOR, DONALD HAVRE, MT	1/19/2005
TAYLOR, MATTHEW CLEARFIELD, UT	1/19/2005
TAYLOR, MEL SAN LEANDRO, CA	1/19/2005
THAN-RIDDLE, KHIN GAMBRILLS, MD	1/19/2005
TILLEY-BISBEE, COURTNEY SCOTTSDALE, AZ	1/19/2005
TOPPING, GARY DERBY, KS	1/19/2005
VALDIVIA, CARLOS OXNARD, CA	1/19/2005
VARGOVICH, KAREN OROFINO, ID	1/19/2005
VARNUM, ROLAND LAKE CHARLES, LA	1/19/2005
VINLUAN, ELEANOR CHEYENNE, WY	1/19/2005
WALLACE, FREDRICK BESSEMER, AL	1/19/2005
WALLACE, SELENA LAKE CITY, FL	1/19/2005
WASHINGTON, CARNELLA OAKLAND, CA	1/19/2005
WEBER, SUSAN COLORADO SPRINGS, CO	1/19/2005
WILKERSON, NINA PHOENIX, AZ	1/19/2005
WILLIAMS, APRIL PARACHUTE, CO	1/19/2005
WILLIAMS, REBECCA AURORA, CO	1/19/2005
WOLAN, NANCY TAMPA, FL	1/19/2005
YOUNG, KISHA LONGVIEW, WA	1/19/2005
FEDERAL/STATE EXCLUSION/ SUSPENSION	
RYDER, JON EUGENE, OR	1/19/2005
FRAUD/KICKBACKS/PROHIBITED ACTS/ SETTLEMENT AGREEMENTS	
GARCIA, GULLERMO MIAMI, FL	11/4/2004
GONSALVES, WALLACE MINERSVILLE, PA	9/23/2004
PATE, JIVA MYRTLE BEACH, SC	11/1/2004
OWNED/CONTROLLED BY CONVICTED ENTITY	
ALPHA HERBS & VITAMINS HOUSTON, TX	1/19/2005
ALPHA SENIOR HEALTH GROUP HOUSTON, TX	1/19/2005
AVIONIX MEDICAL DEVICES, INC MIDLAND, TX	1/19/2005
HEALTH RESOURCES & REHAB HOUSTON, TX	1/19/2005
HEALTH RESOURCES & REHAB CENTER HOUSTON, TX	1/19/2005
JORGENSON DRUG, INC ROUNDUP, MT	1/19/2005
MARITIME HEALTH SERVICES OF TAMPA, INC TAMPA, FL	1/19/2005
SEELIN MEDICAL, INC MIDLAND, TX	1/19/2005
DEFAULT ON HEAL LOAN	
BEAMS, JEFFREY TAMPA, FL	1/19/2005
BULEN, JERRY BRANDON, FL	1/19/2005
EAGLE, DONALD GRAND ISLAND, FL	1/19/2005
GREEN, MICHAEL MAITLAND, FL	1/19/2005
HASLEY, STEVEN MELBOURNE, FL	1/19/2005
HEISLER, HOPE PUNTA GORDA, FL	1/19/2005
JOSEPH, BRAD PITTSBURGH, PA	1/19/2005
LIGHT, DAVID WINTER GARDEN, FL	1/19/2005
MARIN, MELODY VAN NUYS, CA	1/19/2005
MARQUEZ, EVELYN LOS ANGELES, CA	1/19/2005
NEALY, JOY ATLANTA, GA	1/19/2005
ROGEL-ELLIOTT, VALERIE SEMINOLE, FL	1/19/2005
SMITH, MICHAEL TORRANCE, CA	1/19/2005
STANBRIDGE, GARY WHITTIER, CA	1/19/2005
VAFAEE, MOHAMMAD SANTA MONICA, CA	1/19/2005
YANG, SHENG FOUNTAIN VALLEY, CA	1/19/2005
OWNERS OF EXCLUDED ENTITIES	
RATHOD, BABUBHAI MT PLEASANT, MI	1/19/2005

Dated: January 24, 2005.

Katherine B. Petrowski,

Director, Exclusions Staff, Office of Inspector General.

[FR Doc. 05–1788 Filed 1–31–05; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Reporting of Pregnancy Success Rates From Assisted Reproductive Technology Programs

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (DHHS).

ACTION: Notice.

SUMMARY: The CDC is tasked with implementing the Fertility Clinic Success Rate and Certification Act of 1992 (FCSRCA), Public Law 102–493. As mandated by this law CDC publishes annual reports of pregnancy success rates from ART clinics and embryo laboratory certification status of these clinics. Section 2(a) of Public Law 102–493 (42 U.S.C. 263a–1) requires that each assisted reproductive technology (ART) program shall annually report to the Secretary, through the Centers for Disease Control and Prevention, (a) pregnancy success rates achieved by such ART programs, and (b) the identity of each embryo laboratory used by such ART programs, and whether the laboratory is certified or has applied for such certification under this act. Section (6) states that the Secretary, through the CDC, shall annually publish and distribute to the States and the public, pregnancy success rates reported to the Secretary under section 2(a)(1) and, in the case of an assisted reproductive technology program which failed to report one or more success rates as required under such section, the name

of each such program and each pregnancy success rate which the program failed to report.

This Announcement includes information on the change in the data collection contractor and the change in the approved data reporting system for the 2004, 2005, 2006, 2007, and 2008 ART data reporting years in accordance with the FCSRCA. This Announcement supplements the September 1, 2000 and the February 5, 2004, notices.

SUPPLEMENTARY INFORMATION: CDC has contracted with Westat to develop a data reporting system and to collect annual clinic-specific and cycle-specific data from all practicing assisted reproductive technology clinics in the U.S. and its territories for the 2004, 2005, 2006, 2007, and 2008 ART data reporting years. The contract covers clinic tracking, data collection and quality assurance, and validation activities. As such, Westat is the new contractor for ART data collection for the 2004 through 2008 ART data reporting years.

The new Web-based data reporting system (developed by Westat) for the 2004, 2005, 2006, 2007, and 2008 ART data reporting years will be called the National ART Surveillance System (NASS). As such, NASS will be the only approved data reporting system for 2004 through 2008 ART data submissions. ART programs should be aware that Westat will develop and provide all necessary instruction materials for extracting and importing data from other electronic medical record systems into NASS and for checking imported data to ensure that it retains the accuracy and compatibility of the data entry system from which it was extracted.

The anticipated deadline for reporting is December 15 of the year 1 year subsequent to the reporting year in question. (For example, the anticipated deadline to report data on cycles initiated in 2004 is December 15, 2005.) An ART program will not be considered to be in compliance with the federal reporting requirements of FCSRCA if the ART program was in operation in the full year that is being reported, *i.e.*, the clinic was in operation after January 1 of the reporting year, and fails to submit a dataset to Westat in the required data reporting system (NASS) by the reporting deadline. ART programs considered to not be compliant with the federal reporting requirements of FCSRCA will be listed as non-reporters in the published report.

The data reporting activities and the amount and type of data collected will be similar to the current system requirements outlined in the September 1, 2000 **Federal Register** notice (Volume 65, No. 171, pages 53310–53316). CDC has completely funded the data reporting activities for the 2004 through 2008 reporting years. Thus, ART programs will not be charged fees to obtain the new reporting system or to submit data using the new reporting system.

Validation activities for the 2004 through 2008 data reporting years will be similar to those described in the September 1, 2000 **Federal Register** notice (Volume 65, No. 171, pages 53310–53316). Westat will provide the necessary personnel to perform the validation site visits.

Each ART program should be aware that the Paperwork Reduction Act is applicable to this data collection. Under the Paperwork Reduction Act of 1995, a Federal agency shall not conduct or sponsor a collection of information from ten or more persons other than Federal employees, unless the agency has submitted a Standard Form 83, Clearance Request, to the Director of the Office of Management and Budget (OMB), and OMB has approved the collection of information. A person is not required to respond to a collection of information unless it displays a currently valid OMB control number. CDC has obtained OMB approval to collect this data under OMB control No. 0920–0556.

CDC will continue to provide information to all ART programs regarding data collection activities as information becomes available.

FOR FURTHER INFORMATION CONTACT: Victoria Wright, Assisted Reproductive Technology Epidemiology Unit at (770) 488–6384.

Dated: January 25, 2005.

James D. Seligman,

Associate Director for Program Services, Centers for Disease Control and Prevention.

[FR Doc. 05–1787 Filed 1–31–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2005N–0029]

Agency Information Collection Activities; Proposed Collection; Comment Request; Infant Formula Recall Regulations

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 requirements related to the recall of infant formula.

DATES: Submit written or electronic comments on the collection of information by April 4, 2005.

ADDRESSES: Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. 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.

Infant Formula Recall Regulations—21 CFR 107.230, 107.240, 107.250, 107.260, 107.280 (OMB Control Number 0910–0188)—Extension

Section 412(e) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 350a(e)) provides that if the manufacturer of an infant formula has knowledge that reasonably supports the conclusion that an infant formula processed by that manufacturer has left its control and may not provide the nutrients required in section 412(i) of the act or is otherwise adulterated or misbranded, the manufacturer must promptly notify the Secretary of Health and Human Services (the Secretary). If the Secretary determines that the infant formula presents a risk to human health, the manufacturer must immediately take all actions necessary to recall shipments of such infant formula from all wholesale and retail establishments, consistent with recall regulations and guidelines issued by the Secretary. Section 412(f)(2) of the act states that the Secretary shall by regulation prescribe the scope and extent of recalls of infant formula necessary and appropriate for the degree of risk to human health presented by the formula subject to recall. FDA's infant formula recall regulations (part 107 (21 CFR part 107), subpart E) implement these statutory provisions.

Section 107.230 requires each recalling firm to conduct an infant formula recall with the following elements: (1) Evaluate the hazard to human health, (2) devise a written recall strategy, (3) promptly notify each affected direct account (customer) about the recall, and (4) furnish the appropriate FDA district office with copies of these documents. If the recalled formula presents a risk to human health, the recalling firm must also request that each establishment that sells the recalled formula post (at point of purchase) a notice of the recall and provide FDA with a copy of the notice. Section 107.240 requires the recalling firm to conduct an infant formula recall with the following elements: (1) Notify the appropriate FDA district office of the recall by telephone within 24 hours, (2) submit a written report to that office within 14 days, and (3) submit a written status report at least every 14 days until the recall is terminated. Before terminating a recall, the recalling firm is required to submit a recommendation for termination of the recall to the appropriate FDA district office and wait for written FDA concurrence (§ 107.250). Where the recall strategy or implementation is determined to be deficient, FDA may require the firm to change the extent of the recall, carry out additional effectiveness checks, and issue additional notifications (§ 107.260). In addition, to facilitate location of the product being recalled, the recalling firm is required to maintain distribution records for at least 1 year after the expiration of the shelf life of the infant formula (§ 107.280).

The reporting and recordkeeping requirements described previously are designed to enable FDA to monitor the effectiveness of infant formula recalls in order to protect babies from infant formula that may be unsafe because of contamination or nutritional inadequacy or otherwise adulterated or misbranded. FDA uses the information collected under these regulations to help ensure that such products are quickly and efficiently removed from the market.

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
107.230	2	1	2	4,500	9,000
107.240	2	1	2	1,482	2,964
107.250	2	1	2	120	240
107.260	1	1	1	650	650
Total					12,854

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Under 5 CFR 1320.3(b)(2), the time, effort, and financial resources necessary to comply with a collection of information are excluded from the burden estimate if the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary because they would occur in the normal course of activities. No burden has been estimated for the recordkeeping requirement in § 107.280 because these records are maintained as a usual and customary part of normal business activities. Manufacturers keep infant formula distribution records for the prescribed period as a matter of routine business practice.

The reporting burden estimate is based on agency records, which show that there are five manufacturers of infant formula and that there have been, on average, two infant formula recalls per year for the past 3 years.

Dated: January 25, 2005.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 05–1815 Filed 1–31–05; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the meeting of the National Cancer Advisory Board.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign

language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

A portion of the meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4), and 552b(c)(6), as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Advisory Board Subcommittee on Planning and Budget.

Open: February 15, 2005, 7 p.m. to 9 p.m.

Agenda: To discuss activities related to the Subcommittee on Planning and Budget.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Ms. Cherie Nichols, Executive Secretary, National Cancer Institutes, National Institutes of Health, 6116 Executive Boulevard, 2nd Floor, Room 205, Bethesda, MD 20892–2590, (301) 496–6515.

Name of Committee: National Cancer Advisory Board.

Open: February 16, 2005, 8:30 a.m. to 6 p.m.

Agenda: Program reports and presentations; Business of the Board.

Place: National Cancer Institute, 9000 Rockville Pike, Building 31, C Wing, 6th Floor, Conference Room 10, Bethesda, MD 20892.

Contact Person: Dr. Paulette S. Gray, Executive Secretary, National Cancer Institute, National Institute of Health, 6116 Executive Boulevard, 8th Floor, Room 8001, Bethesda, MD 20892–8327, (301) 496–5147.

Name of Committee: National Cancer Advisory Board.

Open: February 17, 2005, 8:30 a.m. to 10:30 a.m.

Agenda: Program reports and presentations; Business of the Board.

Contact Person: Dr. Paulette S. Gray, Executive Secretary, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, 8th Floor, Room 8001, Bethesda, MD 20892–8327, (301) 496–5147.

Name of Committee: National Cancer Advisory Board.

Closed: February 17, 2005, 10:30 a.m. to 12 p.m.

Agenda: Review of grant applications.

Contact Person: Dr. Paulette S. Gray, Executive Secretary, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, 8th Floor, Room 8001, Bethesda, MD 20892–8327, (301) 496–5147.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.gov/advisory/ncab.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1837 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group, Subcommittee G—Education.

Date: March 15–16, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select, 480 King Street, Alexandria, VA 22314.

Contact Person: Ilda M. McKenna, Scientific Review Administrator, Research Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8111, Bethesda, MD 20892, 301–496–7481, *mckennai@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1838 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center on Minority Health and Health Disparities

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting of the National Advisory Council on Minority Health and Health Disparities.

The meeting will be open to the public as indicated below, with accordance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Minority Health and Health Disparities.

Date: February 23, 2005.

Open: 8:30 a.m. to 4 p.m.

Agenda: The Agenda will include Opening Remarks, Administrative Matters, Director's Report, NCMHD, Advisory Council Subcommittee Reports, NIH IC Health Disparities Update, Program Highlights: Select NCMHD Grantees, and other business of the Council.

Place: Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Closed: 4 p.m to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Lisa Evans, JD, Senior Advisor for Policy, National Center on Minority Health and Health Disparities, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, 301–402–1366, *evansl@ncmhd.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Dated: January 26, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1843 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, SBIR Topic 31—New Technology Development for Global Assay of Blood Coagulation.

Date: March 21, 2005.

Time: 9 a.m. to 10 a.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone conference call).

Contact Person: Shelley S. Sehnert, PhD, Scientific Review Administrator, Review Branch, NIH/NHLBI, 6701 Rockledge Drive, Room 7206, Bethesda, MD 20892–792, 301–435–0303.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, SBIR Topic 32—Bioreactor Production for Gene Therapy of Muscular Dystrophy.

Date: March 21, 2005.

Time: 10:30 a.m. to 11:30 a.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone conference call).

Contact Person: Shelley S. Sehnert, PhD, Scientific Review Administrator, Review Branch, NIH/NHLBI, 6701 Rockledge Drive, Room 7206, Bethesda, MD 20892–792, 301–435–0303.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1828 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group, Heart, Lung, and Blood Program Project Review Committee.

Date: March 17, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Jeffrey H. Hurst, PhD, Review Branch, Division of Extramural Affairs, National Heart, Lung, and Blood Institute/NIH, 6701 Rockledge Drive, RM 7208, Bethesda, MD 20892, (301) 435–0303, *hurstj@nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1829 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; Clinical Trials Review Committee.

Date: February 28–March 2, 2005.

Time: 8 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Inner Harbor Hotel, 300 South Charles Street, Baltimore, MD 21201.

Contact Person: Patricia A Haggerty, PhD, Scientific Review Administrator, Review Branch, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, NIH, 6701 Rockledge Drive, Room 7194, MSC 7924, Bethesda, MD 20892, 301/435–0288, *haggerp_nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1830 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communications Disorders Special Emphasis Panel, Middle Ear Clinical Center Review.

Date: February 28, 2005.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852 (Telephone conference call).

Contact Person: Da-yu Wu, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Activities, NIDCD, NIH, 6120 Executive Blvd., Suite 400C, Bethesda, MD 20892, 301–496–8683, *wudy@nidcd.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1820 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meetings.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Training Grant and Career Development Review Committee.

Date: February 17–18, 2005.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: Raul A. Saavedra, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, NSC; 6001 Executive Blvd., Ste. 3208, Bethesda, MD 20892–9529, 301–496–9223, *saavedrr@ninds.nih.gov*.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group, Neurological Sciences and Disorders C.

Date: February 24–25, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.

Contact Person: Andrea Sawczuk, DDS, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, 6001 Executive Boulevard, Room #3208, Bethesda, MD 20892, 301–496–0660, *sawczuka@ninds.nih.gov*.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group, Neurological Sciences and Disorders B.

Date: February 24–25, 2005.

Time: 8:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Crystal City, 2399 Jefferson Davis Hwy, Arlington, VA 22202.

Contact Person: W. Ernest Lyons, PhD, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Boulevard, Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–4056.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group, Neurological Sciences and Disorders K.

Date: February 24–25, 2005.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Katherine M. Woodbury, PhD, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Boulevard, Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group, Neurological Sciences and Disorders A.

Date: March 3–4, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Newport Beach, 1107 Jamboree Road, Newport Beach, CA 92660.

Contact Person: Richard D. Crosland, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Boulevard, Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1822 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Transitional Research for the Prevention and Control of diabetes.

Date: March 23, 2005.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Bethesda North Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Michele L. Barnard, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 753, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8898,*@barnardmextra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1823 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 05–44, Review R03s.

Date: February 24, 2005.

Time: 1 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892 (Telephone conference call).

Contact Person: Rebecca Roper, MS, MPH, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, National Inst of Dental & Craniofacial Research, National Institutes of Health, 45 Center Dr., room 4AN32E, Bethesda, MD 20892, 301 451–5096.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 05–48, Review R13s.

Date: March 16, 2005.

Time: 11 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892 (Telephone conference call).

Contact Person: Sooyoun (Sonia) Kim, MS, Associate SRA, Scientific Review Branch, Division of Extramural Research, National Inst of Dental & Craniofacial Research, National Institutes of Health, Bethesda, MD 20892, 301 594–4827.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 05–47, Review R13s.

Date: March 29, 2005.

Time: 2 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892 (Telephone conference call).

Contact Person: Sooyoun (Sonia) Kim, MS, Associate SRA, Scientific Review Branch, Division of Extramural Research, National Inst of Dental & Craniofacial Research, National Institutes of Health, Bethesda, MD 20892, 301 594–4827.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1824 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, HIV Vaccine Research and Design, (HIVRAD).

Date: February 15–17, 2005.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Chevy Chase Holiday Inn, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Eleazar Cohen, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, Room 3129, 6700 B Rockledge Drive, Bethesda, MD 20892, 301 435–3564, *ec17w@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1825 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN RESOURCES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, Large Scale Centers for the Protein Structure Initiative.

Date: February 21–23, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: C Craig Hyde, PhD, Scientific Review Administrator, Office of Scientific Review, National Institute of

General Medical Sciences, National Institutes of Health, Building 45, Room 3AN18, Bethesda, MD 20892, 301–435–3825, *ch2v@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers, 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1826 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Program Project—Prenatal Events-Postnatal Consequences.

Dates: February 25, 2005.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rm 5B01, Rockville, MD 20852 (Telephone conference call).

Contact Person: Rita Anand, PhD, Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd. Room 5B01, Bethesda, MD 20892. (301) 496–1487, *anandr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1827 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Emphasis Panel, Postbacculaureate Research Education Program.

Date: February 18, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.

Contact Person: Richard I. Martinez, PhD, Scientific Review Administrator, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN–12B, 45 Center Drive MSC 6200, Bethesda, MD 20892–6200, 301–594–2849, *rm63f@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1835 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C.. appendix 2), notice is hereby given of the following meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Minority Programs Review Committee, MARC Review Subcommittee A.

Date: February 17, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.

Contact Person: Richard I. Martinez, PhD, Scientific Review Administrator, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN–12B, 45 Center Drive MSC 6200, Bethesda, MD 20892–6200, 301–594–2489, *rm63f@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1836 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice

is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, Imaging and Mood Disorders.

Date: February 23, 2005.

Time: 12 p.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone conference call).

Contact Person: Peter J. Sheridan, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6142, MSC 9606, Bethesda, MD 20892–9606, 301–443–1513, *psherida@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: January 26, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1839 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2) notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The purpose of this meeting is to evaluate requests for preclinical development resources for potential new therapeutics for type 1 diabetes. The outcome of the evaluation will be a decision whether NIDDK should support the request and make available contract resources for development of the potential therapeutic to improve the treatment or prevent the development of type 1 diabetes and its complications. The research proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the proposed research projects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Type 1 Diabetes—Rapid Access to Intervention Development Special Emphasis Panel, National Institute of Diabetes and Digestive and Kidney Diseases.

Date: February 9, 2005.

Time: 10 a.m.–2 p.m.

Agenda: To evaluate requests for preclinical development resources for potential new therapeutics for type 1 diabetes and its complications.

Place: 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone conference call).

Contact Person: Dr. Myrlene Staten, Senior Advisor, Diabetes Translation Research, Division of Diabetes, Endocrinology and Metabolic Diseases, NIDDK, NIH, 6707 Democracy Boulevard, Bethesda, MD 20892–5460, 301–402–7886.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Disease and Nutrition Research; 98.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 26, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

[FR Doc. 05–1840 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2) notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The purpose of this meeting is to evaluate requests for preclinical development resources for potential new therapeutics for type 1 diabetes. The outcome of the evaluation will be a decision whether NIDDK should support the request and make available contract resources for development of the potential therapeutic to improve the treatment or prevent the development of type 1 diabetes and its complications. The research proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the proposed research projects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Type 1 Diabetes—Rapid Access to Intervention Development Special Emphasis Panel, National Institute of Diabetes and Digestive and Kidney Diseases.

Date: February 18, 2005.

Time: 2 a.m.–4 p.m.

Agenda: To evaluate requests for preclinical development resources for potential new therapeutics for type 1 diabetes and its complications.

Place: 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone conference call).

Contact Person: Dr. Myrlene Staten, Senior Advisor, Diabetes Translation Research, Division of Diabetes, Endocrinology and Metabolic Diseases, NIDDK, NIH, 6707 Democracy Boulevard, Bethesda, MD 20892–5460, (301) 402–7886.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research, 98.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 26, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1842 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections

552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Library of Medicine Special Emphasis Panel; Biomedical Informatics.
Date: March 22, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.
Contact Person: Hua-Chuan Sim, MD, Scientific Review Administrator, National Library of Medicine, Extramural Programs, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892.

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1831 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C.. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Library of Medicine Special Emphasis Panel, IAIMS.
Date: March 11, 2005.
Time: 1 pm. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20892.
Contact Person: Hua-Chuan Sim, MD, Scientific Review Administrator, National Library of Medicine, Extramural Programs, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892.

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1832 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Library of Medicine Special Emphasis Panel; R21's.
Date: March 4, 2005.
Time: 8 a.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Hua-Chuan Sim, MD, Scientific Review Administrator, National Library of Medicine, Extramural Programs, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892.

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1833 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Library of Medicine Special Emphasis Panel, Publications (G13s).
Date: February 25, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Hua-Chuan Sim, MD, Health Science Administrator, National Library of Medicine, Extramural Programs, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892.

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: January 25, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1834 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meetings.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and

the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group, Integrative Nutrition and Metabolic Processes Study Section.
Date: February 14–15, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Ave, Bethesda, MD 20814.
Contact Person: Sooja K. Kim, PhD, RD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6182, MSC 7892, Bethesda, MD 20892, (301) 435–1780, *kims@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1 SBTS 50R: PA–02–125: Bioengineering Nanotechnology Initiative.
Date: February 16, 2005.
Time: 5 p.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.
Contact Person: Roberto J. Matus, MD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, MSC 7854, Bethesda, MD 20892, 301–435–2204, *matusr@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Radio Immunotherapy.
Date: February 17, 2005.
Time: 2 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Syed M. Quadri, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6210, MSC 7804, Bethesda, MD 20892, (301) 435–1211, *quadris@csr.nih.gov*.

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group, Host Interactions with Bacterial Pathogens Study Section.
Date: February 21–22, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Watergate Hotel, 2650 Virginia Avenue, Washington, DC 20037.
Contact Person: Timothy J. Henry, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3212, MSC 7808, Bethesda, MD 20892, (301) 435–1147 *henryt@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Structure Based Drug Design.
Date: February 22, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.
Contact Person: David R. Jollie, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4156, MSC 7806, Bethesda, MD 20892, (301) 435–1722, *jollieda@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Mechanisms of Tumorigenesis,
Date: February 23, 2005.
Time: 1 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Zhiqiang Zou, MD, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6190, MSC 7804, Bethesda, MD 20892, 301–451–0132, *zouzhiq@csr.nih.gov.*

Name of Committee: Biology of Development and Aging Integrated Review Group, Development—2 Study Section.
Date: February 24–25, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: George Washington University Inn, 834 New Hampshire Ave., NW., Washington, DC 20037.
Contact Person: Neelakanta Ravindranath, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5140, MSC 7843, Bethesda, MD 20892, 301–435–1034, *ravindrn@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Intercellular Interactions and Glycobiology.
Date: February 24–25, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: The River Inn, 924 25th Street, NW., Washington, DC 20037.
Contact Person: Marcia Steinberg, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5130, MSC 7840, Bethesda, MD 20892, 301–435–1023, *steinbem@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group, Genetics of Health and Disease Study Section.
Date: February 24–24, 2005.
Time: 9 a.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.
Contact Person: Cheryl M. Corsaro, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2204, MSC 7890, Bethesda, MD 20892, (301) 435–1045, *corsaroc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Clinical Research and Field Studies.
Date: February 25, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Select, 480 King Street, Alexandria, VA 22314.
Contact Person: Alexander D. Politis, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3210, MSC 7808, Bethesda, MD 20892, (301) 435–1150, *politisa@csr.nih.gov.*

Name of Committee: Oncological Sciences Integrated Review Group, Clinical Oncology Study Section.
Date: February 27–March 1, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: John L. Meyer, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6198, MSC 7804, Bethesda, MD 20892, (301) 435–1213, *meyerjl@csr.nih.gov.*

Name of Committee: Digestive Sciences Integrated Review Group, Gastrointestinal Mucosal Pathobiology Study Section.
Date: February 27–28, 2005.
Time: 2 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Sheraton Cresent Hotel, 2620 West Dunlap Avenue, Phoenix, AZ 85021.
Contact Person: Peter J. Perrin, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2183, MSC 7818, Bethesda, MD 20892, (301) 435–0682, *perrinp@csr.nih.gov.*

Name of Committee: Digestive Sciences Integrated Review Group, Clinical and Integrative Gastrointestinal Pathobiology Study Section.
Date: February 27–28, 2005.
Time: 2 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Sheraton Cresent Hotel, 2620 West Dunlap Avenue, Phoenix, AZ 85021.
Contact Person: Mushtaq A. Khan, DVM, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2176, MSC 7818, Bethesda, MD 20892, 301–435–1778, *khanm@csr.nih.gov.*

Name of Committee: Digestive Sciences Integrated Review Group, Gastrointestinal Cell and Molecular Biology Study Section.
Date: February 27–28, 2005.
Time: 2 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.

Place: Sheraton Cresent Hotel, 2620 West Dunlap Avenue, Phoenix, AZ 85021.

Contact Person: Najma Begum, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2175, MSC 7818, Bethesda, MD 20892, 301–435–1243, *begumn@csr.nih.gov.*

Name of Committee: Oncological Sciences Integrated Review Group, Tumor Cell Biology Study Section.

Date: February 27–March 1, 2005.

Time: 6:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Angela Y. Ng, PhD, MBA, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6200, MSC 7804, (For courier delivery, use MD 20817), Bethesda, MD 20892, 301–435–1715, *nga@csr.nih.gov.*

Name of Committee: Oncological Sciences Integrated Review Group, Tumor Microenvironment Study Section.

Date: February 28–March 1, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: Eun Ah Cho, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, 301–435–4467, *choe@csr.nih.gov.*

Name of Committee: Oncological Sciences Integrated Review Group, Cancer Genetics Study Section.

Date: February 28–March 1, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Zhiqiang Zou, PhD, MD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6190, MSC 7804, Bethesda, MD 20892, 301–451–0132, *zouzhiq@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, SSMI 10: Small Business Bioengineering and Physiology.

Date: February 28–March 1, 2005.

Time: 8 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Bethesda North Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Pushpa Tandon, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5104, MSC 7854, Bethesda, MD 20892, 301–435–2397, *tandonp@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Neural Prosthesis Bioengineering Research Partnerships (PAR 04–023).

Date: February 28, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Jean D. Sipe, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4106, MSC 7814, Bethesda, MD 20892, 301–435–1743, *sipej@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Computation Biophysics.

Date: February 28, 2005.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: George W. Chacko, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4186, MSC 7849, Bethesda, MD 20892, 301–435–1220, *chackoge@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group, Clinical Neuroplasticity and Neurotransmitters Study Section.

Date: February 28–March 1, 2005.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

Contact Person: William C. Benzing, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5206, MSC 7846, Bethesda, MD 20892, 301–435–1254, *benzingw@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1821 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C.. appendix 2), notice is hereby given of the following meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Immunology Integrated Review Group, Cellular and Molecular Immunology—A.

Date: February 17–18, 2005.

Time: 8:30 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Beacon Hotel and Corporate Quarters, 1615 Rhode Island Avenue, NW., Washington, DC 20036.

Contact Person: Samuel C. Edwards, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4200, MSC 7812, Bethesda, MD 20892, 301–435–1152, *edwardss@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Urology-related Science.

Date: February 18, 2005.

Time: 12 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.

Contact Person: M. Chris Langub, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4112, MSC 7814, Bethesda, MD 20892, 301–496–8551, *langubm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Innate Immunity and Inflammation.

Date: February 24–25, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select, 480 King Street, Alexandria, VA 22314.

Contact Person: Tina McIntyre, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4202, MSC 7812, Bethesda, MD 20892, 301–594–6375, *mcintyrt@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Prokaryotic and Eukaryotic Genetics and Molecular Biology.

Date: February 24–25, 2005.

Time: 8:30 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Four Points by Sheraton Bethesda, 8400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Mary P. McCormick, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2208, MSC 7890, Bethesda, MD 20892, 301–435–1047, *mccormim@csr.nih.gov.*

Name of Committee: Cardiovascular Sciences Integrated Review Group; Cardiac Contractility, Hypertrophy, and Failure Study Section.

Date: February 28–March 1, 2005.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select, 8120 Wisconsin Ave, Bethesda, MD 20814

Contact Person: Russell T. Dowell, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4128, MSC 7814, Bethesda, MD 20892, 301–435–1850, *dowellr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Biomaterials and Biointerfaces: Quorum.

Date: February 28–March 1, 2005.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Select Bethesda, 8120 Wisconsin Ave, Bethesda, MD 20814.

Contact Person: Alexander Gubin, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4196, MSC 7812, Bethesda, MD 20892, 301–435–2902, *gubina@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Bacterial Pathogenesis.

Date: February 28, 2005.

Time: 10:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Marian Wachtel, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3208, MSC 7858, Bethesda, MD 20892, 301–435–1148, *wachtelm@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 26, 2005.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 05–1841 Filed 1–31–05; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Automated Commercial Environment (ACE): Elimination of C–TPAT Requirement To Establish ACE Importer and Broker Accounts

AGENCY: Customs and Border Protection; Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice announces a change to the application requirements when applying to become an Importer or Broker Account so as to access the Automated Commercial Environment (ACE) Secure Data Portal (''ACE Portal'') or to participate in any ACE test. Specifically, applicants seeking to establish importer or broker accounts so as to access the ACE Portal, or to participate in any ACE test, are no longer required to provide a statement certifying participation in the Customs Trade Partnership Against Terrorism (C–TPAT). Participation in C–TPAT has never been a requirement to establish a carrier account.

EFFECTIVE DATES: The elimination of the C–TPAT requirement to establish an account or participate in any ACE test is effective immediately.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Maricich via e-mail at *Michael.Maricich@dhs.gov*, or by telephone at (703) 668–2406.

SUPPLEMENTARY INFORMATION:

Background

On May 1, 2002, CBP published a General Notice in the **Federal Register** (67 FR 21800) announcing a plan to conduct a National Customs Automation Program (NCAP) test of the first phase of the Automated Commercial Environment. In this notice, CBP stated that it planned to select approximately forty importer accounts from the list of qualified applicants for the initial deployment of this test. The notice also stated that additional participants may be selected throughout the duration of this test. In order to be considered as one of the initial participants, importers' applications had to be received by CBP by June 1, 2002. Applications had to include the importer name, a unique importer number, a statement certifying participation in C–TPAT, and a statement certifying the capability to connect to the Internet.

On June 18, 2002, CBP extended the application period for those desiring to be one of the initial importer participants by publishing a second General Notice in the **Federal Register** (67 FR 41572). That notice emphasized that applications to be an initial participant had to be submitted to CBP prior to August 1, 2002. Applications would be accepted after that date, but parties who so applied would be placed on a waiting list and considered for participation pending expansion of the technology.

On February 4, 2004, CBP published a third General Notice in the **Federal Register** (69 FR 5362) announcing the next step toward the full electronic processing of commercial importations in ACE, with a focus on identifying authorized importers and brokers to participate in the test to implement the Periodic Monthly Statement Process. The Notice stated that participants in this test would benefit by having access to operational data through the ACE Portal, enjoying the capability of being able to interact electronically with CBP, and making payments of duties and fees on a periodic monthly basis. Customs brokers, in order to apply, were required to provide names of the initial forty-one importers participating in the test by whom they had been or will have been designated as the authorized broker. In order to establish an ACE Broker Account, a broker was further required to file an application for participation which was to include the broker name, unique identification number, filer code, statement certifying participation in C–TPAT, statement certifying the capability of connecting to the Internet, statement certifying capability of making periodic payment via the Automated Clearing House (ACH) Credit or ACH Debit, and a statement certifying capability of filing entry/entry summary via Automated Broker Interface (ABI).

Also on February 4, 2004, CBP published a General Notice in the **Federal Register** (69 FR 5360) which described the application process to be followed in order to establish a truck carrier account so as to be eligible to participate in the electronic truck manifest functionality. C–TPAT participation is not required in order to establish a truck carrier account.

On September 8, 2004, CBP published a General Notice in the **Federal Register** (69 FR 54302), reminding the public that importers and their designated brokers may still apply to establish accounts so as to participate in the Periodic Monthly Statement Process. The Notice again invited customs brokers to participate in the ACE Portal test generally.

C–TPAT Participation No Longer Required

In order to encourage maximum participation in ACE and make benefits such as periodic monthly payment widely available, the application process to establish an importer or broker account or to participate in any ACE test will no longer require that a statement certifying C–TPAT participation be provided. It is important to note that this in no way indicates that the support of CBP management for the C–TPAT program has diminished. C–TPAT participants

will continue to realize specific benefits such as reduced examinations. Removal of the C–TPAT requirement for participation in ACE is intended to increase the usage of ACE so as to further streamline the commercial importation process, which will benefit both the importing community and CBP.

Dated: January 27, 2005.

Jayson P. Ahern,

Assistant Commissioner, Office of Field Operations.

[FR Doc. 05–1768 Filed 1–31–05; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1573–DR]

Indiana; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Indiana (FEMA–1573–DR), dated January 21, 2005, and related determinations.

DATES: *Effective Date:* January 21, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated January 21, 2005, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Indiana, resulting from severe winter storms and flooding beginning on January 1, 2005, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such a major disaster exists in the State of Indiana.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance in the designated areas; Hazard Mitigation throughout the State; and any other forms of assistance under the Stafford Act you may deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation and the Other Needs Assistance under section 408 of the Stafford Act will be limited to 75 percent of the total eligible costs. If Public Assistance is later requested and warranted, Federal funds provided under that program will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Ron Sherman, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Indiana to have been affected adversely by this declared major disaster:

The counties of Bartholomew, Benton, Blackford, Boone, Brown, Carroll, Cass, Clark, Clay, Clinton, Crawford, Daviess, Decatur, Delaware, Dubois, Floyd, Fountain, Gibson, Grant, Greene, Hamilton, Hancock, Harrison, Hendricks, Henry, Howard, Huntington, Jackson, Jay, Jennings, Johnson, Knox, Lawrence, Madison, Marion, Martin, Miami, Monroe, Montgomery, Morgan, Orange, Owen, Parke, Pike, Posey, Putnam, Randolph, Rush, Scott, Shelby, Sullivan, Tippecanoe, Tipton, Vanderburgh, Vermillion, Vigo, Wabash, Warren, Warrick, Washington, Wells, and White for Individual Assistance.

All counties within the State of Indiana are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–1780 Filed 1–31–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3198–EM]

Ohio; Amendment No.1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Ohio (FEMA–3198–EM), dated January 11, 2005, and related determinations.

DATES: *Effective Date:* January 25, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of an emergency declaration for the State of Ohio is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared an emergency by the President in his declaration of January 11, 2005:

The counties of Crawford, Huron, Marion, Richland, Sandusky, and Seneca for emergency protective measures (Category B) under the Public Assistance program for a period of 48 hours.

(Catalog of Federal Domestic Assistance No. 97.036, Disaster Assistance.)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–1778 Filed 1–31–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Notice of Adjustment of Statewide Per Capita Threshold for Recommending a Cost Share Adjustment

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: FEMA gives notice that we are increasing the statewide per capita threshold for recommending cost share adjustments for disasters declared on or after January 1, 2005, through December 31, 2005.

DATES: *Effective Date:* February 1, 2005. *Applicability Date*: This notice applies to major disasters declared on or after January 1, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Pursuant to 44 CFR 206.47, FEMA annually adjusts the statewide per capita threshold that is used to recommend an increase of the Federal cost share from seventy-five percent (75%) to not more than ninety percent (90%) of the eligible cost of permanent work under section 406 and emergency work under section 403 and section 407 of the Stafford Act. The adjustment to the threshold is based on the Consumer Price Index for All Urban Consumers published annually by the U.S. Department of Labor. For disasters declared on January 1, 2005, through December 31, 2005, the qualifying threshold is $110 of State population.

We base the adjustment on an increase in the Consumer Price Index for All Urban Consumers of 3.3 percent for the 12-month period ended in December 2004. The Bureau of Labor Statistics of the U.S. Department of Labor released the information on January 19, 2005.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individual and Household Housing; 97.049, Individual and Household Disaster Housing Operations; 97.050, Individual and Household Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–1779 Filed 1–31–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review; Request for the Return of Original Document(s), Form G–884.

The Department of Homeland Security, U.S. Citizenship and Immigration Services has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until April 4, 2005.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

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

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

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

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

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Request for the Return of Original Document(s).

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G–884. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. The information provided will be used by the USCIS to determine whether a person is eligible to obtain original document(s) contained in an alien file.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 2,500 responses at 15 minutes (0.25) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 625 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please contact Richard A. Sloan, Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., Washington, DC 20529; 202–272–8377.

Dated: January 27, 2005.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–1811 Filed 1–31–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Medical Certification for Disability Exceptions, Form N–648.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are

encouraged and will be accepted for sixty days until April 4, 2005.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

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

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

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

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

Overview of this information collection:

(1) *Type of Information Collection:* Extension of currently approved collection.

(2) *Title of the Form/Collection:* Medical Certification for Disability Exceptions.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–648. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. The USCIS uses the Form N–648 to substantiate a claim for an exception to the requirements of section 312(a) of the Immigration and Nationality Act. This certification is needed to support an applicant's claim of an exception to this naturalization requirement.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 20,000 responses at 2 per hour response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 40,000 annual burden hours.

If you have additional comments, or need a copy of the information collection instrument, please contact Richard A. Sloan, Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., Washington, DC 20529; 202–272–8377.

Dated: January 27, 2005.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–1812 Filed 1–31–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4971–N–03]

Notice of Submission of Proposed Information Collection to OMB; Technical Suitability of Products Program

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 continued approval to require an application for acceptance of products for use in structures approved for mortgages or loans insured under the National Housing Act. Under the established Technical Suitability of Products (TSP) program, manufacturers (sponsors) of nonstandard housing-related materials, products, or structural housing systems must apply to HUD for a determination of technical acceptance. The two major categories of acceptance are: (1) Structural building systems, subsystems, and components; and (2) structural and nonstructural materials and products.

DATES: *Comments Due Date:* March 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 (2502–0313) 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: Technical Suitability of Products Program.

OMB Approval Number: 2502–0313.

Description of the Need for the Information and its Proposed Use: Under the established Technical Suitability of Products (TSP) program, manufacturers (sponsors) of nonstandard housing-related materials, products, or structural housing systems must apply to HUD for a determination of technical acceptance. The two major categories of acceptance are: (1) Structural building systems, subsystems, and components; and (2) structural and nonstructural materials and products.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	50	50		44		2,200

Total Estimated Burden Hours: 2,200.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 24, 2005.

Wayne Eddins,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. 05–1751 Filed 1–31–05; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species and/or marine mammals.

DATES: Written data, comments or requests must be received by March 3, 2005.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax (703) 358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone (703) 358–2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

Applicant: San Antonio Zoo, San Antonio, TX, PRT–098187.

The applicant requests a permit to import one male and one female captive-born cheetah (*Acinonyx jubatus jubatus*) from the De Wildt Cheetah Breeding Center, South Africa for the purpose of enhancement of the survival of the species.

Applicant: Cheyenne Mountain Zoo, Colorado Springs, CO, PRT–098356.

The applicant requests a permit to export biological samples (hair and blood) from live captive-born tapirs (*Tapirus pinchaque*) to the University of the Andes, Bogota, Columbia, for the purpose of enhancement of the survival of the species.

Applicant: John Blaine, Missoula, MT, PRT–097566.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: James E. Davidson, St. Augustine, FL, PRT–097137.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Marine Mammals

The public is invited to comment on the following applications for a permit to conduct certain activities with marine mammals. The applications were submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361, *et seq.*), and the regulations governing marine mammals (50 CFR Part 18). Written data, comments, or requests for copies of the complete applications or requests for a public hearing on these applications should be submitted to the Director (address above). Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Applicant: Merle S. Barnaby, Caledonia, MI, PRT–097151.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Western Hudson Bay polar bear population in Canada for personal, non-commercial use.

Applicant: Gary S. Glesby, Houston, TX, PRT–097871.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Western Hudson Bay polar bear population in Canada for personal, non-commercial use.

Applicant: John A. Kemhadjian, Encino, CA, PRT–097152.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Foxe Basin polar bear population in Canada prior to February 18, 1997, for personal, non-commercial use.

Applicant: Leo Potter, Lake Geneva,WI, PRT–097575.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Western Hudson Bay polar bear population in Canada for personal use.

Applicant: John C. Mackay, Fairfield, CA, PRT–096951.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Baffin Bay polar bear population in Canada prior to February 18, 1997, for personal, non-commercial use.

Dated: January 14, 2005.

Lisa J. Lierheimer,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 05–1851 Filed 1–31–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits for endangered species and/or marine mammals.

SUMMARY: The following permits were issued.

ADDRESSES: Documents and other information submitted with these

applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone (703) 358–2104.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on the dates below, as authorized by the provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*), and/or the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361, *et seq.*), the Fish and Wildlife Service issued the requested permits subject to certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in Section 2 of the Endangered Species Act of 1973, as amended.

ENDANGERED SPECIES

Permit number	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
095573	Edward W. Johnson	69 FR 68968; November 26, 2004	December 27, 2004.
096039	Hugh Cropper III	69 FR 68968; November 26, 2004	December 27, 2004.
095425	James A. Toth	69 FR 68968; November 26, 2004	December 27, 2004.

ENDANGERED MARINE MAMMALS AND MARINE MAMMALS

Permit number	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
080580	Nova Southeastern University	69 FR 5569; February 5, 2004	January 12, 2005.
095238	Edward A. Bell	69 FR 68968; November 26, 2004	January 10, 2005.
095768	Sidney R. Wilhite	69 FR 68968; November 26, 2004	January 12, 2005.

Dated: January 14, 2005.

Lisa J. Lierheimer,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 05–1852 Filed 1–31–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Meeting of the Trinity Adaptive Management Working Group

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. I), this notice announces a meeting of the Trinity Adaptive Management Working Group (TAMWG). The TAMWG affords stakeholders the opportunity to give policy, management, and technical input concerning Trinity River restoration efforts to the Trinity Management Council. Primary objectives of the meeting will include: Introduce new members; historical overview; program orientation; how to make TAMWG more effective; TAMWG organization, operations, and effectiveness; and election of officers. The agenda items are approximate and are dependent on the amount of time each item takes. The meeting could end early if the agenda has been completed. The meeting is open to the public.

DATES: The Trinity Adaptive Management Working Group will meet from 9 a.m. to 5 p.m. on Tuesday, March 1, 2005.

ADDRESSES: The meeting will be held at the Veteran's Memorial Hall, 101 Memorial Lane, Weaverville, CA 96001. Telephone: (530) 623–3975.

FOR FURTHER INFORMATION CONTACT: Mike Long of the U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, California 95521, (707) 822–7201. Mike Long is the committee's Designated Federal Official.

SUPPLEMENTARY INFORMATION: For background information and questions regarding the Trinity River Restoration Program, please contact Douglas Schleusner, Executive Director, Trinity River Restoration Program, P.O. Box 1300, 1313 South Main Street, Weaverville, California 96093, (530) 623–1800.

Dated: January 20, 2005.

Paul Hanson,

Acting Manager, California/Nevada Operations Office , Sacramento, CA.

[FR Doc. 05–1792 Filed 1–31–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Natural Gas Pipeline 30 Year Right-of-Way Permit Application Crossing Land Owned by the Fish and Wildlife Service at Stone Lakes National Wildlife Refuge, Sacramento County, California, for Review and Comment

AGENCY: Fish and Wildlife Service, Interior

ACTION: Notice for public comment period.

SUMMARY: This notice advises the public that Longbow, LLC has applied for the installation of one natural gas pipeline for a 30 year right-of-way permit across the U.S. Fish and Wildlife Service (Service) easement tract (37P) located at Stone Lakes National Wildlife Refuge, Sacramento County, California. The pipeline would be underground and would transport natural gas produced from a well located approximately 800 feet east of the Refuge boundary, to a gas sales point two miles to the southwest, located off the Refuge boundary. The applicant proposes to perpendicular bore the pipeline 15–20 feet under the ground. The portion of the Refuge the pipeline would pass under is the right-of-way for the abandoned Southern Pacific Railroad and associated borrow channel. The pipeline would be bored

and installed from private agricultural land 800 feet east of the Refuge using directional drilling equipment, construction and operation of the pipeline would not be detectable at the surface of the Refuge and cause no detectable ground surface disturbances to terrestrial or aquatic habitats within Stone Lakes NWR at any time during it's construction or operation. Therefore the proposed use would not negatively affect the purposes of Stone Lakes NWR or the mission of the Service or impact existing or potential wildlife-dependent recreational uses.

DATES: Written comments should be received on or before March 3, 2005 to receive consideration by the Service.

ADDRESSES: Comments should be addressed to: Manager; California/Nevada Operations Office, Attention Realty Officer, U.S. Fish and Wildlife Service, 2800 Cottage Way, W–2610, Sacramento, CA 95825.

FOR FURTHER INFORMATION CONTACT: Realty Specialist Steve Lay at the above California/Nevada Operations Office address, (916) 414–6447.

SUPPLEMENTARY INFORMATION: The purpose of this Notice is to inform the public that the Service will be proceeding with the processing of this application, the compatibility determination, and the approval processing which includes the preparation of the terms and conditions of the permit. The purpose of the natural gas pipeline is to provide reliable and cost effective energy to the residential, commercial, and industrial customers within Sacramento and adjacent counties. The total width of the subsurface right-of-way is twenty feet to be located ten feet on either side of the centerline. The total length of the right-of-way is 170.85 feet . Therefore the total area of the subsurface right-of-way would comprise approximately 3,417 square feet or 0.0784 acres. The depth of the subsurface right-of-way would be approximately 15–20 feet underground. The pipeline itself is six inches in diameter Schedule 20 ERW carbon steel API 5L Grade B or Grade x 42 steel pipe and will be inserted into a slightly larger diameter (7 inches) hole. An Environmental Action Statement has been prepared by the Stone Lakes NWR Refuge Manager stating the relevant categorical exclusion pertaining to this proposed right-of-way. A Compatibility Determination has been written and has concluded that the proposed use would not negatively affect the purposes of Stone Lakes NWR or the mission of the Service or impact existing or potential wildlife-dependent recreational uses.

Authority: Right-of-way applications for pipelines are to be filed in accordance with Section 28 of the Mineral Leasing Act of 1920 (41 Stat. 449; 30 U.S.C. 185 amended by Pub L. 93–153).

Dated: January 26, 2005.

Ken McDermond,

Acting Manager, California/Nevada Operations Office, Sacramento, California.

[FR Doc. 05–1810 Filed 1–31–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF INTERIOR

Fish and Wildlife Service

Fish and Wildlife Service and Confederated Salish and Kootenai Tribal Governments Sign Annual Funding Agreement

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: On December 15, 2004, the U.S. Fish and Wildlife Service (Service or we) signed an annual funding agreement (AFA or Agreement) with the Confederated Salish and Kootenai Tribal Governments (CSKT) under the Tribal Self-Governance Act of 1994. The action was taken at the discretion of the Service. The decision reflects review and consideration of concerns, issues, and comments received during a 90-day public comment period which began on July 14, 2004, and ended on October 12, 2004. The public comment period was reopened for an additional 15 days on October 20, 2004, and closed on November 4, 2004. The Agreement was re-negotiated and slightly re-worded following the public comment period. The Agreement provides for the CSKT to perform certain programs, services, functions, and activities (Activities) for the National Bison Range and ancillary properties (Northwest Montana Wetland Management District, Pablo, and Ninepipe NWRs) during an 18-month period. The Regional Director for the Service in Denver, Colorado, signed the agreement December 15, 2004. The Secretary of the Interior immediately endorsed the Agreement, and forwarded it to the U.S. Congress for a 90-day review period.

DATES: The agreement period is March 15, 2005, through September 30, 2006. As provided by the Tribal Self-Governance Regulations at 25 CFR 1000.146, and subject to applicable laws and regulations, the Service and the CSKT may agree in writing to extend to a date after September 30, 2006, the term for performing any Activity covered by the AFA. All of the terms and conditions of the AFA will apply during any extension of the term of the AFA. The Service and CSKT may modify the Activities covered by the AFA or the consideration paid by the Service to the CSKT for performing an Activity only by amending the AFA as provided in section 20.A of the AFA.

ADDRESSES: You may obtain the final agreement and supporting documentation at:

1. Montana—National Bison Range Headquarters, 132 Bison Range Road, Moiese, Montana 59824;
2. Denver—U.S. Fish and Wildlife Service Regional Office, National Wildlife Refuge System—Mountain-Prairie Region, P.O. Box 25486, DFC, Denver, Colorado 80225;
3. Confederated Salish and Kootenai Tribes, P.O. Box 278, Pablo, Montana 59855; or
4. Internet—*http://mountain-prairie.fws.gov/cskt-fws-negotiation*.

FOR FURTHER INFORMATION CONTACT: Steve Kallin, Refuge Manager, (406) 644–2211, extension 204.

SUPPLEMENTARY INFORMATION:

What is the National Bison Range Complex? The National Bison Range Complex (NBRC), part of the National Wildlife Refuge System (NWRS), and consists of the National Bison Range, Swan Lake, Lost Trail, Pablo, and Ninepipe National Wildlife Refuges, and the Northwest Montana Wetland Management District. Established in 1908 to conserve the American bison, the Bison Range and ancillary properties provide important habitat for a variety of species such as elk, pronghorn antelope, and migratory birds.

How Did the Service Develop the Agreement? The Service and the CKST carried out negotiations in accordance with regulations in 25 CFR part 1000.

What Events Led to This Action? In spring 2003, the CSKT submitted a formal request to reinitiate negotiations related to compacting of activities at the National Bison Range and ancillary properties (Northwest Montana Wetland Management District, Pablo, and Ninepipe NWRs) pursuant to the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638). In response to this request, negotiations between CSKT and the Service on an AFA for that portion of the National Bison Range Complex within the Flathead Indian Reservation began in the summer of 2003.

What is the Tribal Self-Governance Act? The Tribal Self-Governance Act of 1994 was enacted as an amendment to Public Law 93–638 and incorporated as Title IV of that Act. The Self-Governance Act allows qualifying self-

governance tribes the opportunity to request AFAs with the Bureau of Indian Affairs (BIA) and nonBIA bureaus within the Department of the Interior. When dealing with nonBIA bureaus, including the Service, qualifying tribes may enter into AFAs that would allow them to conduct certain activities of such nonBIA bureaus. Eligible activities include Indian programs (programs created for the benefit of Indians because of their status as Indians); activities otherwise available to Indian tribes (any activity that a Federal agency might otherwise contract to outside entities); and activities that have a special geographic, historical, or cultural significance to an Indian tribe.

Public Law 93–638 and the regulations that implement the law (25 CFR 1000.129) prohibit the inclusion of activities in an AFA that are inherently Federal functions. The Refuge has no special Indian programs. All activities of the Service on national wildlife refuges are for the benefit of the fish and wildlife resources, their habitats, and the American public. Activities that may have a special relationship with a tribe are the most promising for inclusion in an AFA. Whether to enter into an agreement with a tribe for these activities is discretionary on the part of the Service. The Service recognizes that many members of the CSKT who live near the National Bison Range have a cultural, historical, and/or geographical connection to the land and resources of the National Bison Range and; therefore, may feel very much a part of these lands. The proposed agreement provides for the CSKT to perform certain programs, services, functions, and activities for the National Bison Range Complex during an 18-month period.

What Happens Now? The Service and CSKT signed the Agreement on December 15, 2004. The Secretary of the Interior accepted and endorsed the Agreement the same day. In accordance with 25 CFR 1000.177, the Secretary then forwarded the Agreement to the Senate Indian Affairs Committee and the House Resources Committee Office of Insular and Native American Affairs. If there are no objections to the Agreement, it will go into effect 90 days after it was submitted to Congress.

Summary of Public Involvement

On July 6, 2004, the Service issued a press release in Montana announcing a future **Federal Register** notice and present availability of the AFA on the joint Service and CSKT Web site. It provided the Web site where the public could obtain the draft agreement, an address to obtain a hard copy of the document, and an address for submitting comments. The Service announced the public comment period (July 14–October 12, 2004) in the **Federal Register** (69 FR 42199, July 14, 2004). In addition, we issued a joint news release with the CSKT on July 14, 2004, in Montana and provided interviews with local media. We provided the news release, draft Agreement, and an opportunity to provide questions and/or comments on the joint Web site. The Service and the CSKT also provided a joint news release (August 25, 2004) in advance of public meetings held in September 2004, in Polson, Montana, and Missoula, Montana, and an open house at the National Bison Range Complex. On October 12, 2004, the Service and the Tribes issued a joint news release containing information on the cost of the AFA. As a result of the comment period reopening until November 4, 2004, on October 13, 2004, the Service, Congressman Denny Rehberg of Montana, and the CSKT issued a joint news release to the Montana community. The Service issued another news release on October 20, indicating that we published a **Federal Register** notice [69 FR 61692, October 20, 2004] that day announcing the reopening of the comment period. Media contacts, resulting in many newspaper articles and inquiries, occurred regularly throughout the process. Local Montana newspapers carried each announcement as well as some national newsletters of refuge-oriented organizations and Native American publications. We also provided the announcement electronically to private citizens nationally who are members of various conservation and refuge-oriented organizations. We provided Congressional updates throughout the public comment period. We expect a 90-day review by Congress to occur over the next few months.

Nature of Public Comments

We received 1,356 comments by a variety of means. Several individuals and/or groups submitted more than one comment. Comments were addressed to President George W. Bush, Secretary of the Interior Gale A. Norton, FWS Director Steve Williams, Regional Director Ralph O. Morgenweck, Refuge Manager Steve Kallin, Refuge Supervisor Steve Berendzen, or other government officials. Of the comments received, approximately 720 were preprinted postcards; approximately 115 were form letters; and approximately 520 letters/emails were from individuals, environmental groups, Indian tribes, and businesses that contained specific substantive comments. However, some of those comments were third party comments that were forwarded to the Service and those third party comments predated the draft AFA that was available for public comment. Included in the 1,356 comments were approximately 420 pages of petitions containing approximately 8,380 unverified signatures. We received comments from 44 States, 1 from Canada, and several unknown locations. We received more than 900 comments from Montana.

Response to Public Comments

Issue 1: Draft AFA hinders Service ability to fulfill mission of NWRS at the NBRC.

Concerns: This agreement weakens Service's ability to fulfill its trust responsibilities and limits accountability to the public.

Comment: ''Although the draft AFA reserves to FWS the ultimate responsibility and authority for operation and management of the NBRC, many of its provisions hamstring the ability of the FWS to fulfill its duty and public trust obligation under the National Wildlife Refuge System Administration Act to manage the refuge units or inappropriately shift management responsibility to CSKT * * *.''

Response: The National Bison Range Complex (NBRC) and the Confederated Salish and Kootenai Tribes (CSKT) have worked cooperatively in the past on a number of different projects and initiatives. The Service remains committed to fulfilling the mission of the NWRS by working with the CSKT to achieve refuge goals at the NBRC through the Annual Funding Agreement (AFA). The AFA states in Section 7 that the Refuge Manager retains final authority for directing and controlling the operation of the NBRC, as well as the CSKT's performance of duties covered under this AFA.

Issue 2: Draft AFA lacks sufficient specificity to ensure CSKT accountability.

Concern: Lack of specificity prevents successful implementation or meaningful performance assessments, which are essential for enforcing accountability.

Comment: ''From our years of experience and perspectives as managers of National Wildlife Refuges and National Fish Hatcheries, the agreement as written is too broad and comprehensive and lacks the specificity needed to make it work, or even support a meaningful review.'' Also, ''No Refuge Manager, no matter how skilled, could successfully implement this agreement as it is written.''

Response: In this AFA, the Refuge Manager retains the responsibility and authority to provide additional direction to the CSKT, to ensure tasks are completed according to Service standards and applicable policy, regulations, and laws. This AFA has great detail and attempts to strike a balance between specificity and flexibility to enable the Service and the CSKT to adapt to changing conditions.

Issue 3: Reduced financial accountability.

Concern: Records of expenditures are provided ''to the FWS to the extent the FWS requires them for its budget appropriation and apportionment processes * * *'' This requirement is insufficient for a detailed audit necessary to ensure fiscal accountability.

Comment: ''Section 9 of the agreement, ''Records and Other Information,'' lacks any requirements for auditing the CSKT budget or financial records related to the AFA. Specifically, the agreement only calls for the CSKT to provide such information to the FWS ''to the Extent the FWS requires them for its budget appropriation and apportionment processes * * *'' To ensure the FWS's ability to effectively manage operations at the NBRC, while remaining accountable to the public, the CSKT's financial records and other documents related to administering the AFA must be made available to the FWS, and a comprehensive auditing of activities and expenditures of funds must be performed by the FWS prior to negotiation of any subsequent AFAs.''

Response: Since the CSKT is already statutorily mandated to submit single-agency audit reports under 31 U.S.C. 7501 *et seq.*, there is no need for the Agreement to duplicate existing Federal audit requirements. In order to qualify as a Self-Governance Tribe, the CSKT has already had to demonstrate financial accountability under existing Federal statutes and regulations. Section 9 of the Agreement contains additional assurances concerning the CSKT's records, expenditures, and financial report. We do not believe that this AFA reduces the financial accountability of either the CSKT or the NBRC.

Issue 4: Separation of FWS employees from Refuge Manager's supervisory authority.

Concern: Transferring supervision of Service staff to CSKT creates an unworkable management structure and separates the responsibility to manage the NBRC from the authority to accomplish these responsibilities. The Manager is still held accountable for management of the NBRC, but lacks the ability, authority, and flexibility to direct staff efforts on a daily basis to accomplish refuge objectives.

Comment: ''We fear that the proposed structure would eliminate the Refuge Manager's direct authority over refuge employees. It is important that these issues be clarified in the AFA, in an effort to retain the management authority of the Refuge Manager. The Refuge Manager must retain direct supervisory authority over all employees operating on the Bison Range and retain control of the day-to-day implementation of the Range's programs and plans.

The proposed ''transfer'' of staff to CSKT control, a splitting of resources that results in untenable managerial arrangements, should be abandoned. No successful business or government agency would attempt to operate with such a bifurcated supervision. The proposed concept of meeting weekly, or more often, just to initiate the process of describing upcoming tasks, setting objectives and priorities, and then going through an uncertain, time-consuming reconciliation whenever CSKT inserts disagreement or wants changes, is an inherently complicated, weak, and costly managerial process. The NWRS cannot afford such unproductive and costly methods and practices.''

Response: We acknowledge that, while some Service employees will be separated from the direct supervisory control of the Refuge Manager, the Refuge Manager and the Coordinator will work cooperatively to oversee the successful implementation of this AFA. However, under the AFA, the Refuge Manager retains final responsibility and authority for the NBRC operations (see Section 7 A–C of the Agreement), and thus also retains oversight necessary to exercise such authority. The Service has been careful to insure that this AFA does not contravene the spirit or letter of the National Wildlife Refuge System Administration Act (16 U.S.C. 668dd–668ee, as amended). The Service will evaluate the effectiveness of this supervisory structure and will be open to suggested modifications in the future. CSKT will only manage those NBRC employees contracted under this AFA, and CSKT's performance of the Activities under this AFA remains subject to the Refuge Manager's authority.

Issue 5: CSKT may lobby Congress for additional AFA funding.

Concern: If CSKT successfully lobbies Congress to earmark funding for NBRC AFA, national wildlife refuges in Montana, and throughout the NWRS will suffer from reduced funding.

Comment: ''Explicit language throws wide open the door for CSKT to lobby Congress for even greater, and more certain funding and favors (normally a violation of law), at the expense of other units of the NWRS throughout the country.''

Response: The CSKT is already subject to the generally applicable Federal laws that prohibit Federal funds from being used to lobby Congress and other government entities [18 U.S.C. 1913 and 25 CFR 1000.397]. This Agreement does not alter the applicability of those laws to CSKT.

In response to the public comment, we amended the AFA to reflect that the applicable Federal laws prohibit use of Federal funds to lobby any governmental entity, not just Congress. The revised Section 12.G will now read as follows:

G. Lobbying. The CSKT will not use any of the funds the FWS pays the CSKT under this AFA to lobby Congress or any other government entity in any manner prohibited by Federal law.

Issue 6: NEPA Compliance.

Concern: This draft AFA is precedent setting, both for the NBRC and the NWRS. The Categorical Exclusion prepared for the draft AFA is insufficient to address this precedent and is inconsistent with the Service's standard National Environmental Policy Act (NEPA) approach to issues of this magnitude.

Comment: ''Such a broad change in management of critical wildlife resources and public lands and the broad controversy over this transfer clearly mandates an EIS [Environmental Impact Statement], or at minimum, an Environmental Assessment of the impacts.''

Response: The Service does not believe the Agreement is a major Federal action that will result in significant environmental impacts. The Service considers the work that is identified in the Agreement to be part of the routine operations, maintenance, and management of the National Bison Range Complex (whether done by Service employees, CSKT employees, or another contractor). The Service has found that routine operation, maintenance, and management activities do not (individually or cumulatively) have a significant effect on the human environment and are, therefore, categorically excluded from NEPA compliance (516 DM 6).

Issue 7: Waiver of Regulations.

Concern: Using waivers, CSKT may bypass refuge regulations, operational standards, procedures, protocols.

Comment: ''The Federal laws and regulations governing the NBRC have

been shaped by decades of Congressional, agency, and public interest and should not be waived lightly. Language similar to the CATG [Council of Athabascan Tribal Governments] AFA should be included in the CSKT AFA.''

Response: Neither the AFA nor the Tribal Self-Governance Act allows the CSKT to waive any Federal law. However, Section 8.C of the AFA does recognize the Tribal Self-Governance Act provision allowing the CSKT to request a waiver of a *regulation* (25 U.S.C. 458cc(i)(2)). The waiver would be addressed to the Service Director pursuant to 25 CFR 1000.222(a). According to 25 CFR 1000.226, The Secretary may deny a waiver request if:

(b) For a non-Title-I-eligible program, the requested waiver is:

(1) Prohibited by Federal law; or

(2) Inconsistent with the express provisions of the AFA.

In response to the public comment, the parties have agreed that the CSKT will only make a waiver request after consultation with the Refuge Manager. The revised Section 8.C reads as follows:

C. *Waivers.* The CSKT may request, after consulting with the Refuge Manager, that the Secretary waive a regulation in accordance with the procedures in § 403(i)(2) of the Act, 25 U.S.C. 458cc(i)(2), and the Tribal Self-Governance Regulations at 25 CFR part 1000, subpart J.

Issue 8: Federal Tort Claims Act protection for Service volunteers.

Concern: Volunteers are vital to the safe, effective, and timely completion of numerous Activities on the NBRC. We routinely involve volunteers in completion of potentially dangerous activities such as moving the bison herd between grazing units and handling bison during the annual roundup. Under the draft AFA, volunteers for these activities would become CSKT volunteers, and would not be afforded protection under the Federal Tort Claims Act. This lack of protection may preclude many current Service volunteers from volunteering with CSKT.

Comment: ''FWS has stated volunteers for the contractor (CSKT) will not be covered for liability or be compensated in case of injury or accident. I have been a volunteer assisting in bison roundup corral work since 1994. However, because of this lack of protection, I will decline to volunteer if this operation is taken over by contract. Others who have been volunteering will no doubt have no choice but to do the same.''

Response: As to the concern about whether there is compensation for the volunteer in the event of injury or accident, the AFA requires the Tribe to provide workers' compensation ''commensurate with that provided to other CSKT Tribal government employees.'' Accordingly, this should not be an issue for volunteers to the Tribe.

With respect to the liability concern, the Indian Self-Determination Act and the Tribal Self-Governance Act directly focused on the question of liability for activities conducted under those Acts' agreements:

> [T]he Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this subchapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act [25 U.S.C. 450f(c)(1)]

The AFA indicates that the Federal Tort Claims Act (FTCA) applies as authorized by applicable statutes and the Self-Governance Regulations. As the regulations make clear, the FTCA is applicable to the tribe and its employees even if the AFA were silent on this issue. However, applicability of the FTCA has never been absolute, but dependent upon a case-by-case determination of the particular facts and circumstances surrounding each incident. For example, no coverage exists at all under the FTCA for intentional torts. Depending upon the particular circumstances, volunteers may or may not be considered to be employees of the Tribe who specifically fall within the coverage extended by the Tribal Self-Governance Act. The AFA requires that all persons working on this AFA have sufficient professional requirements, skill, and/or experience to properly and safely perform their assigned activities under the AFA. It is hoped that many of the same persons who have volunteered in the past will continue to do so in the future, and thus the Bison Range will operate much the same as it has in the past. Over the past 5 years, two liability claims have been brought. There is no reason to anticipate a change in the future.

The FTCA itself specifically encompasses persons who serve without compensation. The FTCA defines ''employee of the government'' to include both ''employees'' *and* ''persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, *whether with or without compensation''* [28 U.S.C. 2671, *emphasis added*].

Issue 9: Personal safety of employees, volunteers, and visitors.

Concern: The Service will not have direct supervision of, or adequate interaction with CSKT employees and volunteers, in order to anticipate and prevent unsafe situations. This will hinder the Service's ability to provide the normal Service standard of safety.

Comment: ''* * * [S]ome activities on the National Bison Range are unique and dangerous. Sudden loss of the majority of the affected employees would leave management of the refuge and safety of employees and the public in jeopardy.''

Response: Although the Refuge Manager will no longer be directly responsible for the supervision of some employees, this reduced interaction with the staff is not anticipated to result in unsafe conditions. The Refuge Manager retains the responsibility and authority over the NBRC and can address any safety concerns or unsafe situations that come to his attention. The Service will evaluate the effectiveness of this structure on public and employee safety and will be open to suggested adjustments in the future. However, in response to this public concern and in the interest of making this point clear, the AFA has been modified by adding a new Section 7.E which reads as follows:

E. *Safety.* Nothing in this Agreement shall be interpreted as restricting the authority of either the Refuge Manager or the Coordinator to take immediate steps to address any safety concerns.

Issue 10: Qualifications of CSKT employees and volunteers.

Concern: The draft AFA does not provide the Refuge Manager with adequate oversight authority to determine whether CSKT employees and volunteers are adequately qualified to safely, effectively, and efficiently perform assigned Activities.

Comment: ''* * * [W]e recommend that a more descriptive set of standards be developed to ensure qualified professionals are doing the work. Relegating work from federal fish and wildlife biologists and managers with known credentials to persons unknown and potentially unqualified could be detrimental to management efforts on the Refuge.''

Response: The CSKT has an existing Natural Resources Department and has assured the Service that only qualified personnel will be working on the NBRC. To make the issue of qualifications

clearer in response to this public comment, Section 11, C of the AFA was modified to include ''knowledge, skills and abilities'' in the list of items identified in the provision addressing ''Training and Skill.'' The revised section would read as follows:

C. *Training and Skill.* The CSKT will ensure that each CSKT Employee, CSKT Contractor, and CSKT Volunteer has sufficient knowledge, skills, and abilities to properly and safely perform each Activity the CSKT assigns her or him to perform.

Issue 11: Affected [FWS] employees.

Concern: Under the draft AFA, career Service employees are forced to select from employment options they consider completely unacceptable. Many comments characterize the offered employment options as ''unfair treatment'' of the Service's most valuable resource, its employees.

Comment: ''These faithful staff are now being told they have the choice of taking a position with CSKT, taking an IPA position paid for by the refuge, but under full control and supervision of CSKT, transferring to another refuge (fully restricted to time limits and availability) or they face the loss of their job. All of their years of service have been wiped away by the CSKT demands, and the lack of forceful defense by the FWS. What has happened to the often vaunted Federal employee protection and rights? Since when does a decade or more of dependable, timely, and successful work not bring some job protection? How can this heavy-handed and unwarranted abridgement of sound employee practices be permitted to occur on the basis of applying a discretionary authority to sign an AFA as against their long held rights?''

Response: The AFA provides four different options for the existing NBRC employees whose positions will be contracted by CSKT. These options include: (1) Remaining a Service employee and being assigned to CSKT under an Intergovernmental Personnel Act (IPA) Agreement; (2) becoming a CSKT employee but retaining Federal benefits; (3) becoming a CSKT employee with tribal benefits; and (4) reassignment by the Service to another duty station. *See* Section 11.E.3 of the Agreement.

This practice of IPA assignments has also taken place with a nonBIA agency: The National Park Service (NPS) has an AFA with the Grand Portage Band of Chippewa Indians in which an NPS employee is assigned to the Grand Portage Band via an Intergovernmental Personnel Act (IPA) agreement. That option and more are available to NBRC employees under Section 11.E.3 of the NBRC AFA.

In response to related concerns that seasonal NBRC employees may somehow be restricted from extending their employment at the NBRC, the parties have agreed to modify the Agreement to make clear that seasonal employees assigned to CSKT via an IPA agreement can have their assignments extended beyond their 6-month standard period of employment (contingent upon funding from the Service). A new Section 11.E.5.d reads as follows:

d. *Seasonal IPA Employees.* Contingent upon funding provided by FWS, the IPA agreement of any seasonal Affected Federal Employee may be extended beyond the original six month duration specified in the AFA, provided that such extension does not result in such employee working more than 50 weeks of the year, in which case the employee would no longer have seasonal status.

Issue 12: AFA implementation costs.

Concern: Additional costs (i.e., costs above existing station budget) associated with implementing an AFA will reduce available funding for NBRC operations and other NWRs.

Comments: ''In these days of Federal Budget shortages, any increase in operation costs for the National Bison Range will be diverted from budgets of other Refuges.'' And, ''As similar agreements are requested for more refuges, a reasonable person must presume that extra costs will continue to multiply. Negative financial impacts to the Refuge System, as a whole, will compound with each additional agreement.''

Response: The cost estimate that the Service provided to Senator Conrad Burns found that, for fiscal year 2005, the Agreement would cost approximately $23,460, or about 2.45 percent more than it would cost the Service to conduct the same activities within the external boundary of the Flathead Indian Reservation based on FY 2004 operational budgets for the NBRC. The cost estimate also found that, over a 5-year period, there could be cost savings to the NBRC if a supervisory position were to be contracted to CSKT under a future AFA, eliminating the need for the Coordinator position currently provided in the AFA.

Issue 13: Unresolved Incompatible uses on Pablo and Ninepipes NWRs.

Concern: Unresolved CSKT issues with applicability of Service compatibility requirements may extend into other aspects of the AFA.

Comment: ''Because of the importance of the compatibility requirement in refuge system law we request that concrete measures be taken by FWS and CSKT to resolve these compatibility issues before the AFA is finalized. We believe that all parties should act in good faith and begin the important relationship established in the AFA with a ''Clean Slate, unmarred by the compatibility issue.' ''

Response: Most of the incompatible uses on the Pablo and Ninepipes NWRs have been resolved; however, the Service acknowledges that a few agricultural issues are still unresolved pending resolution of Service authority in this matter. The parties continue to discuss these issues and work toward a mutually satisfactory resolution. As long as these issues are being addressed in good faith by both sides, there has been a policy decision that they should not have any bearing on this Agreement.

Issue 14: Service AFAs are inconsistent due to the lack of policy guidance.

Concern: Too many Activities contracted under NBRC draft AFA; ''too much too fast.''

Comments: ''In the interest of future success, I urge a serious consideration of immediate action to suspend the processes now under way. * * *'' And, ''I earnestly recommend the prompt initiation of a policy development process to give proper guidance to FWS managers as more requests for participation are presented by Tribal authorities. To be most profitable, this process should be a thoroughly transparent one, preferably involving the public, representatives of Tribes, and others, employing the processes widely prescribed for public involvement in important policy considerations.''

Response: While the Service may not have a great deal of experience with Tribal AFAs, other Interior agencies have been administering them for years. Four existing AFAs between Tribes and the National Park Service have established a record of success, as have numerous other BIA AFAs, and we are confident that the NBRC AFA will be equally successful. Nonetheless, we agree that, because of the greater amount of public interest in the negotiation process for the NBRC AFA, policy questions were raised that were not at issue in other AFA negotiations. The Service agrees that the development of a policy to guide future AFA negotiations would improve the negotiation process. The Service is beginning the process of developing its policy to address and clarify various

issues including, but not limited to, the role of public comment, the government-to-government relationship, affected employee considerations, and other issues as may be raised during the process of developing this policy. The Service will seek input from Indian Country, nongovernment organizations, and the public as it develops its policy.

Issue 15: No process identified to resolve disagreements over performance deficiencies.

Concern: Section 10.3.b provides no final guidance for resolution of disagreements on performance.

Comment: ''This says that after the Refuge Manager informs CSKT of a deficiency, the CSKT will have a 'reasonable amount of time to either remedy the performance deficiency or establish that no deficiency exists. * * *' This implies that CSKT can unilaterally decide that the Refuge Manager is wrong and that they are not deficient in performance.''

Response: Section 18 of the AFA refers to 25 CFR part 1000, subpart R (''Appeals''), as well as 25 U.S.C. 450m-1, as the authority and process for dispute resolution. To address this public concern, the AFA was amended to read that the CSKT would ''demonstrate to the Refuge Manager'' that an alleged deficiency does not exist. The revised Section 10.A.3.b(2) now reads as follows:

(2) *Written Notice.* The Refuge Manager will notify the Tribal Council in writing of any other performance deficiency, including any performance deficiency that constitutes grounds for reassumption under Section 16.C of this AFA. The written notice will identify the Activity and describe the performance deficiency at issue, the applicable Operational Standard or term or condition of this AFA, and why the performance of the CSKT does not meet the Operational Standard or term or condition. The notice will give the CSKT a reasonable amount of time to either remedy the performance deficiency or demonstrate to the Refuge Manager that no performance deficiency exists, the amount of time to be set by the Refuge Manager depending on the nature of the deficiency.

Dated: January 6, 2005.

Matt Hogan,

Deputy Director, U.S. Fish and Wildlife Service.

[FR Doc. 05–1785 Filed 1–31–05; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Rate Adjustments for Indian Irrigation Projects

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of proposed rate adjustments.

SUMMARY: The Bureau of Indian Affairs (BIA) owns, or has an interest in, irrigation facilities located on various Indian reservations throughout the United States. We are required to establish rates to recover the costs to administer, operate, maintain, and rehabilitate those facilities. We request your comments on the proposed rate adjustments.

DATES: Interested parties may submit comments on the proposed rate adjustments on or before April 4, 2005.

ADDRESSES: All comments on the proposed rate adjustments must be in writing and addressed to: Arch Wells, Director, Office of Trust Services, Attn: Irrigation and Power, MS–4655–MIB, Code 210, 1849 C Street, NW., Washington, DC 20240, Telephone (202) 208–5480.

FOR FURTHER INFORMATION CONTACT: For details about a particular irrigation project, please use the tables in **SUPPLEMENTARY INFORMATION** section to contact the regional or local office where the project is located.

SUPPLEMENTARY INFORMATION: The tables in this notice list the irrigation project contacts where the BIA recovers its costs for local administration, operation, maintenance, and rehabilitation, the current irrigation assessment rates, and the proposed rates for the 2005 irrigation season and subsequent years where applicable.

What Are Some of the Terms I Should Know for This Notice?

The following are terms we use that may help you understand how we are applying this notice.

Administrative costs means all costs we incur to administer our irrigation projects at the local project level. Local project level does not normally include the Agency, Region, or Central Office costs unless we state otherwise in writing.

Assessable acre means lands designated by us to be served by one of our irrigation projects and to which we provide irrigation service and recover our costs. (See *Total assessable acres.*)

BIA means the Bureau of Indian Affairs.

Bill means our statement to you of the assessment charges and/or fees you owe the United States for administration, operation, maintenance, and/or rehabilitation. The date we mail or hand deliver your bill will be stated on it.

Costs mean the costs we incur for administration, operation, maintenance, and rehabilitation to provide direct support or benefit to an irrigation facility.

Customer means any person or entity that we provide irrigation service to.

Due date is the date on which your bill is due and payable. This date will be stated on your bill.

I, me, my, you, and your means all interested parties, especially persons or entities that we provide irrigation service to and who receive beneficial use of our irrigation projects affected by this notice and our supporting policies, manuals, and handbooks.

Irrigation project means, for the purposes of this notice, the facility or portions thereof, that we own, or have an interest in, including all appurtenant works, for the delivery, diversion, and storage of irrigation water to provide irrigation service to customers for whom we assess periodic charges to recover our costs to administer, operate, maintain, and rehabilitate. These projects may be referred to as facilities, systems, or irrigation areas.

Irrigation service means the full range of services we provide customers of our irrigation projects, including, but not limited to, water delivery. This includes our activities to administer, operate, maintain, and rehabilitate our projects.

Maintenance costs means all costs we incur to maintain and repair our irrigation projects and equipment of our irrigation projects and is a cost factor included in calculating your operation and maintenance (O&M) assessment.

Must means an imperative or mandatory act or requirement.

Operation and maintenance (O&M) assessment means the periodic charge you must pay us to reimburse our costs.

Operation or operating costs means costs we incur to operate our irrigation projects and equipment and is a cost factor included in calculating your O&M assessment.

Past due bill means a bill that has not been paid by the close of business on the 30th day after the due date, as stated on the bill. Beginning on the 31st day after the due date we begin assessing additional charges accruing from the due date.

Rehabilitation costs means costs we incur to restore our irrigation projects or features to original operating condition or to the nearest state which can be achieved using current technology and

is a cost factor included in calculating your O&M assessment.

Total assessable acres means the total acres served by one of our irrigation projects.

Total O&M cost means the total of all the allowable and allocatable costs we incur for administering, operating, maintaining, and rehabilitating our irrigation projects serving your farm unit.

Water means water we deliver at our projects for the general purpose of irrigation and other purposes we agree to in writing.

Water delivery is an activity that is part of the irrigation service we provide our customers when water is available.

We, us, and our means the United States Government, the Secretary of the Interior, the BIA, and all who are authorized to represent us in matters covered under this notice.

Does This Notice Affect Me?

This notice affects you if you own or lease land within the assessable acreage of one of our irrigation projects, or you have a carriage agreement with one of our irrigation projects.

Where Can I Get Information on the Regulatory and Legal Citations in This Notice?

You can contact the appropriate office(s) stated in the tables for the irrigation project that serves you, or you can use the Internet site for the Government Printing Office at *http://www.gpo.gov.*

Why Are You Publishing This Notice?

We are publishing this notice to notify you that we propose to adjust one or more of our irrigation assessment rates. This notice is published in accordance with the BIA's regulations governing its operation and maintenance of irrigation projects, specifically, 25 CFR 171.1. These sections provide for the fixing and announcing of the rates for annual assessments and related information for our irrigation projects.

What Authorizes You To Issue This Notice?

Our authority to issue this notice is vested in the Secretary of the Interior by 5 U.S.C. 301 and the Act of August 14, 1914 (38 Stat. 583; 25 U.S.C. 385). The Secretary has in turn delegated this authority to the Assistant Secretary—Indian Affairs under part 209, chapter 8.1A, of the Department of the Interior's Departmental Manual.

When Will You Put the Rate Adjustments Into Effect?

We will put the rate adjustments into effect for the 2005 irrigation season and subsequent years where applicable.

How Do You Calculate Irrigation Rates?

We calculate irrigation assessment rates in accordance with 25 CFR 171.1(f) by estimating the cost of normal operation and maintenance at each of our irrigation projects. The cost of normal operation and maintenance means the expenses we incur to provide direct support or benefit for an irrigation project's activities for administration, operation, maintenance, and rehabilitation. These costs are then applied as stated in the rate table in this notice.

What Kinds of Expenses Do You Include in Determining the Estimated Cost of Normal Operation and Maintenance?

We include the following expenses:

(a) Personnel salary and benefits for the project engineer/manager and project employees under their management control;

(b) Materials and supplies;

(c) Major and minor vehicle and equipment repairs;

(d) Equipment, including transportation, fuel, oil, grease, lease and replacement;

(e) Capitalization expenses;

(f) Acquisition expenses;

(g) Maintenance of a reserve fund available for contingencies or emergency expenses for, and insuring, reliable operation of the irrigation project; and

(h) Other expenses we determine necessary to properly perform the activities and functions characteristic of an irrigation project.

When Should I Pay My Irrigation Assessment?

We will mail or hand deliver your bill notifying you of the amount you owe to the United States and when such amount is due. If we mail your bill, we will consider it as being delivered no later than 5 business days after the day we mail it. You should pay your bill no later than the close of business on the 30th day after the due date stated on the bill.

What Information Must I Provide for Billing Purposes?

We must obtain certain information from you to ensure we can properly process, bill for, and collect money owed to the United States. We are required to collect the taxpayer identification number or social security number to properly bill the responsible party and service the account under the authority of, and as prescribed in, Public Law 104–143, the Debt Collection Improvement Act of 1996.

(a) At a minimum, this information is:

(1) Full legal name of person or entity responsible for paying the bill;

(2) Adequate and correct address for mailing or hand delivering our bill; and

(3) The taxpayer identification number or social security number of the person or entity responsible for paying the bill.

(b) It is your responsibility to ensure we have correct and accurate information for paragraph (a) of this section.

(c) If you are late paying your bill due to your failure to furnish such information or comply with paragraph (b) of this section, you cannot appeal your bill on this basis.

What Can Happen if I Do Not Provide the Information Required for Billing Purposes?

We can refuse to provide you irrigation service.

If I Allow My Bill To Become Past Due, Could This Affect My Water Delivery?

If we do not receive your payment before the close of business on the 30th day after the due date stated on your bill, we will send you a past due notice. Your bill will have additional information concerning your rights. We will consider your past due notice as delivered no later than 5 business days after the day we mail it. We have the right to refuse water delivery to any of your irrigated land on which the bill is past due. We can continue to refuse water delivery until you pay your bill or make payment arrangements that we agree to. Our authority to demand payment of your past due bill is 31 CFR 901.2, ''Demand for Payment.''

Are There Any Additional Charges If I Am Late Paying My Bill?

Yes. We will assess you interest on the amount owed and use the rate of interest established annually by the Secretary of the United States Treasury (Treasury) to calculate what you will be assessed (31 CFR 901.9(b)). You will not be assessed this charge until your bill is past due. However, if you allow your bill to become past due, interest will accrue from the due date, not the past due date. Also, you will be charged an administrative fee of $12.50 for each time we try to collect your past due bill. If your bill becomes more than 90 days past due, you will be assessed a penalty charge of 6 percent per year and it will accrue from the date your bill initially

became past due. Our authority to assess interest, penalties, and administration fees on past due bills is prescribed in 31 CFR 901.9, ''Interest, penalties, and costs.''

What Else Can Happen To My Past Due Bill?

If you do not pay your bill or make payment arrangements that we agree to, we are required to send your past due bill to the Treasury for further action. We must send your bill to Treasury no later than 180 days after the original due date of your irrigation assessment bill. The requirement for us to send your unpaid bill to Treasury is prescribed in 31 CFR 901.1, ''Aggressive agency collection activity.''

Who Can I Contact for Further Information?

The following tables are the regional and project/agency contacts for our irrigation facilities.

BILLING CODE 4310–W7–P

Northwest Region Contacts	
Stanley Speaks, Regional Director Bureau of Indian Affairs, Northwest Regional Office 911 N.E. 11th Avenue Portland, Oregon 97232-4169 Telephone: (503) 231-6702	
Project Name	*Project/Agency Contacts*
Flathead Irrigation Project	Ernest T. Moran, Superintendent Flathead Agency Irrigation Division PO Box 40 Pablo, Montana 59855-0040 Telephone: (406) 675-2700
Fort Hall Irrigation Project	Eric J. LaPointe, Superintendent Fort Hall Agency PO Box 220 Fort Hall, Idaho 83203-0220 Telephone: (208) 238-2301
Wapato Irrigation Project	Pierce Harrison, Project Administrator Wapato Irrigation Project PO Box 220 Wapato, WA 98951-0220 Telephone: (509) 877-3155

Rocky Mountain Region Contacts	
Keith Beartusk, Regional Director Bureau of Indian Affairs, Rocky Mountain Regional Office 316 North 26th Street Billings, Montana 59101. Telephone: (406) 247-7943	
Project Name	*Agency/Project Contacts*
Blackfeet Irrigation Project	Ross Denny, Superintendent Box 880 Browning, MT 59417 Telephone: (406) 338-7544, Superintendent (406) 338-7519, Irrigation
Crow	Frank Merchant, acting Superintendent
Irrigation Project	Dan Lowe, Irrigation Manager PO Box 69 Crow Agency, MT 59022 Telephone: (406) 638-2672, Superintendent (406) 638-2863, Irrigation
Fort Belknap Irrigation Project	Cleo Hamilton, Superintendent Dan Spencer, Irrigation Manager R.R.1, Box 980 Harlem, MT 59526 Telephone: (406) 353-2901, Superintendent (406) 353-2905, Irrigation
Fort Peck Irrigation Project	Spice Bighorn, Superintendent PO Box 637 Poplar, MT 59255 Rhonda Knudsen, Irrigation Manager 602 6th Avenue North Wolf Point, MT 59201 Telephone: (406) 768-5312, Superintendent (406) 653-1752, Irrigation
Wind River Irrigation Project	Ray Nation, acting Superintendent Hilaire Peck, Irrigation Manager PO Box 158 Fort Washakie, WY 82514 Telephone: (307) 332-7810, Superintendent (307) 332-2596, Irrigation

Southwest Region Contacts	
Larry Morrin, Regional Director Bureau of Indian Affairs, Southwest Regional Office 615 First Street, NW Albuquerque, New Mexico 87102 Telephone: (505) 346-7590/91	
Project Name	*Project/Agency Contacts*
Pine River Irrigation Project	Michael Stancampiano, Superintendent John Formea, Irrigation Engineer PO Box 315 Ignacio, CO 81137-0315 Telephone: (970) 563-4511, Superintendent (970) 563-1017, Irrigation

Western Region Contacts	
Wayne Nordwall, Regional Director Bureau of Indian Affairs, Western Regional Office PO Box 10 Phoenix, Arizona 85001 Telephone: (602) 379-6600	
Project Name	*Project/Agency Contacts*
Colorado River Irrigation Project	Allen Anspach, Superintendent R.R. 1 Box 9-C Parker, AZ 85344
	Telephone: (928) 669-7111
Duck Valley Irrigation Project	Paul Young, Superintendent 1555 Shoshone Circle Elko, Nevada 89801 Telephone: (775) 738-0569
Fort Yuma Irrigation Project	William Pyott, Land Operations Officer P.O. Box 11000 Yuma, Arizona Telephone: (520) 782-1202
San Carlos Irrigation Project Joint Works	Randy Shaw, Supervisory General Engineer 13805 N. Arizona Boulevard Coolidge, AZ 85228 Telephone: (520) 723-6216
San Carlos Irrigation Project Indian Works	Joe Revak, Supervisory General Engineer Pima Agency, Land Operations Box 8 Sacaton, AZ 85247 Telephone: (520) 562-3372
Uintah Irrigation Project	Lynn Hansen, Irrigation Manager PO Box 130 Fort Duchesne, UT 84026 Telephone: (435) 722-4341
Walker River Irrigation Project	Robert Hunter, Superintendent 1677 Hot Springs Road Carson City, Nevada 89706 Telephone: (775) 887-3500

What Irrigation Assessments or Charges Are Proposed for Adjustment By This Notice?

The rate table below contains the current rates for all of our irrigation projects where we recover our costs for operation and maintenance. The table also contains the proposed rates for the 2005 season and subsequent years where applicable. An asterisk immediately following the name of the project notes the irrigation projects where rates are proposed for adjustment.

Project Name	*Rate Category*	*Current 2004 Rate*	*Proposed 2005 Rate*
Flathead Irrigation Project	Basic per acre	$21.45	$21.45
Fort Hall Irrigation Project	Basic per acre	$22.00	$22.00
Fort Hall Irrigation Project Minor Units	Basic per acre	$14.00	$14.00
Fort Hall Irrigation Project * Michaud	Basic per acre	$30.00	$33.00
	Pressure per acre	$43.50	$46.50
Wapato Irrigation Project Simcoe Units	Billing Charge Per Tract	$5.00	$5.00
	Farm unit/land tracts up to one acre (minimum charge)	$13.00	$13.00
	Farm unit/land tracts over one acre - per acre	$13.00	$13.00
Wapato Irrigation Project Ahtanum Units	Billing Charge Per Tract	$5.00	$5.00
	Farm unit/land tracts up to one acre (minimum charge)	$13.00	$13.00
	Farm unit/land tracts over one acre - per acre	$13.00	$13.00
Wapato Irrigation Project Satus Unit	Billing Charge Per Tract	$5.00	$5.00
	Farm unit/land tracts up to one acre (minimum charge)	$51.00	$51.00
	"A" farm unit/land tracts over one acre - per acre	$51.00	$51.00
	Additional Works farm unit/land tracts over one acre - per acre	$56.00	$56.00
	"B" farm unit/land tracts over one acre - per acre	$61.00	$61.00
	Water Rental Agreement Lands - per acre	$62.00	$62.00

Rocky Mountain Region Rate Table

Project Name	*Rate Category*	*Current 2004 Rate*	*Proposed 2005 Rate*
Blackfeet Irrigation Project	Basic-per acre	$13.00	$13.00
Crow Irrigation Project	Basic-per acre	$16.00	$16.00
Fort Belknap Irrigation Project	Indian per acre	$7.75	$7.75
	non-Indian per acre	$15.50	$15.50
Fort Peck Irrigation Project *	Basic-per acre	$14.00	$17.50
Wind River Irrigation Project	Basic-per acre	$14.00	$14.00

Southwest Region Rate Table			
Project Name	*Rate Category*	*Current 2004 Rate*	*Proposed 2005 Rate*
Pine River Irrigation Project	Minimum Charge per tract	$25.00	$25.00
	Basic-per acre	$8.50	$8.50

Western Region Rate Table				
Project Name	*Rate Category*	*Current 2004 Rate*	*Proposed 2005 Rate*	*Proposed 2006 Rate*
Colorado River Irrigation Project	Basic per acre up to 5.75 acre-feet	$47.00	$47.00	To be Determined
	Excess Water per acre-foot over 5.75 acre-feet	$17.00	$17.00	
Duck Valley Irrigation Project	Basic-per acre	$5.30	$5.30	
Fort Yuma Irrigation Project (See Note #1)	Basic-per acre up to 5.0 acre-feet	$60.00	$60.00	
	Excess Water per acre-foot over 5.0 acre-feet	$10.50	$10.50	
San Carlos Irrigation Project (Joint Works) * (See Note #2)	Basic-per acre	$20.00	$30.00	$30.00
San Carlos Irrigation Project (Indian Works) *	Basic-per acre	$56.00	$77.00	To be Determined
Uintah Irrigation Project *	Basic-per acre	$11.00	$11.00	
	Minimum Bill	$10.00	$25.00	
Walker River Irrigation Project	Indian per acre	$7.32	$7.32	
	non-Indian per acre	$15.29	$15.29	

Note #1– The Fort Yuma Irrigation Project is owned and operated by the Bureau of Reclamation (Reclamation). The irrigation rates assessed for operation and maintenance are established by Reclamation and are provided for informational purposes only. The BIA collects the irrigation assessments on behalf of Reclamation.

Note #2 – The 2005 irrigation rate of $30 per acre has been established through a previously publicized notice. The rate of $30 per acre for 2006 is being proposed as part of this notice.

Consultation and Coordination With Tribal Governments (Executive Order 13175)

The BIA irrigation projects are vital components of the local agriculture economy of the reservations on which they are located. To fulfill its responsibilities to the tribes, tribal organizations, water user organizations, and the individual water users, the BIA communicates, coordinates, and consults on a continuing basis with these entities on issues of water delivery, water availability, costs of administration, operation, maintenance, and rehabilitation. This is accomplished at the individual irrigation projects by Project, Agency, and Regional representatives, as appropriate, in accordance with local protocol and procedures. This notice is one component of the BIA's overall coordination and consultation process to provide notice and request comments from these entities on adjusting our irrigation rates.

Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (Executive Order 13211)

The rate adjustments will have no adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increase use of foreign supplies) should the proposed rate adjustments be implemented. This is a notice for rate adjustments at BIA owned and operated irrigation projects, except for the Fort Yuma Irrigation Project. The Fort Yuma Irrigation Project is owned and operated by the Bureau of Reclamation with a portion serving the Fort Yuma Reservation.

Regulatory Planning and Review (Executive Order 12866)

These rate adjustments are not a significant regulatory action and do not need to be reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

This rate making is not a rule for the purposes of the Regulatory Flexibility Act because it is ''a rule of particular applicability relating to rates.'' 5 U.S.C. 601(2).

Unfunded Mandates Act of 1995

These rate adjustments impose no unfunded mandates on any governmental or private entity and are in compliance with the provisions of the Unfunded Mandates Act of 1995.

Takings (Executive Order 12630)

The Department has determined that these rate adjustments do not have significant ''takings'' implications. The rate adjustments do not deprive the public, state, or local governments of rights or property.

Federalism (Executive Order 13132)

The Department has determined that these rate adjustments do not have significant Federalism effects because they pertain solely to Federal-tribal relations and will not interfere with the roles, rights, and responsibilities of states.

Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act of 1995

These rate adjustments do not affect the collections of information which have been approved by the Office of Information and Regulatory Affairs, Office of Management and Budget, under the Paperwork Reduction Act of 1995. The OMB Control Number is 1076–0141 and expires April 30, 2006.

National Environmental Policy Act

The Department has determined that these rate adjustments do not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370(d)).

Dated: January 12, 2005.

David W. Anderson,

Assistant Secretary—Indian Affairs.

[FR Doc. 05–1747 Filed 1–31–05; 8:45 am]

BILLING CODE 4310–W7–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–060–1320–EL, WYW154432]

Notice of Intent To Prepare an Environmental Impact Statement, To Initiate Scoping, Provide Notice of a Public Meeting, and To Solicit Comments on Fair Market Value and Maximum Economic Recovery for a Federal Coal Lease Application Received From Cordero Mining Company for a Coal Tract in the Decertified Powder River Federal Coal Production Region, WY

AGENCY: Bureau of Land Management, Interior.

SUMMARY: The Bureau of Land Management (BLM) has received a competitive coal lease application from Cordero Mining Company for a maintenance tract of Federal coal adjacent to the company's Cordero Rojo Mine in Campbell County, Wyoming. A maintenance tract is a parcel of land containing coal reserves nominated for leasing that may be used to extend an existing mine. This tract, which was applied for as a lease by application (LBA) under the provisions of 43 Code of Federal Regulations (CFR) 3425.1, is called the Maysdorf Tract and has been assigned LBA case number WYW154432. Consistent with the National Environmental Policy Act (NEPA) regulations, BLM must prepare an environmental analysis prior to holding a competitive Federal coal lease sale. In accordance with the provisions of section 102(2)(C) of NEPA, BLM is announcing it will prepare an Environmental Impact Statement (EIS) for this lease application and is soliciting public comments regarding issues and resource information.

DATES: This notice initiates the EIS scoping process and request for Fair Market Value (FMR) and Maximum Economic Recovery (MER) comments (*see* 43 CFR 3425.4). The BLM can best use public input if comments and resource information are submitted within 60 days of publication of this notice in the **Federal Register**. On February 15, 2005, the BLM will host an open house between 3:30 and 5:30 p.m. and a public scoping meeting will be held at 7 p.m. at the Clarion Western Plaza Motel, 2009 South Douglas Highway, Gillette, Wyoming. The purpose of an open house is to provide information to the public regarding the Powder River Basin (PRB) Coal Review. At the public scoping meeting the public is invited to submit comments and resource information, and offer issues or concerns to be considered in

the LBA process. The BLM will announce public meetings and other opportunities to submit comments on this project at least 15 days prior to the event. Announcements will be made through local news media and the Casper Field Office's Web site: *http://www.wy.blm.gov/cfo*.

ADDRESSES: Please submit written comments or concerns to the BLM Casper Field Office, Attn: Nancy Doelger, 2987 Prospector Drive, Casper, Wyoming 82604. Written comments or resource information may be hand-delivered to the BLM Casper Field Office. Comments or questions may also be sent by facsimile to the attention of Nancy Doelger at (307) 261–7587; or sent electronically to: *casper_wymail@blm.gov*. Please put Maysdorf Tract/Nancy Doelger in the subject line.

Members of the public may examine documents pertinent to this proposal by visiting the Casper Field Office during its business hours (7:45 a.m. to 4:30 p.m.), Monday through Friday, except holidays.

Your response is important and will be considered in the EIS process. If you do respond we will keep you informed of the availability of environmental documents that address impacts that might occur from this proposal. Please note that comments and information submitted regarding this project including names, electronic mail addresses and street addresses of the respondents will be available for public review and disclosure at the Casper Field Office. Individuals may request confidentiality. If you wish to withhold your name, electronic mail address, or street address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, or from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

FOR FURTHER INFORMATION CONTACT: Nancy Doelger or Mike Karbs, BLM Casper Field Office, 2987 Prospector Drive, Casper, Wyoming 82604. Ms. Doelger or Mr. Karbs may also be reached by telephone at (307) 261–7600.

SUPPLEMENTARY INFORMATION: Cordero Mining Company (CMC) initially filed an application to lease the Federal coal on the Maysdorf Tract adjacent to the Cordero Rojo Mine on September 20, 2001. The Powder River Regional Coal Team reviewed this lease application at a public meeting held on May 30, 2002, in Casper, Wyoming, and recommended that BLM process it.

CMC filed applications to modify the tract on May 22, 2002; April 30, 2004; and November 9, 2004. As currently filed, the application includes approximately 230.3 million tons of in-place Federal coal underlying the following lands in Campbell County, Wyoming:

T. 46 N., R. 71 W., 6th P.M., Wyoming
Section 4: Lots 5, 6, 7 (E½ E½), 10 (E½ E½), 11, 12;
Section 10: Lots 1, 2, 3 (N½, N½ S½), 4 (N½, N½ S½), 5 (N½, N½ S½), 6 (N½, N½ S½);
Section 11: Lots 1 through 8, 9 (N½, N½ S½), 10 (N½, N½ S½), 11 (N½, N½ S½), 12 (N½, N½ S½);
T. 47 N., R. 71 W, 6th P.M., Wyoming
Section 8: Lots 3 through 6, 11 through 13;
Section 21: Lots 1, 2, 3 (E½ E½), 6 (E½ E½), 7 through 10, 11 (E½ E½), 14 (E½ E½), 15, 16;
Section 28: Lots 1, 2, 3 (E½ E½), 6 (E½ E½), 7 through 10, 11 (E½ E½), 14 (E½ E½), 15, 16;
Section 33: Lots 1, 2, 3 (E½ E½), 6 (E½ E½), 7 through 10, 11 (E½ E½), 14 (E½ E½), 15, 16.
Containing 2,219.39 acres more or less.

The surface estate of Lots 3, 4, 5, of Section 10, and Lot 4 of Section 11, T. 46 N., R. 71 W., containing 132.13 acres, more or less, is owned by the Federal government and administered by the BLM. The remainder of the surface estate is privately owned.

CMC proposes to mine the tract as a part of the Cordero Rojo Mine. At the 2003 mining rate of 36 million tons per year, the coal included in the Maysdorf Tract would extend the life of the Cordero Rojo Mine six to seven years. In accordance with 43 CFR 3425.1–9, BLM will evaluate the tract's proximity to all mining operations and may decide to add or subtract Federal coal lands to avoid bypassing coal or to increase potential competitive interest in the tract.

The Cordero Rojo Mine is operating under approved mining permits from the Wyoming Department of Environmental Quality, Land Quality and Air Quality Divisions.

The Office of Surface Mining Reclamation and Enforcement (OSM) will be a cooperating agency in the preparation of the EIS. If the Maysdorf Tract is leased to the applicant, the new lease must be incorporated into the existing mining and reclamation plan for the adjacent mine and the Secretary of the Interior must approve the revision to the Mineral Leasing Act (MLA) mining plan before the Federal coal in the tract can be mined. OSM is the Federal agency that would be responsible for recommending approval, approval with conditions, or disapproval of the revised MLA mining plan to the office of the Secretary of the Interior if this tract is leased.

The BLM will provide interested parties the opportunity to submit comments or relevant information or both. This information will help BLM identify issues to be considered in preparing a draft EIS and in evaluating the FMV and MER of the Federal coal included in the Maysdorf Tract. Issues that have been raised during processing previous EISs in the Wyoming PRB include: the need for resolution of conflicts between existing and proposed oil and gas development including coal bed natural gas (CBNG) and coal mining on the tract proposed for leasing; potential impacts to big game herds and hunting; potential impacts to sage grouse; potential impacts to listed threatened and endangered species; potential health impacts related to blasting; the need to consider the cumulative impacts of coal leasing decisions combined with other existing and proposed development in the Wyoming PRB; and potential site specific and cumulative impacts on air and water quality.

The BLM open house that precedes the scoping meeting will provide information about the PRB Coal Review, a regional technical study being prepared to update the BLM's current status of coal development in the PRB, and to forecast coal and related industrial development. Based on these two review documents, a cumulative impact analysis will be developed for use in future EISs, including the EIS that BLM will prepare for the Maysdorf Tract.

Alan L. Kesterke,
Acting State Director.

[FR Doc. 05–1599 Filed 1–31–05; 8:45 am]
BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Agency Information Collection; Proposed Revisions to a Currently Approved Information Collection; Comment Request

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of renewal of a currently approved collection (OMB No. 1006–0005).

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44

U.S.C. 3501 *et seq.*), the Bureau of Reclamation (we, our, or us) intends to submit a request for renewal (with revisions) of an existing approved information collection to the Office of Management and Budget (OMB): Individual Landholder's and Farm Operator's Certification and Reporting Forms for Acreage Limitation, 43 CFR part 426 and 43 CFR part 428, OMB Control Number: 1006–0005. This information collection is required under the Reclamation Reform Act of 1982 (RRA), Acreage Limitation Rules and Regulations, 43 CFR part 426, and Information Requirements for Certain Farm Operations In Excess of 960 Acres and the Eligibility of Certain Formerly Excess Land, 43 CFR part 428. We request your comments on the revised RRA forms and specific aspects of the information collection.

DATES: Your written comments must be received on or before April 4, 2005.

ADDRESSES: You may send written comments to the Bureau of Reclamation, Attention: D–5300, PO Box 25007, Denver, CO 80225–0007. You may request copies of the proposed revised forms by writing to the above address or by contacting Stephanie McPhee at: (303) 445–2897.

FOR FURTHER INFORMATION CONTACT: Stephanie McPhee at: (303) 445–2897.

SUPPLEMENTARY INFORMATION:

Title: Individual Landholder's and Farm Operator's Certification and Reporting Forms for Acreage Limitation, 43 CFR part 426 and 43 CFR part 428.

Abstract: This information collection requires certain landholders (direct or indirect landowners or lessees) and farm operators to complete forms demonstrating their compliance with the acreage limitation provisions of Federal reclamation law. These forms are submitted to districts who use the information to establish each landholder's status with respect to landownership limitations, full-cost pricing thresholds, lease requirements, and other provisions of Federal reclamation law. In addition, forms are submitted by certain farm operators to provide information concerning the services they provide and the nature of their farm operating arrangements. All landholders whose entire westwide landholdings total 40 acres or less are exempt from the requirement to submit RRA forms. Landholders who are ''Aqualified recipients'' have RRA forms submittal thresholds of 80 acres or 240 acres depending on the district's RRA forms submittal threshold category where the land is held. Only farm operators who provide multiple services to more than 960 acres held in trusts or by legal entities are required to submit forms.

Changes to the RRA Forms and the Instructions to Those Forms

We made a few editorial changes to the currently approved RRA forms and the instructions to those forms that are designed to assist the respondents by increasing their understanding of the forms, clarifying the instructions for use when completing the forms, and clarifying the information that is required to be submitted to the districts with the forms. The proposed revisions to the RRA forms will be included starting in the 2006 water year.

In response to Reclamation's efforts to fully implement the acreage limitation provisions applicable to public entities (43 CFR 426.10 and the Act of July 7, 1970, Pub. L. 91–310), we have revised the existing ''Declaration of Public Entities Landholdings'' (Form 7–21PE) to allow Reclamation to ascertain required information about public entities' landholdings and the revenue generated from public entities' farming activities. There is expected to be a minimal increase in burden hours resulting from the changes to this form because (1) the number of public entities expected to complete the revised areas of Form 7–21PE is minimal, (2) the majority of public entities will continue to submit the same information on the revised Form 7–21PE that they have already been submitting on the current Form 7–21PE, and (3) the majority of pubic entities will be allowed to skip entire sections of the revised Form 7–21PE based on the characteristics of their farming activities. The proposed revisions to Form 7–21PE will be included starting in the 2006 water year.

Frequency: Annually.

Respondents: Landholders and farm operators of certain lands in our projects, whose landholdings exceed specified RRA forms submittal thresholds.

Estimated Total Number of Respondents: 17,875.

Estimated Number of Responses per Respondent: 1.02.

Estimated Total Number of Annual Responses: 18,233.

Estimated Total Annual Burden on Respondents: 13,590 hours.

Estimate of Burden for Each Form:

Form No.	Burden estimate per form (in minutes)	Number of respondents	Annual number of responses	Annual burden on respondents (in hours)
Form 7–2180	60	4,963	5,062	5,062
Form 7–2180EZ	45	503	513	385
Form 7–2181	78	1,467	1,496	1,945
Form 7–2184	45	36	37	28
Form 7–2190	60	1,845	1,882	1,882
Form 7–2190EZ	45	109	111	83
Form 7–2191	78	880	898	1,167
Form 7–2194	45	4	4	3
Form 7–21PE	75	178	182	228
Form 7–21PE–IND	12	5	5	1
Form 7–21TRUST	60	1,045	1,066	1,066
Form 7–21VERIFY	12	6,237	6,362	1,272
Form 7–21FC	30	243	248	124
Form 7–21XS	30	164	167	84
Form 7–21FARMOP	78	196	200	260

Comments

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical use;

(b) The accuracy of our burden estimate for the proposed collection of information;

(c) Ways to enhance the quality, usefulness, and clarity of the information to be 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.

We will summarize all comments received regarding this notice. We will publish that summary in the **Federal Register** when the information collection request is submitted to OMB for review and approval.

Department of the Interior practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from public disclosure, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public disclosure in their entirety.

Dated: January 14, 2005.

Roseann Gonzales,

Director, Office of Program and Policy Services, Denver Office.

[FR Doc. 05–1789 Filed 1–31–05; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Agency Information Collection Activities; Proposed Revisions to a Currently Approved Information Collection; Comment Request

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of renewal of a currently approved collection (OMB No. 1006–0023).

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Bureau of Reclamation (we, our, or us) intends to submit a request for renewal (with revisions) of an existing approved information collection to the Office of Management and Budget (OMB): Limited Recipient Identification Sheet, Trust Information Sheet for Acreage Limitation, 43 CFR part 426, OMB Control Number: 1006–0023. As a result of Reclamation's activities to fully implement the acreage limitation provisions applicable to public entities (43 CFR 426.10 and the Act of July 7, 1970, Public Law 91–310), a new ''Public Entity Information Sheet'' (Form 7–2565) has been developed for approval as part of this information collection. We request your comments on the proposed RRA forms and specific aspects of the information collection.

DATES: Your written comments must be received on or before April 4, 2005.

ADDRESSES: You may send written comments to the Bureau of Reclamation, Attention: D–5300, PO Box 25007, Denver, CO 80225–0007. You may request copies of the proposed forms by writing to the above address or by contacting Stephanie McPhee at: (303) 445–2897.

FOR FURTHER INFORMATION CONTACT: Stephanie McPhee at: (303) 445–2897.

SUPPLEMENTARY INFORMATION:

Title: Limited Recipient Identification Sheet, Trust Information Sheet, Public Entity Information Sheet for Acreage Limitation, 43 CFR part 426 and the Act of July 7, 1970, Public Law 91–310.

Abstract: Identification of limited recipients—Some entities that receive Reclamation irrigation water may believe that they are under the RRA forms submittal threshold and consequently, may not submit the appropriate RRA form(s). However, some of these entities may in fact have a different RRA forms submittal threshold than what they believe it to be due to the number of natural persons benefiting from each entity and the location of the land held by each entity. In addition, some entities that are exempt from the requirement to submit RRA forms due to the size of their landholdings (directly and indirectly owned and leased land) may in fact be receiving Reclamation irrigation water for which the full-cost rate must be paid because the start of Reclamation irrigation water deliveries occurred after October 1, 1981 (43 CFR 426.6(b)(2)). The information obtained through completion of the Limited Recipient Identification Sheet allows us to establish entities' compliance with Federal reclamation law. The Limited Recipient Identification Sheet is disbursed at our discretion. The proposed revisions to the Limited Recipient Identification Sheet will be included starting in the 2006 water year, and are designed to facilitate ease of completion.

Trust review—We are required to review and approve all trusts (43 CFR 426.7(b)(2)) in order to ensure trusts meet the regulatory criteria specified in 43 CFR 426.7. Land held in trust generally will be attributed to the beneficiaries of the trust rather than the trustee if the criteria are met. When we become aware of trusts with a relatively small landholding (40 acres or less), we may extend to those trusts the option to complete and submit for our review the Trust Information Sheet instead of actual trust documents. If we find nothing on the completed Trust Information Sheet that would warrant the further investigation of a particular trust, that trustee will not be burdened with submitting trust documents to us for in-depth review. The Trust Information Sheet is disbursed at our discretion. The proposed revisions to the Trust Information Sheet will be included starting in the 2006 water year, and are designed to facilitate ease of completion.

Acreage limitation provisions applicable to public entities—Land farmed by a public entity can be considered exempt from the application of the acreage limitation provisions provided the public entity meets certain criteria pertaining to the revenue generated through the entity's farming activities (43 CFR 426.10 and the Act of July 7, 1970, Public Law 91–310). We are required to ascertain whether or not public entities that receive Reclamation irrigation water meet such revenue criteria regardless of how much land the public entities hold (directly or indirectly own or lease) (43 CFR 426.10(a)). In order to minimize the burden on public entities, standard RRA forms are submitted by a public entity only when the public entity holds more than 40 acres, which makes it difficult to apply the revenue criteria as required to those public entities that hold less than 40 acres. A new ''Public Entity Information Sheet'' (Form 7–2565) has been developed for approval as part of this information collection. The information obtained through completion of Form 7–2565 allows us to establish compliance with Federal reclamation law for those public entities that hold less than 40 acres and thus do not submit a standard RRA form because they are below the RRA forms submittal threshold. In addition, for those public entities that do not meet the exemption criteria, we must determine the proper rate to charge for Reclamation irrigation water deliveries. There is anticipated to be a very minimal increase in burden hours resulting from the addition of this form because of the very limited type of landholders that can use this form (*i.e.*, only those public entities that hold less

than 40 acres). The Public Entity Information Sheet is disbursed at our discretion and will be effective starting in the 2006 water year. Because of the addition of this proposed new form to this information collection, we also propose that the title of this information collection be changed to ''Forms for Certain Landholders That Hold Less Than 40 Acres for Acreage Limitation.'' This change in title will allow us to capture the purpose of the forms in this information collection without listing lengthy form names.

Frequency: Generally, these forms will be submitted once per identified entity, trust, or public entity. Each year, we expect new responses in accordance with the following numbers.

Respondents: Entity landholders, trusts, and public entities identified by Reclamation that are subject to the acreage limitation provisions of Federal reclamation law.

Estimated Total Number of Respondents: 425.

Estimated Number of Responses per Respondent: 1.0.

Estimated Total Number of Annual Responses: 425.

Estimated Total Annual Burden on Responses: 52 hours.

Estimate of Burden for Each Form:

Form number	Burden estimate per form (in minutes)	Number of respondents	Annual number of responses	Annual burden on respondents (in hours)
Limited Recipient Identification Sheet	5	175	175	15
Trust Information Sheet	5	150	150	12
Public Entity Information Sheet	15	100	100	25

Comments

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical use;

(b) The accuracy of our burden estimate for the proposed new collection of information;

(c) Ways to enhance the quality, usefulness, and clarity of the information to be 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.

We will summarize all comments received regarding this notice. We will publish that summary in the **Federal Register** when the information collection request is submitted to OMB for review and approval.

Department of the Interior practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from public disclosure, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public disclosure in their entirety.

Dated: January 14, 2005.

Roseann Gonzales,

Director, Office of Program and Policy Services, Denver Office.

[FR Doc. 05–1790 Filed 1–31–05; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Agency Information Collection; Proposed Revisions to a Currently Approved Information Collection; Comment Request

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of renewal of a currently approved collection (OMB No. 1006–0006).

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Bureau of Reclamation (we, our, or us) intends to submit a request for renewal (with revisions) of an existing approved information collection to the Office of Management and Budget (OMB): Certification Summary Form, Reporting Summary Form for Acreage Limitation, 43 CFR part 426 and 43 CFR part 428, OMB Control Number: 1006–0006. This information collection is required under the Reclamation Reform Act of 1982 (RRA), Acreage Limitation Rules and Regulations, 43 CFR part 426, and Information Requirements for Certain Farm Operations In Excess of 960 Acres and the Eligibility of Certain Formerly Excess Land, 43 CFR part 428. We request your comments on the revised RRA forms and specific aspects of the information collection.

DATES: Your written comments must be received on or before April 4, 2005.

ADDRESSES: You may send written comments to the Bureau of Reclamation, Attention: D–5300, P.O. Box 25007, Denver, CO 80225–0007. You may request copies of the proposed revised forms by writing to the above address or by contacting Stephanie McPhee at: (303) 445–2897.

FOR FURTHER INFORMATION CONTACT: Stephanie McPhee at: (303) 445–2897.

SUPPLEMENTARY INFORMATION:

Title: Certification Summary Form, Reporting Summary Form for Acreage Limitation, 43 CFR part 426 and 43 CFR part 428.

Abstract: These forms are to be used by district offices to summarize individual landholder (direct or indirect landowner or lessee) and farm operator certification and reporting forms as required by the RRA, 43 CFR part 426, and 43 CFR part 428. This information allows us to establish water user compliance with Federal reclamation law.

Changes to the RRA Forms and the Instructions to Those Forms

The changes made to the current Form 7–21SUMM–C, Form 7–21SUMM–R, and the corresponding instructions clarify the completion instructions for these forms (for example, adding verbiage to specify when requested acreages are to be provided on a westwide or district-specific basis). Other changes to the forms and the corresponding instructions are editorial in nature and are designed to assist the respondents by increasing their understanding of the forms, and clarifying the instructions for use when completing the forms. The proposed revisions to the RRA forms will be effective in the 2006 water year.

Draft of a New Form

As part of Reclamation's ongoing acceptance of users' comments on the RRA forms, Reclamation has received a request to devise a way to more efficiently track limited recipients that hold less than 40 acres (*i.e.*, those that are below the RRA forms submittal threshold and thus do not submit standard RRA forms) and the full-cost and excess land held by such limited recipients. In an effort to address this comment Reclamation has drafted a proposed new form, ''Tabulation H of Limited Recipients That Hold Less Than 40 Acres, and Full-Cost Landholders and Excess Landowners That Are Below the RRA Forms Submittal Threshold.'' The implementation of this proposed new form will be based on the public comments received and if implemented, will be effective in the 2006 water year as a mandatory part of the districts' annual submittal of Form 7–21SUMM–C and/or Form 7–21SUMM–R, as appropriate.

Frequency: Annually.

Respondents: Contracting entities that are subject to the acreage limitation provisions of Federal reclamation law.

Estimated Total Number of Respondents: 248.

Estimated Number of Responses per Respondent: 1.25.

Estimated Total Number of Annual Responses: 310.

Estimated Total Annual Burden on Respondents: 12,400 hours.

Estimate of Burden for Each Form:

Form number	Burden estimate per form (in hours)	Number of respondents	Annual number of responses	Annual burden on respondents (in hours)
7–21SUMM–C and associated tabulation sheets	40	195	244	9,760
7–21SUMM–R and associated tabulation sheets	40	53	66	2,640

Comments

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information will have practical use;

(b) Whether the proposed new Tabulation H is necessary for the proper performance of our functions, including whether the information will have practical use for the districts;

(c) The accuracy of our burden estimate for the proposed collection of information;

(d) Ways to enhance the quality, usefulness, and clarity of the information to be collected; and

(e) 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.

We will summarize all comments received regarding this notice. We will publish that summary in the **Federal Register** when the information collection request is submitted to OMB for review and approval.

Department of the Interior practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from public disclosure, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public disclosure in their entirety.

Dated: January 14, 2005.

Roseann Gonzales,

Director, Office of Program and Policy Services, Denver Office.

[FR Doc. 05–1791 Filed 1–31–05; 8:45 am]

BILLING CODE 4310–MN–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Hearings of the Judicial Conference Advisory Committees on Rules of Bankruptcy, Civil, and Criminal Procedure, and the Rules of Evidence

AGENCY: Judicial Conference of the United States, Advisory Committees on Rules of Bankruptcy, Civil, and Criminal Procedure, and the Rules of Evidence.

ACTION: Notice of cancellation of four open hearings and extension of one open hearing.

SUMMARY: Four public hearings on proposed rules amendments have been canceled and one public hearing has been extended for a second day. The following public hearings on proposed rules amendments have been canceled:

- Evidence Rules in New Haven, Connecticut, on January 27, 2005;
- Bankruptcy Rules in Washington, DC., on February 3, 2005; and in San Francisco, California, on February 7, 2005; and
- Criminal Rules in Washington, DC., on February 4, 2005.

The following public hearing on proposed rules amendments has been extended for a second day:

- The public hearing on proposed amendments to the Civil Rules, in Washington, DC., has been extended one additional day. The hearings will be held on February 11 and 12, 2005. The hearings on each day will be held at 8:30 a.m., in the Judicial Conference Center of the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE.

[Original notice of all five hearings appeared in the **Federal Register** of September 13, 2004.]

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC. 20544, telephone (202) 502–1820.

Dated: January 26, 2005.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. 05–1764 Filed 1–13–05; 8:45 am]

BILLING CODE 2210–55–M

NATIONAL COUNCIL ON DISABILITY

Sunshine Act Meetings

TIMES AND DATES: 9 a.m.–5 p.m. March 9–11, 2005.

PLACE: Hilton Hawaiian Village, 2005 Kalia Road, Honolulu, Hawaii.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED: Reports from the Chairperson and the Executive Director, Team Reports, Panel Discussion on Emergency Preparedness for People with Disabilities, Panel Discussion on Outdoor Activities for People with Disabilities; Joint Session with the Hawaii Disability and Communications Board, Briefing on Consumer-Directed Health Care and Olmstead Implementation, Unfinished Business, New Business, Announcements, Adjournment.

FOR FURTHER INFORMATION CONTACT: Mark S. Quigley, Director of Communications, National Council on Disability, 1331 F Street, NW., Suite 850, Washington, DC 20004; (202) 272–2004 (voice), (202) 272–2074 (TTY), (202) 272–2022 (fax), *mquigley@ncd.gov* (e-mail).

Agency Mission: The National Council on Disability (NCD) is an independent federal agency composed of 15 members appointed by the President and confirmed by the U.S. Senate. Its overall purpose is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all people with disabilities, including people from culturally diverse backgrounds, regardless of the nature or significance of the disability; and to empower people with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

Accommodations: Those needing sign language interpreters or other disability accommodations should notify NCD at least one week before this meeting.

Language Translation: In accordance with E.O. 13166, Improving Access to Services for Persons with Limited English Proficiency, those people with disabilities who are limited English proficient and seek translation services for this meeting should notify NCD at least one week before this meeting.

Multiple Chemical Sensitivity/ Environmental Illness: People with multiple chemical sensitivity/ environmental illness must reduce their exposure to volatile chemical substances to attend this meeting. To reduce such exposure, NCD requests that attendees not wear perfumes or scented products at this meeting. Smoking is prohibited in meeting rooms and surrounding areas.

Dated: January 28, 2005.

Ethel D. Briggs,

Executive Director.

[FR Doc. 05–1941 Filed 1–28–05; 1:37 pm]

BILLING CODE 6820–MA–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Arts Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Arts Advisory Panel, Museums section (American Masterpieces category) to the National Council on the Arts will be held from February 23–25, 2005, in Room 716 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506. This meeting, from 9 a.m. to 5:30 p.m. on February 23rd and 24th, and from 9 a.m. to 11:30 a.m. on February 25th, will be closed. Please note that the ending day and time of this meeting is tentative, and the meeting may conclude on February 24th.

This meeting is for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of April 30, 2003, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Further information with reference to this meeting can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5691.

Dated: January 26, 2005.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 05–1798 Filed 1–31–05; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Meeting

The National Science Foundation announces the following meeting:

Name: Interagency Arctic Research Policy Committee (IARPC).

Date and Time: Tuesday, March 1, 2005, 2–3:30 p.m.

Place: National Science Foundation, Room 1235, 4201 Wilson Blvd., Arlington, VA.

Type of Meeting: Closed. The meeting is closed to the public because future fiscal year budgets will be discussed.

Contact Person: Charles E. Myers, Office of Polar Programs, Room 755, National Science Foundation, Arlington, VA 22230, Telephone : (703) 292–8029.

Purpose of Committee: The Interagency Arctic Research Policy Committee was established by Public Law 98–373, the Arctic Research and Policy Act, to help set priorities for future arctic research, assist in the development of national arctic research policy, prepare a multi-agency Plan for arctic research, and simplify coordination of arctic research.

Proposed Meeting Agenda Items:

1. U.S. Arctic Policy Review.
2. International Polar Year (IPY) Research Activities.
3. Discussion of Budget for IPY Activities.
4. Report of the Arctic Research Commission.

Charles E. Myers,

Head, Interagency Arctic Staff, Office of Polar Programs.

[FR Doc. 05–1786 Filed 1–31–05; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–395]

South Carolina Electric & Gas Company, Virgil C. Summer Nuclear Station; Exemption

1.0 Background

The South Carolina Electric & Gas Company (SCE&G, the licensee) is the holder of the Renewed Facility Operating License No. NPF–12 which authorizes operation of the Virgil C. Summer Nuclear Station (VSNS). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the Nuclear Regulatory Commission (NRC or the Commission) now or hereafter in effect.

The facility consists of a pressurized-water reactor located in Fairfield County in South Carolina.

2.0 Request/Action

Title 10 of the Code of Federal Regulations (10 CFR), part 50, section 50.44 specifies requirements for the control of hydrogen gas generated after a postulated loss-of-coolant accident (LOCA) for reactors fueled with zirconium cladding. Acceptance criteria contained in 10 CFR 50.46 are for emergency core cooling systems (ECCSs) for reactors fueled with zircaloy or ZIRLO™ cladding. In addition, Appendix K to 10 CFR part 50 requires that the Baker-Just equation be used to predict the rates of energy release, hydrogen concentration, and cladding oxidation from the metal-water reaction.

In summary, the exemption request relates solely to the specific types of cladding material specified in these regulations. As written, the regulations presume the use of zircaloy or ZIRLO™ fuel rod cladding. Thus, an exemption from the requirements of 10 CFR 50.44, 10 CFR 50.46, and Appendix K to 10 CFR part 50 is needed to irradiate lead test assemblies (LTAs) consisting of developmental clad alloys at VSNS.

3.0 Discussion

3.1 Fuel Mechanical Design

Optimized ZIRLO™

Optimized ZIRLO™ has a lower tin content than the licensed ZIRLO™. Tin is a solid solution strengthener and α-phase stabilizer present entirely in the base α-phase zirconium crystalline structure. Potential impacts of a reduced tin content on material properties include (1) a reduced tensile strength, (2) an increased thermal creep rate, (3) an increased irradiation growth rate, (4) a reduced $\alpha \rightarrow \alpha + \beta$ phase transition temperature, and (5) an improved corrosion resistance. The slight reduction in tin content will not effect the size, shape, or distribution of any second phase or inter-metallic precipitates, nor the overall microstructure of this developmental zirconium alloy. With a consistent microstructure, low tin ZIRLO™ will exhibit many similar material characteristics as the licensed ZIRLO™. Further, the final annealing of Optimized ZIRLO™ has been designed to improve mechanical performance.

In the exemption request, SCE&G provides details of the planned post-irradiation examinations (PIEs) of the LTAs. Examinations include rod profilometry, rod growth, rod oxidation, and visual inspection. In response to a request for additional information, the licensee stated that PIE data, as well as data from other Westinghouse LTA programs, will be used to ensure existing design models remain valid.

As a result of the PIEs, any negative aspects of the low tin alloy's performance, including the potential impacts of a reduced tin content identified above, will be identified and resolved. Furthermore, significant deviations from model predictions will be reconciled.

The fuel rod burnup and fuel duty experienced by the LTAs in VSNS will remain well within the operating experience base and applicable licensed limits for ZIRLO™.

Utilizing currently approved fuel performance and fuel mechanical design models and methods, SCE&G and Westinghouse will perform cycle-specific reload evaluations to ensure that the LTAs satisfy existing design criteria.

Based upon LTA irradiation experience of similar low tin versions of ZIRLO™, expected performance due to similar material properties, and an LTA PIE program aimed at qualifying model predictions, the staff finds the LTA mechanical design acceptable for VSNS.

3.2 Core Physics and Non-LOCA Safety Analysis

The SCE&G exemption request relates solely to the specific types of cladding material specified in the regulations. No new or altered design limits for purposes of 10 CFR part 50, Appendix A, General Design Criterion 10, ''Reactor Design,'' need to be applied or are required for this program.

Optimized ZIRLO™

Due to similar material properties, any impact of low tin ZIRLO™ on the safety analysis models and methods is expected to be minimal. Utilizing currently approved core physics, core thermal-hydraulics, and non-LOCA safety analysis models and methods, SCE&G and Westinghouse will perform cycle-specific reload evaluations to ensure that the LTAs satisfy design criteria.

Nuclear design evaluations will ensure that LTAs be placed in nonlimiting core locations. As such, additional thermal margin to design limits will be maintained between LTA fuel rods and the hot rod evaluated in safety analyses. Thermal-hydraulic and non-LOCA evaluations will confirm that the LTAs are bounded by the current analysis of record.

Based upon the use of approved models and methods, expected material performance, and the placement of LTAs in nonlimiting core locations, the staff finds that the irradiation of up to four LTAs in VSNS will not result in unsafe operation nor violation of Specified Acceptable Fuel Design Limits. Furthermore, in the event of a Design Basis Accident, these LTAs will not promote consequences beyond those currently analyzed.

3.3 Regulatory Evaluation

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 if, (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) special circumstances are present.

3.3.1 10 CFR 50.44

The underlying purpose of 10 CFR 50.44 is to ensure that means are provided for the control of hydrogen gas that may be generated following a LOCA. The licensee has provided means for controlling hydrogen gas and has previously considered the potential for hydrogen gas generation stemming from a metal-water reaction. The LTA rods containing a low tin version of ZIRLO™ cladding are similar in chemical composition to zircaloy cladding. Metal-water reaction tests performed by Westinghouse on low tin versions of ZIRLO™ (documented in Appendix B of Addendum 1 to WCAP–12610–P–A) demonstrate comparable reaction rates. Accordingly, the previous calculations of hydrogen production resulting from a metal-water reaction will not be significantly changed. As such, application of 10 CFR 50.44 is not necessary for the licensee to achieve its underlying purpose in these circumstances.

3.3.2 10 CFR 50.46

The underlying purpose of 10 CFR 50.46 is to establish acceptance criteria for ECCS performance. The applicability of these ECCS acceptance criteria has been demonstrated by Westinghouse. Ring compression tests performed by Westinghouse on low tin versions of ZIRLO™ (documented in Appendix B of Addendum 1 to WCAP–12610–P–A) demonstrate an acceptable retention of post-LOCA ductility up to 10 CFR 50.46 limits of 2200 °F and 17 percent Equivalent Cladding Reacted. Utilizing currently approved LOCA models and methods, Westinghouse will perform cycle-specific reload evaluations prior to use to ensure that the LTAs satisfy 10 CFR 50.46 acceptance criteria. Therefore, the exemption to expand the application of 10 CFR 50.46 to include Optimized ZIRLO™ is acceptable.

3.3.3 10 CFR Part 50, Appendix K

Paragraph I.A.5 of Appendix K to 10 CFR part 50 states that the rates of energy, hydrogen concentration, and cladding oxidation from the metal-water reaction shall be calculated using the Baker-Just equation. Since the Baker-Just equation presumes the use of zircaloy clad fuel, strict application of the rule would not permit use of the equation for the LTA cladding for determining acceptable fuel performance. Metal-water reaction tests performed by Westinghouse on low tin versions of ZIRLO™ (documented in Appendix B of Addendum 1 to WCAP–12610–P–A) demonstrate conservative reaction rates relative to the Baker-Just equation. Thus, application of Appendix K, Paragraph I.A.5 is not necessary for the licensee to achieve its underlying purpose in these circumstances.

3.3.4 Special Circumstances

In summary, the staff reviewed the licensee's request of proposed exemption to allow up to four LTAs containing fuel rods, guide thimble tubes, and instrumentation tubes

fabricated with Optimized ZIRLO™. Based on the staff's evaluation, as set forth above, the staff considers that granting the proposed exemption will not defeat the underlying purpose of 10 CFR 50.44, 10 CFR 50.46, or Appendix K to 10 CFR part 50. Accordingly, special circumstances, are present pursuant to 10 CFR 50.12(a)(2)(ii).

3.3.5. Other Standards in 10 CFR 50.12

The staff examined the rest of the licensee's rationale to support the exemption request, and concluded that the use of Optimized ZIRLO™ would satisfy 10 CFR 50.12(a) as follows:

(1) The requested exemption is authorized by law:

No law precludes the activities covered by this exemption request. The Commission, based on technical reasons set forth in rulemaking records, specified the specific cladding materials identified in 10 CFR 50.44, 10 CFR 50.46, and 10 CFR part 50, Appendix K. Cladding materials are not specified by statute.

(2) The requested exemption does not present an undue risk to the public health and safety as stated by the licensee:

The LTA safety evaluation will ensure that these acceptance criteria [in the Commission's regulations] are met following the insertion of LTAs containing Optimized ZIRLO™ material. Fuel assemblies using Optimized ZIRLO™ cladding will be evaluated using NRC-approved analytical methods and plant specific models to address the changes in the cladding material properties. The safety analysis for VSNS is supported by the applicable technical specification. The VSNS reload cores containing Optimized ZIRLO™ cladding will continue to be operated in accordance with the operating limits specified in the technical specifications. LTAs utilizing Optimized ZIRLO™ cladding will be placed in non-limiting core locations. Thus, the granting of this exemption request will not pose an undue risk to public health and safety.

The NRC staff has evaluated these considerations as set forth in Section 3.1 of this exemption. For the reasons set forth in that section, the staff concludes that Optimized ZIRLO™ may be used as a cladding material for no more than four LTAs to be placed in nonlimiting core locations during VSNS's next refueling outage, and that an exemption from the requirements of 10 CFR 50.44, 10 CFR 50.46, and 10 CFR part 50, Appendix K does not pose an undue risk to the public health and safety.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants SCE&G exemptions from the requirements of 10 CFR 50.44, 10 CFR 50.46, and 10 CFR part 50, Appendix K, to allow four LTAs containing fuel rods with Optimized ZIRLO™ and several different developmental clad alloys.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (70 FR 1742).

This exemption is effective upon issuance.

Dated in Rockville, Maryland, this 14th day of January 2005.

For the Nuclear Regulatory Commission.

James E. Lyons,

Deputy Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 05–1772 Filed 1–31–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–390]

Utility Name; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–90 issued to the Tennessee Valley Authority (the licensee) for operation of the Watts Bar Nuclear Plant (WBN), Unit 1, located in Rhea County, Tennessee.

The proposed change allows entry into a mode or other specified condition in the applicability of a Technical Specification (TS), while in a condition statement and the associated required actions of the TS, provided the licensee performs a risk assessment and manages risk consistent with the program in place for complying with the requirements of title 10 of the Code of Federal Regulations (10 CFR), part 50, section 50.65(a)(4). Limiting Condition for Operation (LCO) 3.0.4 exceptions in individual TSs would be eliminated, several notes or specific exceptions are revised to reflect the related changes to LCO 3.0.4, and Surveillance Requirement (SR) 3.0.4 is revised to reflect the LCO 3.0.4 allowance. The No Significant Hazards Consideration Determination concerning this change was published in the **Federal Register** on January 18, 2005 (70 FR 2901).

A separate change, not described in the above **Federal Register** notice, was also included in the licensee's application. In accordance with TS Task Force (TSTF)—285, Charging Pump Swap Low-Temperature Over-Pressurization Allowance, LCO 3.4.12, Cold Overpressure Mitigation System (COMS), is being revised to modify and relocate two notes in the WBN TSs. The changes are all administrative, except a change which would allow two charging pumps to be made capable of injecting into the Reactor Coolant System to support pump swap operations for a period not to exceed 1 hour instead of the currently allowed 15 minutes.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves 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. 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 WBN TS is consistent with improvements made to the Standard Technical Specifications for Westinghouse Plants and continues to provide controls for safe operation within the required limits. The probability of occurrence or the consequences of an accident are not significantly increased as a result of the increased time from 15 minutes to one hour to allow pump swap operations. The one hour time period is reasonable considering the small likelihood of an event during this brief period and the other administrative controls available (*e.g.*, operator action to stop any pump that inadvertently starts) and considering the required vent paths in accordance with the LCO. The proposed change does not affect degradation of accident mitigation systems. The proposed

revision continues to maintain the required safety functions.

Accordingly, the probability of an accident or the consequences of an accident previously evaluated is not significantly increased.

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 improves the WBN TS consistent with improvements made to the Standard Technical Specifications (STS) for Westinghouse Plants and continues to provide controls for safe operation within the required limits. The subject change improves currently allowed pump swap provisions by realistically addressing time to safely and deliberately secure the operating pump and place the alternate pump in service, and provides additional assurance that seal injection requirements are not compromised. No new or different accident potential is created by the subject change. The change does not adversely impact plant equipment, test methods, or operating practices. 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.

The proposed change to the WBN TS is consistent with improvements made to the Standard Technical Specifications for Westinghouse Plants and provides improved pump swap provisions which should enhance safe operation within required limits. The change does not adversely impact plant equipment, test methods, or operating practices. The proposed change does not affect degradation of accident mitigation systems and continues to maintain the required safety functions of COMS to assure that the reactor vessel is adequately protected against exceeding pressure and temperature limits. 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.

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.

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 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

The filing of requests for 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 by the above date, 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 identify 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 bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner 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 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 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, 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.

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).

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 General Counsel, Tennessee Valley Authority, ET 11A, 400 West Summit Hill Drive, Knoxville, TN 37902, attorney for the licensee.

For further details with respect to this action, see the application for amendment dated September 15, 2004, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 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/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

Dated in Rockville, Maryland, this 25th day of January 2005.

For the Nuclear Regulatory Commission.

Douglas V. Pickett,

Senior Project Manager, Section II, Project Directorate II, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 05–1771 Filed 1–31–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Workshop on Regulatory Structure for New Plant Licensing, Part 1: Technology-Neutral Framework

The U.S. Nuclear Regulatory Commission (NRC) has issued a working draft of a NUREG report ''Regulatory Structure for New Plant Licensing, Part 1: Technology-Neutral Framework'' (draft NUREG–3–2005) for public review and comment. The purpose of this working draft NUREG is to provide an approach, scope, and acceptance criteria that could be used by the NRC staff to develop a technology-neutral set of requirements for future plant licensing. At the present time, the material contained in the working draft NUREG is preliminary and does not represent a final staff position, but rather is an interim product issued for the purpose of engaging stakeholders early in the development of the document and to support a workshop to be held in March 2005. As such, certain sections of this document are incomplete and are planned to be completed following receipt of initial stakeholder feedback. It is the staff's intent to complete this document in late 2005 and issue it as a final draft for stakeholder review and comment.

The work represented in this document is, however, considered sufficiently developed to illustrate one possible way to establish a technology-neutral approach to future plant licensing and to identify the key technical and policy issues which must be addressed; accordingly, it can serve as a useful vehicle for engaging stakeholders and facilitating discussion.

The NRC staff has issued a working draft NUREG on ''Regulatory Structure for New Plant Licensing, Part 1: Technology-Neutral Framework.'' The NRC staff requests comments within 90 days from the issuing date of this **Federal Register** Notice. Comments may be accompanied by relevant information or supporting data. Please mention draft NUREG–3–2005 in the subject line of your comments. You may submit comments by any one of the following methods.

Mail comments to Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001.

E-mail comments to *NRCREP@nrc.gov*. You may also submit comments via the NRC's rulemaking Web site at *http://ruleforum.llnl.gov*. Address questions about our rulemaking Web site to Carol Gallagher (301) 415–5905; e-mail *CAG@nrc.gov*.

Hand deliver comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission at (301) 415–5144.

Requests for information about the draft NUREG may be directed to Mr. A. Singh at (301) 415–0250 or e-mail *AXS3@nrc.gov*.

Comments will be most helpful if received by April 22, 2005. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

The NRC intends to conduct a workshop on March 14–16, 2005, to help facilitate the review and comment process. This workshop will be held in the auditorium at NRC headquarters, 11545 Rockville Pike, Rockville, Maryland.

Please notify Mr. A. Singh at (301) 415–0250 or e-mail *AXS3@nrc.gov*, if you plan to attend the workshop so that you can be pre-registered. Pre-registration will help facilitate your entry into the NRC facility for the workshop. In addition, please arrive at NRC headquarters 45 minutes prior to the start of the workshop so that you

have adequate time to be processed through security.

Please notify Mr. A. Singh at (301) 415–0250 or e-mail *AXS3@nrc.gov* if you would like to make a formal presentation at the workshop. Once all the presenters have been identified, you will be notified with the time allocated for your presentation.

Background

The Commission, in its Policy Statement on Regulation of Advanced Nuclear Power Plants, stated its intention to ''improve the licensing environments for advanced nuclear power reactors to minimize complexity and uncertainty in the regulatory process.'' The staff noted in its Advanced Reactor Research Plan to the Commission, (SECY–03–0059, ML023310534) that a risk-informed regulatory structure applied to license and regulate new reactors, regardless of their technology, could enhance consistency and efficiency of NRC's regulatory process across reactors with radically different concepts. As such, this new process, if implemented, could be available for use later in the decade.

The NRC's past light-water reactor (LWR) experience, especially the recent efforts to risk-inform the regulations, has provided insight into the potential value of following a top-down approach for the development of a regulatory structure for a new generation of reactors. Such an approach could also facilitate the implementation of performance-based regulation and make the regulations for new reactors more coherent.

The development of a technology-neutral regulatory structure will help ensure that a systematic approach is used to develop the regulations that will govern the design, construction, and operation of new reactors. This structure will ensure uniformity, consistency, and defensibility in the development of the regulations, particularly when addressing the unique design and operational aspects of new reactors.

Discussion

A working draft of NUREG–3–2005, ''Regulatory Structure for New Plant Licensing, Part 1: Technology-Neutral Framework,'' has been issued for stakeholder review and comment. The objective of the regulatory structure for new plant licensing is to provide a technology-neutral approach to enhancing the effectiveness and efficiency of new plant licensing in the longer term (beyond the advanced designs currently in the pre-application stage). This regulatory structure has four major parts:

(1) A technology-neutral framework.

(2) A set of technology-neutral requirements.

(3) A technology-specific framework.

(4) Technology-specific regulatory guides.

Currently, only work related to Part 1 of the regulatory structure for new plant licensing, the technology-neutral framework, has proceeded. Work has not been initiated on the other three parts. The staff has done enough work to demonstrate the feasibility of developing a technology-neutral framework. The framework is a hierarchal structure that combines deterministic and probabilistic criteria for developing technology-neutral requirements to ensure the protection of the public health and safety. The framework contains criteria for developing—

- A safety philosophy.
- Protective strategies.
- Risk, design, construction, and operational objectives.
- Treatment of uncertainties.
- A process for defining the scope of requirements.
- Performance-based concepts.

For each of these items, the staff has developed preliminary ''working'' criteria that demonstrate the feasibility of a technology-neutral framework in sufficient detail to start soliciting stakeholder input. However, difficult technical and policy issues associated with these items are being addressed by the staff that must be resolved before the framework can be completed and implemented. These issues will be discussed in detail at the workshop (see below).

Workshop Agenda

A final agenda will be provided at the workshop. The preliminary agenda is as follows:

Monday, March 14, 2005

- 8:30 a.m. to 10 a.m.—Introduction and NRC presentation (Overview of Regulatory Structure for New Plant Licensing, and Policy and Technical Issues)
- 10 a.m. to 5:30 p.m.—Open discussion with stakeholders on policy and technical issues (Safety Philosophy, Protective Strategies, Risk Objectives, Design, Construction, Operational Objectives, Treatment of Uncertainties and Defense-in-Depth, Performance-Based Concepts)

Tuesday, March 15, 2005

- 8:30 a.m. to 11 a.m.—Open discussion with stakeholders on implementation and other issues (includes example of applying the framework)
- 12:15 p.m. to 5:30 p.m.—Breakout Sessions (Small, parallel group discussions on various policy and technical issues, to be identified)

*Wednesday, March 16, 2005**

- 8:30 a.m. to 12:30 p.m.—Specific comments on the working draft NUREG and formal stakeholder presentations

*The workshop may be extended into the afternoon if additional time is needed to accommodate stakeholder presentations.

Policy and Technical Issues

The staff is soliciting comments on the issues associated with development and implementation of the framework document. These issues include, but are not limited to, the following topics:

1. Safety Philosophy (Level of Safety)

An issue for Commission consideration with respect to developing a new regulatory structure is defining the goal in the technology-neutral requirements for achieving enhanced safety. The Advanced Reactor Policy states that the Commission ''expects that advanced reactor designs will comply with the Commission's Safety Goal Policy'' and that ''advanced reactors will provide enhanced margins of safety.'' The framework proposes a safety philosophy that will define a level of safety that will meet the expectation of enhanced safety. In the framework, the staff proposes a safety philosophy directly tied to the Commission's 1986 Safety Goal Policy (51 FR 28044); that is, the staff proposes that the technology-neutral requirements be written to achieve the level of safety defined by the Safety Goal Policy Quantitative Health Objectives.

- Is it appropriate to use the Commission's Safety Goal Policy Quantitative Health Objectives (QHO) as the level of safety the technology-neutral regulations should be written to achieve? If not, what should be used?

2. Protective Strategies

Protective strategies are identified that define the safety fundamentals for safe nuclear power plant design, construction, and operation. They are the fundamental building blocks for developing technology-neutral requirements and regulations. Acceptable performance in these protective strategies provides reasonable assurance that the overall mission of adequate protection of public health and safety is met. Moreover, the protective strategies implicitly require a defense-in-depth approach that will ensure

uncertainties in performance do not compromise achieving overall plant safety objectives.

• Is the process described for the development of a technology-neutral regulatory structure reasonable? Is it complete? Is the relationship between the different pieces of the framework understandable? If not, where is it not understandable?

• What is meant by each protective strategy? For example, for Barrier Integrity protective strategy, what constitutes or defines a barrier?

• Is the use of protective strategies a reasonable approach for defining high-level safety functions? If not, what other approach(es) should be considered?

• Is the use of a deductive analysis of each protective strategy, to identify technology-neutral requirements and performance-based measures, a reasonable approach?

• Are the protective strategies described in Chapter 3, ''Safety Fundamentals: Protective Strategies'' reasonable? Are they complete? If not, what strategies are missing or not reasonable?

• Are the basic principles of a performance-based approach presented in Chapter 3 sufficiently clear and reasonable? If not, where are they not clear or not reasonable?

3. Quantitative Risk Objectives and Criteria, Design, Construction, and Operational Objectives and Criteria

The risk objectives and the design, construction, and operational objectives complement the protective strategies. The risk and design objectives provide a safety approach for meeting safety and risk goals for all facilities, that is parallel to protective strategies. This approach ensure that worker risk and environment is maintained within acceptable levels, and sets specific design expectations that provide defense-in-depth requirements at the design level.

• Is meeting a frequency consequence (F–C) curve an appropriate way to achieve enhanced safety for new reactors? If so, how should the F–C curve be interpreted? How could this interpretation be done on a practical basis? Should another approach be used? If so, what should it be?

• The Top Level Regulatory Criteria (TLRC) is another curve, which represents exposure at the site boundary under various conditions. What are the advantages and disadvantages of these two curves?

• With respect to implementing the F–C curve, where and how should the consequences be evaluated? (For example: evaluated at a particular site and its boundary? Averaged over all weather or for a conservatively defined weather?)

• Should the F–C curve shown in Figure 4–1 be expressed in terms of dose or curies released?

• Should the F–C curve be used as the acceptance criteria for all event sequences analyzed? If so, how should the cumulative effects of all event sequences be considered? Or, should the F–C curve frequency represent a cumulative frequency of all event sequences leading to a defined consequence?

• Can specific regions under the F–C curve be related to safety margins so as to facilitate implementation of safety decision-making?

• Are the International Commission on Radiation Protection (ICRP) guidelines the appropriate criteria to use for specifying radiological limits for new reactors? Should other guidelines be used? If so, what are they?

• Are the proposed technology-neutral risk guidelines appropriate? If not, what should be used?

• Is the proposed use of 10 CFR part 20 and GDC 19 of appendix A to 10 CFR part 50 appendix A appropriate for worker protection? If not, what is appropriate?

• Is the proposed approach for protection of the environment appropriate and adequate? If not, what is appropriate?

• Are the objectives and issues identified in the discussion of construction objectives appropriate? Are they sufficiently complete? What additional considerations will be important for new reactor designs?

• Are the operational objectives appropriate? What issues are not discussed that likely to be important for new reactors? Are any of the identified issues unnecessary for new reactors?

Commission approved the use of probabilistic criteria for identifying events that must be considered for the design, in the safety classification of Structures, Systems and Components (SSCs) and to replace the single failure criterion. The approach proposed in the framework involves identifying event sequence categories by frequency to define abnormal operational occurrences (AOOs), design basis accidents (DBAs), and beyond-design-basis events, classifying SSCs as either risk-significant or non-risk-significant based on the SSCs' quantified risk importance and criteria consistent with the work done in support of the 10 CFR 50.69 rulemaking; and replace the single-failure criterion with event sequences from the design-specific probabilistic risk assessment (PRA).

• Is the proposed approach for the selection of AOOs and DBAs reasonable? Should another approach be used? If so, what should it be? Are the acceptance criteria reasonable?

• Can a technology-neutral definition of accident prevention be developed? If so, what should it be? If not, what technology-specific definitions should be used?

• Should a risk-informed safety classification process build upon the risk criteria and process contained in 10 CFR 50.69? If not, what risk criteria and process should be used?

• What risk criteria and process are appropriate for non-LWR concepts (*e.g.*, high temperature gas reactors) to address accident prevention and safety classification?

• What acceptance criteria should be used to reflect uncertainties? Should they be set at a defined level of confidence; or should evaluation of uncertainty in both the challenge and the capability be required?

The Commission approved the use of scenario-specific source terms, provided that the staff understands the fission product behavior, and plant conditions and performance. In the framework, the staff used a flexible, performance-based approach to establish scenario-specific licensing source terms. The key features of this approach are: (1) Scenarios are to be selected from a design-specific PRA; (2) source term calculations are based on verified analytical tools; (3) source terms for compliance should be 95% confidence level values, based on best-estimate calculations; and (4) source terms for licensing decisions should reflect scenario-specific timing, form, and magnitude of the release.

The approach used for selecting DBAs may result in smaller source terms than used for LWR safety analyses. Is this approach reasonable for siting? Or should siting be based on a large source term?

The Commission asked the staff to provide further details on the options for, and associated impacts of, requiring that modular reactor designs account for the integrated risk posed by multiple reactors.

• Should the consideration of integrated risk be applied to all reactors on a site, not just modular reactors?

• If integrated risk is to be considered on a per site basis, how should it be accounted for?

—limit the number of reactors on a site?
—site specific criteria?
—nationwide criteria?
—other criteria?

Note: See ACRS letter of April 22, 2004 for additional considerations.

The Commission approved the staff proposal that no change to emergency preparedness requirements is needed in the near term. The Commission also approved, for the longer term, the staff developing guidelines for assessing possible modifications to emergency preparedness requirements as part of the work to develop a description of defense-in-depth.

What should the role of emergency preparedness in defense-in-depth be, as it relates to possible simplification of the emergency planning requirements; *e.g.*, reduction in the size of the emergency planning zones (EPZs) for reactors that are designed with greater safety margins than the current light water reactors?

In considering possible changes to the existing emergency preparedness regulations or guidance, should factors other than reactor size and location, level of safety (*i.e.*, likelihood of release), magnitude and chemical form of release, and timing of release be addressed? Is consideration of these factors adequate and reasonable? If not, why? In addition, should the changes address considerations beyond the following; and if so, what are they?

1. Consideration of the full range of accidents.
2. Use of the defense-in-depth philosophy.
3. Prototype operating experience.
4. Acceptance by Federal, State, and local agencies.
5. Acceptance by the public.

4. Treatment of Uncertainties and Defense-in-Depth

The Commission approved the staff recommendation for developing a definition of defense-in-depth that would be incorporated into a policy statement. In licensing future reactors, the treatment of uncertainties will play a key role in ensuring safety limits are met and the design is robust with respect to unanticipated factors. In general, uncertainties associated with new plants will tend to be larger than uncertainties associated with existing plants due to new technologies being used, the lack of operating experience or, in the case of some proposed LWRs, new design features (*e.g.*, increased use of passive systems). Any licensing approach for new plants must account for the treatment of these uncertainties. The aim is to develop an approach for future reactors which can be reconciled with past practices used for operating reactors, but which improves on past practices by being more consistent and by making use of quantitative information where possible. The approach recommended for dealing with uncertainties when ensuring the safety of new plants is the concept of multiple successive layers of barriers and lines of defense against undesirable consequences. This approach is usually referred to as defense-in-depth. The concept of defense-in-depth is fundamental to the treatment of uncertainties.

- Are the types of uncertainty adequately described? If not, what should be changed or added?
- A major reason for including a deterministic (structuralist) component in the defense-in-depth model (*i.e.*, the protective strategies) is to address the unknown contributors (initiating events, failure mechanisms, physical performance, etc.) to accidents. The deterministic component of the model requires that each protective strategy is implemented, however, the extent or degree to which each strategy is implemented is tempered by the associated risk (which is the probabilistic or rationalist component of the model).

—What approaches to determining the degree of defense-in-depth provided by each protective strategy would be appropriate?

—How relevant is the rationalist approach, given the uncertainty associated with the unknown contributors?

—Are expert judgment approaches appropriate? What caveats and controls would be needed?

—Are there ways to structure the uncertainty associated with ''unknown'' aspects of the risk that can be helpful? Could these be used to provide a qualitative description of the uncertainty that would provide a basis for assessment?

—What other possibilities are there?

- Are there additional defense-in-depth principles that should be adhered to? If so, what are they?
- Is the proposed defense-in-depth criteria for containment appropriate? If not, what should be used?
- Is the defense-in-depth model advocated in the report appropriate? Does it achieve the proper balance between structuralist and rationalist aspects? If not, how should it be changed?
- Is the implementation of the defense-in-depth model described in the report appropriate? If not, how it should be changed?
- Are incompleteness uncertainties reasonably accounted for? If not, how should they be dealt with?
- Are the proposed factors for considering changes to existing emergency preparedness regulations or guidance appropriate? If not, what should be used?

The Commission asked the staff to develop containment functional performance requirements and criteria, working closely with industry experts (*e.g.*, designers, Electric Power Research Institute, etc.) and other stakeholders regarding options in this area, and to take into account such features as core, fuel, and cooling systems design. The Commission also stated that the staff should pursue the development of functional performance standards, and then submit options and recommendations to the Commission on this important policy decision.

- Does the proposed functional performance requirement and criterion for containment take into account such features as the fuel, core, and cooling system design?
- Are the proposed performance requirement and criterion performance-based?
- Are the proposed performance requirement and criterion risk-informed?
- Does the proposed performance requirement and criterion adequately account for uncertainties, including completeness uncertainties?
- Would the proposed performance requirement and criterion result in excessive regulatory burden, including containment design, construction and operating costs?
- Does the proposed performance requirement and criterion provide for public confidence?
- How should the options, including the proposed option, be revised in consideration of the above questions?

5. Process for Defining Scope of Requirements (and General Implementation Issues)

A deductive process will be developed to identify and define the scope and content of detailed technical and administrative requirements that are necessary to ensure the safety objectives and criteria are met.

- Should the technology-neutral requirements be developed as an independent alternative to licensing under 10 CFR part 50?
- Is there a near-term (*i.e.*, 3–5 years) need for the framework?
- The derivation of detailed technical requirements is being developed. Is the process described (and illustrated with the barrier integrity example) for the identification of the scope and content of the detailed technical requirements from the protective strategies reasonable? How could it be improved?
- The approach for obtaining the needed administrative requirements is

being developed. Is the process described so far reasonable? Are the discussions on analysis methods and qualification, and on research and development appropriate?

• Should the technology-neutral requirements build upon and utilize 10 CFR part 50 requirements as much as possible (*i.e.*, whenever 10 CFR 50 requirements are technology neutral they should be incorporated)?

• Are the desired characteristics of a technology-neutral regulatory structure listed in Sections 1.4 and 6.3 of the framework reasonable? Is the list complete? If not, what characteristic(s) is missing?

• Are the described checks for completeness of the framework adequate? What other checks could be performed?

• Is it reasonable and practical to maintain a living PRA, which would be used to periodically reclassify reactor accidents as operating experience accrues?

• From a regulatory perspective, in terms of enforceability, is it practical to include the technology-specific details in a regulatory guide, although included as part of the license, or directly in a regulation?

• Would performance-based requirements developed according to appendix A to CFR 10 part 50, sufficiently address enforceability, given that prescriptive requirements are easier to enforce?

• At what stage should the technology-specific regulatory guides be developed and to what level of detail? Currently, it is envisioned, prior to pre-application or pre-certification, to develop the technology-specific regulatory guides for each technology type, not for each applicant. The technology-specific regulatory guide would specify how to interpret such statements in the technology-neutral regulation as fuel damage, accident prevention.

• It is envisioned that these new technology-neutral regulations would be a voluntary alternative to 10 CFR part 50. Should these regulations be voluntary or mandatory? What would be the motivation for an applicant to use this alternative? Should a licensee be allowed to seek an exemption to 10 CFR part 50 to propose an alternative approach based on the technology-neutral regulations?

• Is a technology-neutral framework desirable for licensing future reactors? What are the advantages of using a technology-neutral framework? What are the difficulties of using such a framework?

6. Appendices

The following appendices have been identified to provide further detailed information in understanding the criteria and guidelines in the framework document.

• Will the identified set of appendices be helpful? Should any be dropped or redirected?

• Would additional appendices be helpful? If yes, what should be the topic and to what level should it be written?

A. Guidance for the Formulation of Performance-Based Requirements: Provides an explanation of how the topics that must be addressed to provide defense-in-depth protection via the protective strategies can be implemented through performance-based requirements. Identifies the steps in this process including the need for safety margin.

—Are there additional performance-based considerations that should be included in appendix A?

B. Current Quantitative Guidelines for LWRs: The Framework discusses the possibility of using surrogates to demonstrate that the risk objectives of the frequency-consequence curve have been met. Appendix B illustrates how core damage frequency and large early release frequency are used for current LWRs as surrogates for the risk objectives expressed by the latent cancer QHO and early fatality QHO, respectively.

—Are there additional examples of the use of surrogates to achieve higher level risk objectives that would be useful here?

C. Safety Characteristics of New Reactors: Brief summary descriptions of a number of possible new reactor concepts. Includes a discussion of safety features (and vulnerabilities, if identified) structured to make clear the linkage to the Framework.

—Are there additional characteristics/features/attributes of the various innovative designs that should receive special attention in appendix C?

D. Probabilistic Risk Assessment Quality Needs for New Reactors: There are now standards for PRA of LWRs. This appendix will define PRA in a technology-neutral manner (*e.g.*, core damage frequency as a definition for Level 1 is technology-specific), identify extensions and changes that may be needed for some new reactors, and will describe how PRA is related to the development of regulatory requirements for new reactors (*e.g.*, development of a living PRA and what a living PRA entails).

—What should be the scope and depth of this appendix? At a higher level and look to professional organization to develop standard?

E. Assessment of 10 CFR Part 50 for New Reactors: A review of 10 CFR Part 50 requirements against a specific new reactor design. Identifies where current requirements are directly applicable, which requirements are not applicable, which requirements need to be adapted to the new design concept, and what design features and uncertainties call for new requirements.

F. Completeness Check: A review of other work being performed in this area to identify any significant holes. Review and compare against the NEI–02–02 framework and the technical document being prepared by IAEA relating to technology-neutral regulations.

—Are there other sources that should be reviewed?

7. Glossary

A glossary is being developed with a standard set of definitions of terms, in order to provide a common understanding, and to help facilitate discussions and communication regarding the regulatory structure for new plant licensing.

• Have the appropriate terms been identified? If not, what terms should be deleted or added?

• Are the definitions reasonable? If not, why?

• Should the definitions be standardized? Can the definitions be used elsewhere? If not, which definitions can not be standardized, and why?

Information about the working draft NUREG and the workshop may be directed to Mr. A. Singh at (301) 415–0250 or e-mail *axs3@NRC.GOV.*

Although a time limit is given for comments on this draft document, comments and suggestions in connection with items for inclusion in guides currently being developed, or improvements in all published guides, are encouraged at any time.

(5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 25th day of January 2005.

For the Nuclear Regulatory Commission.

Charles E. Ader,

Director, Division of Risk Analysis and Applications, Office of Nuclear Regulatory Research.

[FR Doc. 05–1770 Filed 1–31–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Meetings; Sunshine Act

DATE: Weeks of January 31, February 7, 14, 21, 28, March 7, 2005.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

MATTERS TO BE CONSIDERED:

Week of January 31, 2005

Thursday, February 3, 2005

9:30 a.m. Briefing on Human Capital Initiatives (Closed—Ex. 2).

Week of February 7, 2005—Tentative

There are no meetings scheduled for the week of February 7, 2005.

Week of February 14, 2005—Tentative

Tuesday, February 15, 2005

9:30 a.m. Briefing on Office of Nuclear Material Safety and Safeguards Programs, Performance, and Plans—Waste Safety (Public Meeting) (Contact: Jessica Shin, 301–415–8117).

This meeting will be webcast live at the Web address—*http://www.nrc.gov*.

Week of February 21, 2005—Tentative

Tuesday, February 22, 2005

9:30 a.m. Briefing on Status of Office of the Chief Information Officer (OCIO) Programs, Performance, and Plans (Public Meeting) (Contact: Patricia Wolfe, 301–415–6031).

This meeting will be webcast live at the Web address—*http://www.nrc.gov*.

1:30 p.m. Briefing on Emergency Preparedness Program Initiatives (Closed—Ex. 1) (This meeting was originally scheduled for February 15, 2005).

Wednesday, February 23, 2005

9:30 a.m. Briefing on Status of Office of the Chief Financial Officer (OCFO) Programs, Performance, and Plans (Public Meeting) (Contact: Edward New, 301–415–5646).

This meeting will be webcast live at the Web address—*http://www.nrc.gov*.

Thursday, February 24, 2005

1 p.m. Briefing on Nuclear Fuel Performance (Public Meeting) (Contact: Frank Akstulewicz, 301–415–1136).

This meeting will be webcast live at the Web address—*http://www.nrc.gov*.

Week of February 28, 2005—Tentative

There are no meetings scheduled for the week of February 28, 2005.

Week of March 7, 2005—Tentative

Monday, March 7, 2005

9:30 a.m. Briefing on Office of Nuclear Material Safety and Safeguards Programs, Performance, and Plans—Materials Safety (Public Meeting) (Contact: Shamica Walker, 301–415–5142).

This meeting will be webcast live at the Web address—*http://www.nrc.gov*.

* 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.

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The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.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: 301–415–2100, or by e-mail at *aks.@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

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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 (301–415–1969). In 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: January 27, 2005.

Dave Gamberoni,

Office of the Secretary.

[FR Doc. 05–1885 Filed 1–28–05; 9:39 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 January 7, 2005, through January 19, 2005. The last biweekly notice was published on January 18, 2005 (70 FR 2886).

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 bases 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.*

AmerGen Energy Company, LLC, Docket No. 50–461, Clinton Power Station, Unit 1, DeWitt County, Illinois

Date of amendment request: September 15, 2004.

Description of amendment request: The proposed amendment would delete requirements from the Technical Specifications (TSs) to maintain hydrogen recombiners and hydrogen and oxygen monitors. A notice of availability for this TS improvement using the consolidated line item improvement process was published in the **Federal Register** on September 25, 2003 (68 FR 55416). Licensees were generally required to implement upgrades as described in NUREG–0737, ''Clarification of TMI [Three Mile Island] Action Plan Requirements,'' and Regulatory Guide (RG) 1.97, ''Instrumentation for Light-Water-Cooled Nuclear Power Plants to Assess Plant and Environs Conditions During and Following an Accident.'' Implementation of these upgrades was an outcome of the lessons learned from the accident that occurred at TMI, Unit 2. Requirements related to combustible gas control were imposed by order for many facilities and were added to, or included, in the TSs for nuclear power reactors currently licensed to operate. The revised Title 10 of the Code of Federal Regulations (10 CFR) Section 50.44, ''Standards for combustible gas control system in light-water-cooled power reactors,'' eliminated the requirements for hydrogen recombiners and relaxed safety classifications and licensee commitments to certain design and qualification criteria for hydrogen and oxygen monitors.

The U.S. Nuclear Regulatory Commission (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 September 25, 2003 (68 FR 55416). The licensee affirmed the applicability of the model NSHC determination in its application dated September 15, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of NSHC is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The revised 10 CFR 50.44 no longer defines a design-basis loss-of-coolant accident (LOCA) hydrogen release, and eliminates requirements for hydrogen control systems to mitigate such a release. The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The NRC has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage. In addition, these systems were ineffective at mitigating hydrogen releases from risk-significant accident sequences that could threaten containment integrity.

With the elimination of the design-basis LOCA hydrogen release, hydrogen and oxygen monitors are no longer required to mitigate design-basis accidents and, therefore, the hydrogen monitors do not meet the definition of a safety-related component as defined in 10 CFR 50.2. RG 1.97 Category 1, is intended for key variables that most directly indicate the accomplishment of a safety function for design-basis accident events. The hydrogen and oxygen monitors no longer meet the definition of Category 1 in RG 1.97. As part of the rulemaking to revise 10 CFR 50.44 the NRC found that Category 3, as defined in RG 1.97, is an appropriate categorization for the hydrogen monitors because the monitors are required to diagnose the course of beyond design-basis accidents. Also, as part of the rulemaking to revise 10 CFR 50.44, the NRC found that Category 2, as defined in RG 1.97, is an appropriate categorization for the oxygen monitors, because the monitors are required to verify the status of the inert containment.

The regulatory requirements for the hydrogen and oxygen monitors can be relaxed without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. Classification of the hydrogen monitors as Category 3, [classification of the oxygen monitors as Category 2,] and removal of the hydrogen and oxygen monitors from TS will not prevent an accident management strategy through the use of the severe accident management guidelines, the emergency plan, the emergency operating procedures, and site survey monitoring that support modification of emergency plan protective action recommendations.

Therefore, the elimination of the hydrogen recombiner requirements and relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, does not involve a significant increase in the probability or the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, will not result in any failure mode not previously analyzed. The hydrogen recombiner and hydrogen and oxygen monitor equipment was intended to mitigate a design-basis hydrogen release. The hydrogen recombiner and hydrogen and oxygen monitor equipment are not considered accident precursors, nor does their existence or elimination have any adverse impact on the pre-accident state of the reactor core or post accident confinement of radionuclides within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety.

The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The NRC has found that this hydrogen release is not risk-significant

because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage.

Category 3 hydrogen monitors are adequate to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The intent of the requirements established as a result of the TMI, Unit 2 accident can be adequately met without reliance on safety-related hydrogen monitors.

Category 2 oxygen monitors are adequate to verify the status of an inerted containment.

Therefore, this change does not involve a significant reduction in the margin of safety. The intent of the requirements established as a result of the TMI, Unit 2 accident can be adequately met without reliance on safety-related oxygen monitors. Removal of hydrogen and oxygen monitoring from TS will not result in a significant reduction in their functionality, reliability, and availability.

The NRC staff proposes to determine that the amendment request involves NSHC.

Attorney for licensee: Mr. Thomas S. O'Neill, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60666.

NRC Section Chief: Gene Y. Suh.

Arizona Public Service Company, et al., Docket Nos. STN 50–528, STN 50–529, and STN 50–530, Palo Verde Nuclear Generating Station, Units 1, 2, and 3, Maricopa County, Arizona

Date of amendments request: December 16, 2004.

Description of amendments 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 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 December 16, 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 significance hazards consideration.

Attorney for licensee: Kenneth C. Manne, Senior Attorney, Arizona Public Service Company, P.O. Box 52034, Mail Station 7636, Phoenix, Arizona 85072–2034.

NRC Section Chief: Robert A. Gramm.

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 amendments request: December 1, 2004.

Description of amendments 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 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 December 1, 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 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 significance 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.

Detroit Edison Company, Docket No. 50–341, Fermi 2, Monroe County, Michigan

Date of amendment request: December 6, 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 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 December 6, 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 TSs reporting requirements to provide a monthly operating 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 significant hazards consideration.

Attorney for licensee: Peter Marquardt, Legal Department, 688 WCB, Detroit Edison Company, 2000 2nd Avenue, Detroit, Michigan 48226–1279 .

NRC Section Chief: M. Kotzalas (Acting).

Dominion Nuclear Connecticut, Inc., Docket No. 50–336, Millstone Power Station, Unit No. 2, New London County, Connecticut

Date of amendment request: June 6, 2004.

Description of amendment request: The proposed change would modify the Millstone Power Station, Unit No. 2 Technical Specifications (TSs) to extend the 10-year test interval for the Integrated Leakage Rate Test program to 15 years from the last Type A test. Specifically, the proposed change would revise TS 6.19, ''Containment Leakage Rate Testing [CLRT] Program,'' and permit a one-time, 5-year extension of the 10-year performance-based Type A test interval. In addition, the testing would be in accordance with the CLRT Program, Regulatory Guide (RG) 1.163, ''Performance-Based Containment Leak-Test Program'' and surveillance testing requirements as proposed in Nuclear Energy Institute 94–01 for Type A testing.

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 license amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed extension to Type A testing cannot increase the probability of an accident previously evaluated since extension of the containment Type A testing is not a physical plant modification that could alter the probability of accident occurrence, nor is it an activity or modification that by itself could lead to equipment failure or accident initiation.

The proposed one-time, five-year extension to Type A testing does not result in a significant increase in the consequences of an accident as documented in NUREG–1493. The NUREG notes that very few potential containment leakage paths are not identified by Type B and C tests. It concludes that even reducing the Type A (ILRT [integrated leak rate test]) testing frequency to once per twenty years leads to an imperceptible increase in risk.

DNC (the licensee) provides a high degree of assurance through indirect testing and inspection that the containment will not degrade in a manner detectable only by Type A testing. The last two Type A tests identified containment leakage within acceptance criteria, indicating a very leak-tight containment. Inspections required by the ASME Code [American Society of Mechanical Engineers Boiler and Pressure Vessel Code] are also performed in order to identify indications of containment degradation that could affect leak-tightness. Separately, Type B and C testing required by Technical Specifications, identifies any containment opening from design penetrations, such as valves, that would otherwise be detected by a Type A test. These factors establish that a one-time, five-year extension to the Millstone Unit 2 Type A test interval will not represent a significant increase in the consequences of an accident.

2. Does the proposed license amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed revision to the Technical Specifications adds a one-time extension to the current interval for Type A testing for Millstone Unit 2. The current test interval of ten years, based on past performance, would be extended on a one-time basis to fifteen years from the last Type A test. The proposed extension to Type A testing does not create the possibility of a new or different type of accident since there are no physical changes being made to the plant and there are no changes to the operation of the plant that could introduce a new failure.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

The proposed revision to Millstone Unit 2 Technical Specifications adds a one-time extension to the current interval for Type A testing. The current test interval of ten years, based on past performance, would be extended on a one-time basis to fifteen years from the last Type A test for Millstone Unit 2. RG 1.174 provides guidance for determining the risk impact of plant-specific changes to the licensing basis. RG 1.174 defines very small changes in risk as resulting in increases of CDF [core damage frequency] below 10^{-6}/yr and increases in LERF [large early release frequency] below 10^{-7}/yr. Since the ILRT does not impact CDF, the relevant criterion is LERF. The increase in LERF, resulting from a change in the Type A ILRT test interval from a once-per-ten-years to a once-per-fifteen-years is 0.83×10^{-8}/yr, based on internal events. Since guidance in Reg. Guide 1.174 defines very small changes in LERF as below 10^{-7}/yr, increasing the ILRT interval from ten to fifteen years is, therefore, considered non-risk significant and will not significantly reduce the margin of safety. The NUREG–1493 generic study of the effects of extending containment leakage testing found that a 20-year interval in Type A leakage testing resulted in an imperceptible increase in risk to the public. NUREG–1493 generically concludes that the design containment leakage rate contributes about 0.1 percent of the overall risk. Decreasing the Type A testing frequency would have a minimal effect on this risk since 95% of the Type A detectable leakage paths would already be detected by Type B and C testing. Given that the proposed change will continue to meet the current design basis, any reduction in a margin of safety would not be significant.

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: Lillian M. Cuoco, Senior Nuclear Counsel, Dominion Nuclear Connecticut, Inc., Rope Ferry Road, Waterford, CT 06385.

NRC Section Chief: Darrell J. Roberts.

Dominion Nuclear Connecticut Inc., et al., Docket No. 50–423, Millstone Power Station, Unit No. 3, New London County, Connecticut

Date of amendment request: December 16, 2004.

Description of amendment request: The proposed amendment would revise the current fuel rod average licensing basis burnup limit for one lead test assembly (LTA) containing advanced zirconium based alloys to a limit not exceeding 71,000 MWD/MTU.

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. Involve a significant increase in the probability or consequences of an accident previously evaluated.

The Westinghouse LTA is very similar in design to the Westinghouse fuel that comprises the remainder of the core. The reload core design for Millstone Unit 3 Cycle 12, where one LTA will operate to high burnup, will meet all applicable design criteria. The performance of the Emergency Core Cooling System will not be affected by the operation of the LTA and operation of the LTA to high burnup will not result in a change to the Millstone Unit 3 reload design and safety analysis limits. Operation of one Westinghouse LTA to high burnup will not result in a measurable impact on normal operating releases, and will not increase the predicted radiological consequences of accidents postulated in Chapter 15 of the Millstone FSAR [final safety analysis report]. Therefore, neither the probability of occurrence nor the consequences of any accident previously evaluated is significantly increased.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

The Westinghouse LTA is very similar in design (both mechanical and composition of materials) to the resident Westinghouse fuel. All design and performance criteria will continue to be met and no new single failure mechanisms will be created. The irradiation of one LTA to high burnup does not involve any alteration to plant equipment or procedures, which would introduce any new or unique operational modes or accident precursors. Therefore, the possibility for a new or different kind of accident from any accident previously evaluated is not created.

3. Involve a significant reduction in a margin of safety.

The operation of one Westinghouse LTA to high burnup does not change the performance requirements of any system or component such that any design criteria will be exceeded. The normal limits on core operation defined in the Millstone Unit 3 Technical Specifications will remain applicable for the core in which the high burnup assembly is irradiated. Therefore, the margin of safety as defined in the Bases to the Millstone Unit 3 Technical Specifications is not significantly reduced.

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: Lillian M. Cuoco, Senior Nuclear Counsel, Dominion Nuclear Connecticut, Inc., Waterford, CT 06141–5127.

NRC Section Chief: Darrell Roberts.

Dominion Nuclear Connecticut, Inc., Docket Nos. 50–336 and 50–423, Millstone Power Station, Unit Nos. 2 and 3, New London County, Connecticut

Date of amendment request: September 8, 2004.

Description of amendment request: The proposed amendment deletes the requirements from the technical specifications (TSs) to maintain hydrogen recombiners and hydrogen monitors. Licensees were generally required to implement upgrades as described in NUREG–0737, ''Clarification of TMI [Three Mile Island] Action Plan Requirements,'' and Regulatory Guide (RG) 1.97, ''Instrumentation for Light-Water-Cooled Nuclear Power Plants to Assess Plant and Environs Conditions During and Following an Accident.'' Implementation of these upgrades was an outcome of the lessons learned from the accident that occurred at TMI Unit 2. Requirements related to combustible gas control were imposed by Order for many facilities and were added to or included in the TSs for nuclear power reactors currently licensed to operate. The revised 10 CFR 50.44, ''Standards for Combustible Gas Control System in Light-Water-Cooled Power Reactors,'' eliminated the requirements for hydrogen recombiners and relaxed safety classifications and licensee commitments to certain design and qualification criteria for hydrogen and oxygen monitors.

The NRC staff issued a notice of availability of a model no significant hazards consideration determination for referencing in license amendment applications in the **Federal Register** on September 25, 2003 (68 FR 55416). The licensee affirmed the applicability of the model NSHC determination in its application dated September 8, 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:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The revised 10 CFR 50.44 no longer defines a design-basis loss-of-coolant accident (LOCA) hydrogen release, and eliminates requirements for hydrogen control systems to mitigate such a release. The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage. In addition, these systems were ineffective at mitigating hydrogen releases from risk-significant accident sequences that could threaten containment integrity.

With the elimination of the design-basis LOCA hydrogen release, hydrogen monitors are no longer required to mitigate design-basis accidents and, therefore, the hydrogen monitors do not meet the definition of a safety-related component as defined in 10 CFR 50.2. Category 1 in RG 1.97 is intended for key variables that most directly indicate the accomplishment of a safety function for design-basis accident events. The hydrogen monitors no longer meet the definition of Category 1 in RG 1.97. As part of the rulemaking to revise 10 CFR 50.44 the Commission found that Category 3, as defined in RG 1.97, is an appropriate categorization for the hydrogen monitors because the monitors are required to diagnose the course of beyond design-basis accidents.

The regulatory requirements for the hydrogen monitors can be relaxed without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. Classification of the hydrogen monitors as Category 3, and removal of the hydrogen monitors from TS will not prevent an accident management strategy through the use of the severe accident management guidelines (SAMGs), the emergency plan (EP), the emergency operating procedures (EOP), and site survey monitoring that support modification of emergency plan protective action recommendations (PARs).

Therefore, the elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TSs, does not involve a significant increase in the probability or the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From any Previously Evaluated

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TSs, will not result in any failure mode not previously analyzed. The hydrogen recombiner and hydrogen monitor equipment was intended to mitigate a design-basis hydrogen release. The hydrogen recombiner and hydrogen monitor equipment are not considered accident precursors, nor does their existence or elimination have any adverse impact on the pre-accident state of the reactor core or post-accident confinement of radionuclides within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TSs, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety.

The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage.

Category 3 hydrogen monitors are adequate to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The intent of the requirements established as a result of the TMI Unit 2 accident can be adequately met without reliance on safety-related hydrogen monitors.

Therefore, this change does not involve a significant reduction in the margin of safety. Removal of hydrogen monitoring from TSs will not result in a significant reduction in their functionality, reliability, and availability.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Nuclear Counsel, Dominion Nuclear Connecticut, Inc., Rope Ferry Road, Waterford, CT 06385.

NRC Section Chief: Darrell J. Roberts.

Duke Energy Corporation, Docket Nos. 50–369 and 50–370, McGuire Nuclear Station, Units 1 and 2, Mecklenburg County, North Carolina; Docket Nos. 50–269, 50–270, and 50–287, Oconee Nuclear Station, Units 1, 2, and 3, Oconee County, South Carolina

Date of amendment request: September 20, 2004.

Description of amendment request: The proposed amendment deletes the requirements from the technical specifications (TS) to maintain hydrogen recombiners (McGuire only) and hydrogen monitors (McGuire and Oconee). Licensees were generally required to implement upgrades as described in NUREG–0737, ''Clarification of TMI [Three Mile Island] Action Plan Requirements,'' and Regulatory Guide 1.97, ''Instrumentation for Light-Water-Cooled Nuclear Power Plants to Assess Plant and Environs Conditions During and Following an Accident.'' Implementation of these upgrades was an outcome of the lessons learned from the accident that occurred at TMI Unit 2. Requirements related to combustible gas control were imposed by Order for many facilities and were added to or included in the TS for nuclear power reactors currently licensed to operate. The revised 10 CFR 50.44, ''Standards for Combustible Gas Control System in Light-Water-Cooled Power Reactors,'' eliminated the requirements for hydrogen recombiners and relaxed safety classifications and licensee commitments to certain design and qualification criteria for hydrogen and oxygen monitors.

The NRC staff issued a notice of availability of a model no significant hazards consideration determination for referencing in license amendment applications in the **Federal Register** on September 25, 2003 (68 FR 55416). The licensee affirmed the applicability of the model NSHC determination in its application dated September 20, 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:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The revised 10 CFR 50.44 no longer defines a design-basis loss-of-coolant accident (LOCA) hydrogen release, and eliminates requirements for hydrogen control systems to mitigate such a release. The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage. In addition, these systems were ineffective at mitigating hydrogen releases from risk-significant accident sequences that could threaten containment integrity.

With the elimination of the design-basis LOCA hydrogen release, hydrogen monitors are no longer required to mitigate design-basis accidents and, therefore, the hydrogen monitors do not meet the definition of a safety-related component as defined in 10 CFR 50.2. Category 1 in [Regulatory Guide] RG 1.97 is intended for key variables that most directly indicate the accomplishment of a safety function for design-basis accident events. The hydrogen monitors no longer meet the definition of Category 1 in RG 1.97. As part of the rulemaking to revise 10 CFR 50.44 the Commission found that Category 3, as defined in RG 1.97, is an appropriate categorization for the hydrogen monitors because the monitors are required to diagnose the course of beyond design-basis accidents.

The regulatory requirements for the hydrogen monitors can be relaxed without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. Classification of the hydrogen monitors as Category 3, and removal of the hydrogen monitors from [Technical Specification] TS will not prevent an accident management strategy through the use of the severe accident management guidelines (SAMGs), the emergency plan (EP), the emergency operating procedures (EOP), and site survey monitoring that support modification of emergency plan protective action recommendations (PARs).

Therefore, the elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, does not involve a significant increase in the probability or the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From any Previously Evaluated

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, will not result in any failure mode not previously analyzed. The hydrogen recombiner and hydrogen monitor equipment was intended to mitigate a design-basis hydrogen release. The hydrogen recombiner and hydrogen monitor equipment are not considered accident precursors, nor does their existence or elimination have any adverse impact on the pre-accident state of the reactor core or post accident confinement of radionuclides within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety.

The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage.

Category 3 hydrogen monitors are adequate to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The intent of the requirements established as a result of the TMI Unit 2 accident can be adequately met without reliance on safety-related hydrogen monitors.

Therefore, this change does not involve a significant reduction in the margin of safety. Removal of hydrogen monitoring from TS will not result in a significant reduction in their functionality, reliability, and availability.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ms. Lisa F. Vaughn, Duke Energy Corporation, 422 South Church Street, Charlotte, North Carolina 28201–1006.

NRC Section Chief: John A. Nakoski.

Entergy Nuclear Operations, Docket Nos. 50–247 and 50–286, Indian Point Nuclear Generating Unit Nos. 2 and 3, Westchester County, New York

Date of amendment request: October 22, 2004.

Description of amendment request: The proposed amendments would delete the requirements from the Technical Specifications (TSs) to maintain hydrogen recombiners and hydrogen monitors. Licensees were generally required to implement upgrades as described in NUREG–0737, ''Clarification of TMI [Three Mile Island] Action Plan Requirements,'' and Regulatory Guide (RG) 1.97, ''Instrumentation for Light-Water-Cooled Nuclear Power Plants to Assess Plant and Environs Conditions During and Following an Accident.'' Implementation of these upgrades was an outcome of the lessons learned from the accident that occurred at TMI Unit 2. Requirements related to combustible gas control were imposed by Order for many facilities and were added to or included in the TSs for nuclear power reactors currently licensed to operate. The revised 10 CFR 50.44, ''Standards for Combustible Gas Control System in Light-Water-Cooled Power Reactors,'' eliminated the requirements for hydrogen recombiners and relaxed safety classifications and licensee commitments to certain design and qualification criteria for hydrogen and oxygen monitors.

The Nuclear Regulatory Commission (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 September 25, 2003 (68 FR 55416). The licensee affirmed the applicability of the model NSHC determination in its application dated October 22, 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:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The revised 10 CFR 50.44 no longer defines a design-basis loss-of-coolant accident (LOCA) hydrogen release, and eliminates requirements for hydrogen control systems to mitigate such a release. The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage. In addition, these systems were ineffective at mitigating hydrogen releases from risk-significant accident sequences that could threaten containment integrity.

With the elimination of the design-basis LOCA hydrogen release, hydrogen monitors are no longer required to mitigate design-basis accidents and, therefore, the hydrogen monitors do not meet the definition of a safety-related component as defined in 10 CFR 50.2. Category 1 in RG 1.97 is intended for key variables that most directly indicate the accomplishment of a safety function for design-basis accident events. The hydrogen monitors no longer meet the definition of Category 1 in RG 1.97. As part of the rulemaking to revise 10 CFR 50.44 the Commission found that Category 3, as defined in RG 1.97, is an appropriate categorization for the hydrogen monitors because the monitors are required to diagnose the course of beyond design-basis accidents.

The regulatory requirements for the hydrogen monitors can be relaxed without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. Classification of the hydrogen monitors as Category 3, and removal of the hydrogen monitors from TS will not prevent an accident management strategy through the use of the severe accident management guidelines (SAMGs), the emergency plan (EP), the emergency operating procedures (EOP), and site survey monitoring that support modification of emergency plan protective action recommendations (PARs).

Therefore, the elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, does not involve a significant increase in the probability or the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, will not result in any failure mode not previously analyzed. The hydrogen recombiner and hydrogen monitor equipment was intended to mitigate a design-basis hydrogen release. The hydrogen recombiner and hydrogen monitor equipment are not considered accident precursors, nor does their existence or elimination have any adverse impact on the pre-accident state of the reactor core or post accident confinement

of radionuclides within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety.

The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage.

Category 3 hydrogen monitors are adequate to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The intent of the requirements established as a result of the TMI Unit 2 accident can be adequately met without reliance on safety-related hydrogen monitors.

Therefore, this change does not involve a significant reduction in the margin of safety. Removal of hydrogen monitoring from TS will not result in a significant reduction in their functionality, reliability, and availability.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. John Fulton, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Section Chief: Richard J. Laufer.

Entergy Nuclear Operations, Docket Nos. 50–247 and 50–286, Indian Point Nuclear Generating Unit Nos. 2 and 3, Westchester County, New York

Date of amendment request: October 25, 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 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 25, 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 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 [a] margin of safety.

Based upon the reasoning presented above, the requested change does not involve significance hazards consideration.

Attorney for licensee: Mr. John Fulton, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Section Chief: Richard J. Laufer.

Entergy Nuclear Operations, Inc., Docket No. 50–333, James A. FitzPatrick Nuclear Power Plant, Oswego County, New York

Date of amendment request: December 30, 2004.

Description of amendment request: The proposed amendment would revise a Technical Specification (TS) surveillance requirement (SR) in TS 3.1.4, ''Control Rod Scram Times.'' Specifically, the proposed change would revise the frequency for SR 3.1.4.2, ''Control Rod Scram Time Testing,'' from ''120 days cumulative operation in MODE 1'' to ''200 days cumulative operation in MODE 1.''

The NRC staff issued a notice of availability of a model no significant hazards consideration (NSHC) determination for referencing in licensing amendment applications in the **Federal Register** on August 23, 2004 (69 FR 51864). The licensee affirmed the applicability of the model NSHC determination in its application dated December 30, 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 change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change extends the frequency for testing control rod scram time testing from every 120 days of cumulative Mode 1 operation to 200 days of cumulative Mode 1 operation. The frequency of surveillance testing is not an initiator of any accident previously evaluated. The frequency of surveillance testing does not affect the ability to mitigate any accident previously evaluated, as the tested component is still required to be operable. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change extends the frequency for testing control rod scram time testing from every 120 days of cumulative Mode 1 operation to 200 days of cumulative Mode 1 operation. The proposed change does not result in any new or different modes of plant operation. 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 proposed change extends the frequency for testing control rod scram time

testing from every 120 days of cumulative Mode 1 operation to 200 days of cumulative Mode 1 operation. The proposed change continues to test the control rod scram time to ensure the assumptions in the safety analysis are protected. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. John Fulton, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Section Chief: Richard J. Laufer.

Entergy Operations, Inc., Docket No. 50–313, Arkansas Nuclear One, Unit No. 1, Pope County, Arkansas

Date of amendment request: December 20, 2004.

Description of amendment request: The proposed amendment would increase the lifting tripod's rating from 150 tons to 190 tons. This would allow for additional flexibility when lifting the new reactor vessel head during refueling outages.

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 ANO–1 [Arkansas Nuclear One, Unit 1] Tripod does not perform a safety function required by 10 CFR [Part] 50. The Tripod serves to perform heavy load movements during refueling outages[,] including [movement of] the reactor vessel head. Safe load paths have been established in accordance with NUREG–0612[, ''Control of Heavy Loads at Nuclear Power Plants,''] to ensure that the fuel and safety[-]related equipment required to be inservice are protected. Use of actual Tripod eyelet Certified Material Test Reports (CMTRs) demonstrates that a safety factor of 3 to yield is maintained and that the lifting devices will perform their design function under maximum lifted loads. The Tripod does not serve any mitigative functions to lessen accidents.

Therefore, the proposed change does not affect the probability or consequences of any ANO–1 analyzed accidents.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The only time that the Tripod is performing heavy loads movements is during Refueling operations. Safe load paths and load drop analyses have been performed to assure that heavy loads movements will not cause fuel damage or cause safety[-]related equipment to become inoperable. The proposed use of CMTRs instead of minimum yield strength of the material still assures that the Tripod will perform its required function to not create an accident. In addition, there is no change to the operation of the Tripod that would create a new failure mode or possible accident.

Therefore, the proposed change does not create the possibility of a new or different type of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The design margin for the Tripod is established by NUREG–0612 and ANSI [American National Standards Institute] N14.6–1978[, ''Special Lifting Devices for Shipping Containers Weighing 10,000 Pounds or More for Nuclear Materials'']. A factor of safety of 3 for yield strength and 5 for ultimate strength for both the static and dynamic load factors is required to be met. These factors of safety provide sufficient margin to assure that the Tripod will perform its design function of maximum lifted loads. In addition, the use [of] a dynamic load factor of 1.15 above the static load is well above the actual dynamic factor to be experienced from the design lift speed of the polar crane. The use of CMTRs does not result in a significant reduction in the margin of safety of the Tripod. In addition, the Tripod will be load tested to 150% [percent] of its design static and dynamic loading which will further assure adequate safety margin.

Therefore, the margin of safety is not changed by the proposed change to the ANO–1 SAR [Safety Analysis Report].

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: Nicholas S. Reynolds, Esquire, Winston and Strawn, 1400 L Street, NW., Washington, DC 20005–3502.

NRC Section Chief: Robert A. Gramm.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of amendment request: December 17, 2004.

Description of amendment request: The proposed change will revise the air lock surveillance test acceptance criteria to be consistent with the NRC approved Industry Technical Specification Task Force (TSTF) change to the Standard Technical Specifications (STS), TSTF–52, entitled ''Implement 10 CFR [Part] 50, Appendix J, Option B.'' By letter dated April 6, 1998, the NRC Staff issued amendment number 135 to the GGNS license permitting the implementation of the containment leak rate testing provisions of 10 CFR Part 50, Appendix J, Option 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.

Primary containment air lock leak rate testing can have no effect on the probability of any postulated accident. The proposed change will increase the allowed containment air lock leakage rate and convert it from an absolute leakage rate to a percentage of the overall primary containment leakage rate. No change to the overall leakage rate of the containment is being proposed, therefore there is no change to the consequences of any postulated accident. The change in air lock leakage rate will not impact the design or operation of any plant system or component nor will they affect initiation or mitigation of any accidents previously analyzed.

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 primary containment air locks form part of the primary containment pressure boundary. The periodic containment air lock leakage rate tests specified in SR 3.6.1.2.1 verifies that the air lock leakage does not exceed the allowed fraction of the overall primary containment leakage rate. This request involves a change in the allowable leakage rate of the primary containment air locks without increasing the overall allowed leakage rate of the containment. Changing the allowable leakage rate has no influence on, nor does it contribute in any way to, the possibility of a new or different kind of accident or malfunction from those previously analyzed. There will be no effect on the types and amounts of overall leakage from the primary containment boundary. The proposed amendment will not produce any changes to the design or operation of the plant. The method of performing the test is not changed. No new accident modes are created by changing the allowable leakage in this manner. No safety-related equipment or safety functions are altered as a result of this change.

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.

Air lock integrity and leak tightness are essential for maintaining primary containment leakage rate to within limits in the event of a design basis accident. The periodic containment air lock leakage rate tests verify that the air lock leakage does not exceed the allowed fraction of the overall primary containment leakage rate. Since no changes are proposed to the maximum allowable primary containment leakage rate, the design basis radiological analysis is not impacted by this change. The license amendment request removes unnecessary conservatism from the testing program and allows consistency with current industry practice. Since no changes are proposed to the maximum allowable primary containment leakage rate, the design basis radiological analysis is not impacted by this change.

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: Nicholas S. Reynolds, Esquire, Winston and Strawn, 1400 L Street, NW., 12th Floor, Washington, DC 20005–3502.

NRC Section Chief: Michael K. Webb.

Exelon Generation Company, LLC, Docket Nos. STN 50–454 and STN 50–455, Byron Station, Unit Nos. 1 and 2, Ogle County, Illinois; Docket Nos. STN 50–456 and STN 50–457, Braidwood Station, Unit Nos. 1 and 2, Will County, Illinois; Docket Nos. 50–237 and 50–249, Dresden Nuclear Power Station, Units 2 and 3, Grundy County, Illinois; Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois; Docket Nos. 50–254 and 50–265, Quad Cities Nuclear Power Station, Units 1 and 2, Rock Island County, Illinois

Date of amendment request: September 15, 2004.

Description of amendment request: The proposed amendment would delete requirements from the Technical Specifications (TSs) to maintain hydrogen recombiners and hydrogen and oxygen monitors. Licensees were generally required to implement upgrades as described in NUREG–0737, ''Clarification of TMI [Three Mile Island] Action Plan Requirements,'' and Regulatory Guide (RG) 1.97, ''Instrumentation for Light-Water-Cooled Nuclear Power Plants to Assess Plant and Environs Conditions During and Following an Accident.'' Implementation of these upgrades was an outcome of the lessons learned from the accident that occurred at TMI, Unit 2. Requirements related to combustible gas control were imposed by order for many facilities and were added to, or included, in the TSs for nuclear power reactors currently licensed to operate. The revised Title 10 of the Code of Federal Regulations (10 CFR) Section 50.44, ''Combustible gas control for nuclear power reactors,'' eliminated the requirements for hydrogen recombiners and relaxed safety classifications and licensee commitments to certain design and qualification criteria for hydrogen and oxygen monitors.

The U.S. Nuclear Regulatory Commission (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 September 25, 2003 (68 FR 55416). The licensee affirmed the applicability of the model NSHC determination in its application dated September 15, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of NSHC is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The revised 10 CFR 50.44 no longer defines a design-basis loss-of-coolant accident (LOCA) hydrogen release, and eliminates requirements for hydrogen control systems to mitigate such a release. The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage. In addition, these systems were ineffective at mitigating hydrogen releases from risk-significant accident sequences that could threaten containment integrity.

With the elimination of the design-basis LOCA hydrogen release, hydrogen and oxygen monitors are no longer required to mitigate design-basis accidents and, therefore, the hydrogen monitors do not meet the definition of a safety-related component as defined in 10 CFR 50.2. RG 1.97 Category 1, is intended for key variables that most directly indicate the accomplishment of a safety function for design-basis accident events. The hydrogen and oxygen monitors no longer meet the definition of Category 1 in RG 1.97. As part of the rulemaking to revise 10 CFR 50.44 the Commission found that Category 3, as defined in RG 1.97, is an appropriate categorization for the hydrogen monitors because the monitors are required to diagnose the course of beyond design-basis accidents. Also, as part of the rulemaking to revise 10 CFR 50.44, the Commission found that Category 2, as defined in RG 1.97, is an appropriate categorization for the oxygen monitors, because the monitors are required to verify the status of the inert containment.

The regulatory requirements for the hydrogen and oxygen monitors can be relaxed without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. Classification of the hydrogen monitors as Category 3, classification of the oxygen monitors as Category 2, and removal of the hydrogen and oxygen monitors from TS will not prevent an accident management strategy through the use of the SAMGs [severe accident management guidelines], the emergency plan (EP), the emergency operating procedures (EOPs), and site survey monitoring that support modification of emergency plan protective action recommendations (PARs).

Therefore, the elimination of the hydrogen recombiner requirements and relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, does not involve a significant increase in the probability or the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, will not result in any failure mode not previously analyzed. The hydrogen recombiner and hydrogen and oxygen monitor equipment was intended to mitigate a design-basis hydrogen release. The hydrogen recombiner and hydrogen and oxygen monitor equipment are not considered accident precursors, nor does their existence or elimination have any adverse impact on the pre-accident state of the reactor core or post accident confinement of radionuclides within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety.

The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage.

Category 3 hydrogen monitors are adequate to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The intent of the requirements established as a result of the TMI, Unit 2 accident can be adequately met without reliance on safety-related hydrogen monitors.

Category 2 oxygen monitors are adequate to verify the status of an inerted containment.

Therefore, this change does not involve a significant reduction in the margin of safety. The intent of the requirements established as a result of the TMI, Unit 2 accident can be adequately met without reliance on safety-related oxygen monitors. Removal of hydrogen and oxygen monitoring from TS will not result in a significant reduction in their functionality, reliability, and availability.

Based on the reasoning presented above and the previous discussion of the amendment request, the requested change does not involve a significant hazards consideration.

Attorney for licensee: Mr. Thomas S. O'Neill, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Section Chief: Gene Y. Suh.

Exelon Generation Company, LLC, Docket Nos. 50–237 and 50–249, Dresden Nuclear Power Station (DNPS), Units 2 and 3, Grundy County, Illinois; Exelon Generation Company, LLC, Docket Nos. 50–254 and 50–265, Quad Cities Nuclear Power Station (QCNPS), Units 1 and 2, Rock Island County, Illinois

Date of amendment request: November 4, 2004.

Description of amendment request: The proposed amendments would revise the plant technical specification (TS) pressure and temperature (P/T) limit curves for 54 effective full power years (EFPY) to support a 20-year license extension for both DNPS and QCNPS to 60 years (*i.e.*, 54 EFPY), and resolves a non-conservative condition for TS Section 3.4.9, Figure 3.4.9–2, ''Non-Nuclear Heatup/Cooldown Curve,'' for QCNPS.

Basis for proposed no significant hazards consideration determination: As required by Title 10 of the Code of Federal Regulations (10 CFR) section 50.91(a), Exelon Generation Company (EGC) has provided its analysis of the issue of no significant hazards consideration (NSHC), which is presented below:

According to 10 CFR 50.92, ''Issuance of amendment,'' paragraph (c), a proposed amendment to an operating license involves no significant hazards consideration if 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.

In support of this determination, an evaluation of each of the three criteria set forth in 10 CFR 50.92 is provided below regarding the proposed license amendment.

Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed changes request that, for DNPS, Units 2 and 3 and QCNPS, Units 1 and 2, P/T limit curves in TS 3.4.9, ''RCS Pressure and Temperature (P/T) Limits,'' be revised.

The P/T limits are prescribed during all operational conditions to avoid encountering pressure, temperature, and temperature rate-of-change conditions that might cause undetected flaws to propagate, resulting in non-ductile failure of the reactor coolant pressure boundary, which is an unanalyzed condition. The methodology used to determine the P/T limits has been approved by the NRC [Nuclear Regulatory Commission] and thus is an acceptable method for determining these limits. Therefore, the proposed changes do not affect the probability of an accident previously evaluated.

There is no specific accident that postulates a non-ductile failure of the reactor coolant pressure (RCP) boundary. The loss of coolant accident analyzed for the plant assumes a 4.281 square feet complete break of the recirculation pump suction line. The revision to the P/T limits does not change this assumption. Thus, the radiological consequences of any accident previously evaluated are not increased.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed changes do not change the response of plant equipment to transient conditions. The proposed changes do not introduce any new equipment, modes of system operation, or failure mechanisms.

Non-ductile failure of the RCP boundary is not an analyzed accident. The proposed changes to the P/T limits were developed using an NRC-approved methodology, and thus the revised limits will continue to provide protection against non-ductile failure of the RCP boundary.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

Does the change involve a significant reduction in a margin of safety?

The margin of safety related to the proposed changes is the margin between the proposed P/T limits and the pressures and temperatures that would produce nonductile failure of the RCP boundary. NRC requirements to protect the integrity of the reactor coolant pressure boundary in nuclear power plants is established in 10 CFR 50, Appendix G, ''Fracture Toughness Requirements,'' which requires that the P/T limits for an operating plant be at least as conservative as those that would be generated if the methods of American Society of Mechanical Engineers, Section XI, Appendix G, were applied. The use of an NRC-approved methodology, together with conservatively chosen plant-specific input parameters, provides an acceptable margin of safety. Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

Based upon the above responses, EGC concluded that the proposed amendment presents no significant hazards consideration under the standards set forth in 10 CFR 50.92 and, accordingly, a finding of no significant hazards consideration is justified.

The NRC staff has reviewed EGC'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 requested amendments involve NSHC.

Attorney for licensee: Mr. Thomas S. O'Neill, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Section Chief: Gene Y. Suh.

Exelon Generation Company, LLC, and PSEG Nuclear LLC, Docket Nos. 50–277 and 50–278, Peach Bottom Atomic Power Station, Units 2 and 3, York and Lancaster Counties, Pennsylvania

Date of application for amendments: September 15, 2004.

Description of amendment request: The proposed amendment would delete requirements from the Technical Specifications (TSs) to maintain containment hydrogen and oxygen monitors. A notice of availability for this technical specification improvement using the consolidated line item improvement process (CLIIP) was published in the **Federal Register** on September 25, 2003 (68 FR 55416). Licensees were generally required to implement upgrades as described in NUREG–0737, ''Clarification of TMI [Three Mile Island] Action Plan Requirements,'' and Regulatory Guide 1.97, ''Instrumentation for Light-Water-Cooled Nuclear Power Plants to Assess Plant and Environs Conditions During and Following an Accident.''

Implementation of these upgrades was an outcome of the lessons learned from the accident that occurred at TMI, Unit 2. Requirements related to combustible gas control were imposed by Order for many facilities and were added to or included in the TSs for nuclear power reactors currently licensed to operate. The revised 10 CFR 50.44, ''Standards for combustible gas control system in light-water-cooled power reactors,'' eliminated the requirements for hydrogen recombiners and relaxed safety classifications and licensee commitments to certain design and qualification criteria for hydrogen and oxygen monitors.

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 September 25, 2003 (68 FR 55416). The licensee affirmed the applicability of the relevant portions of the model NSHC determination (hydrogen and oxygen monitors only) in its application dated September 15, 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:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The revised 10 CFR 50.44 no longer defines a design-basis loss-of-coolant accident (LOCA) hydrogen release, and eliminates requirements for hydrogen control systems to mitigate such a release. The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage. In addition, these systems were ineffective at mitigating hydrogen releases from risk-significant accident sequences that could threaten containment integrity.

With the elimination of the design-basis LOCA hydrogen release, hydrogen and oxygen monitors are no longer required to mitigate design-basis accidents and, therefore, the hydrogen monitors do not meet the definition of a safety-related component as defined in 10 CFR 50.2. RG [Regulatory Guide] 1.97 Category 1, is intended for key variables that most directly indicate the accomplishment of a safety function for design-basis accident events. The hydrogen and oxygen monitors no longer meet the definition of Category 1 in RG 1.97. As part of the rulemaking to revise 10 CFR 50.44 the Commission found that Category 3, as defined in RG 1.97, is an appropriate categorization for the hydrogen monitors because the monitors are required to diagnose the course of beyond design-basis accidents. Also, as part of the rulemaking to revise 10 CFR 50.44, the Commission found that Category 2, as defined in RG 1.97, is an appropriate categorization for the oxygen monitors, because the monitors are required to verify the status of the inert containment.

The regulatory requirements for the hydrogen and oxygen monitors can be relaxed without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. Classification of the hydrogen monitors as Category 3, [classification of the oxygen monitors as Category 2,] and removal of the hydrogen and oxygen monitors from TS will not prevent an accident management strategy through the use of the severe accident management guidelines (SAMGs), the emergency plan (EP), the emergency operating procedures (EOPs), and site survey monitoring that support modification of emergency plan protective action recommendations (PARs).

Therefore, the elimination of the hydrogen recombiner requirements and relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, does not involve a significant increase in the probability or the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, will not result in any failure mode not previously analyzed. The hydrogen recombiner and hydrogen and oxygen monitor equipment was intended to mitigate a design-basis hydrogen release. The hydrogen recombiner and hydrogen and oxygen monitor equipment are not considered accident precursors, nor does their existence or elimination have any adverse impact on the pre-accident state of the reactor core or post accident confinement of radionuclides within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen and oxygen monitor requirements, including removal of these requirements from TS, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety.

The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage.

Category 3 hydrogen monitors are adequate to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The intent of the requirements established as a result of the TMI, Unit 2 accident can be adequately met without reliance on safety-related hydrogen monitors.

Category 2 oxygen monitors are adequate to verify the status of an inerted containment.

Therefore, this change does not involve a significant reduction in the margin of safety. The intent of the requirements established as a result of the TMI, Unit 2 accident can be adequately met without reliance on safety-related oxygen monitors. Removal of hydrogen and oxygen monitoring from TS will not result in a significant reduction in their functionality, reliability, and availability.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for Licensee: Thomas S. O'Neill, Associate and General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Section Chief: Darrell Roberts.

Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit 3 Nuclear Generating Plant, Citrus County, Florida

Date of amendment request: September 21, 2004.

Description of amendment request: The proposed amendment deletes the requirements from the technical specifications (TS) to maintain containment hydrogen monitors. Licensees were generally required to implement upgrades as described in NUREG–0737, ''Clarification of TMI [Three Mile Island] Action Plan Requirements,'' and Regulatory Guide (RG) 1.97, ''Instrumentation for Light-Water-Cooled Nuclear Power Plants to Assess Plant and Environs Conditions During and Following an Accident.'' Implementation of these upgrades was an outcome of the lessons learned from the accident that occurred at TMI Unit 2. Requirements related to combustible

gas control were imposed by Order for many facilities and were added to or included in the TS for nuclear power reactors currently licensed to operate. The revised 10 CFR 50.44, ''Standards for Combustible Gas Control System in Light-Water-Cooled Power Reactors,'' eliminated the requirements for hydrogen recombiners and relaxed safety classifications and licensee commitments to certain design and qualification criteria for hydrogen and oxygen monitors.

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 September 25, 2003 (68 FR 55416). The licensee affirmed the applicability of the relevant portions of the model NSHC determination (hydrogen monitors only) in its application dated September 21, 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:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The revised 10 CFR 50.44 no longer defines a design-basis loss-of-coolant accident (LOCA) hydrogen release, and eliminates requirements for hydrogen control systems to mitigate such a release. The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage. In addition, these systems were ineffective at mitigating hydrogen releases from risk-significant accident sequences that could threaten containment integrity.

With the elimination of the design-basis LOCA hydrogen release, hydrogen monitors are no longer required to mitigate design-basis accidents and, therefore, the hydrogen monitors do not meet the definition of a safety-related component as defined in 10 CFR 50.2. Category 1 in RG 1.97 is intended for key variables that most directly indicate the accomplishment of a safety function for design-basis accident events. The hydrogen monitors no longer meet the definition of Category 1 in RG 1.97. As part of the rulemaking to revise 10 CFR 50.44 the Commission found that Category 3, as defined in RG 1.97, is an appropriate categorization for the hydrogen monitors because the monitors are required to diagnose the course of beyond design-basis accidents.

The regulatory requirements for the hydrogen monitors can be relaxed without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. Classification of the hydrogen monitors as Category 3, and removal of the hydrogen monitors from TS will not prevent an accident management strategy through the use of the severe accident management guidelines (SAMGs), the emergency plan (EP), the emergency operating procedures (EOPs), and site survey monitoring that support modification of emergency plan protective action recommendations (PARs).

Therefore, the elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, does not involve a significant increase in the probability or the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, will not result in any failure mode not previously analyzed. The hydrogen recombiner and hydrogen monitor equipment was intended to mitigate a design-basis hydrogen release. The hydrogen recombiner and hydrogen monitor equipment are not considered accident precursors, nor does their existence or elimination have any adverse impact on the pre-accident state of the reactor core or post accident confinement of radionuclides within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen monitor requirements, including removal of these requirements from TS, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety.

The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage.

Category 3 hydrogen monitors are adequate to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The intent of the requirements established as a result of the TMI Unit 2 accident can be adequately met without reliance on safety-related hydrogen monitors.

Therefore, this change does not involve a significant reduction in the margin of safety. Removal of hydrogen monitoring from TS will not result in a significant reduction in their functionality, reliability, and availability.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Steven R. Carr, Associate General Counsel—Legal Department, Progress Energy Service Company, LLC, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Section Chief: Michael L. Marshall.

Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit 3 Nuclear Generating Plant, Citrus County, Florida

Date of amendment request: January 13, 2005.

Description of amendment request: The proposed change would allow a one-time extended allowed outage time (AOT) change to Improved Technical Specifications (ITS) 3.5.2, Emergency Core Cooling Systems (ECCS)—Operating; 3.6.6, Reactor Building Spray and Containment Cooling Systems; 3.7.8, Decay Heat Closed Cycle Cooling Water System (DC); and 3.7.10, Decay Heat Seawater System to allow the refurbishment of Decay Heat Seawater System Pump RWP–3B online.

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:

This request has been evaluated against the standards in 10 CFR 50.92, and has been determined to not involve a significant hazards consideration. In support of this conclusion, the following analysis is provided:

1. Does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed license amendment extends, on a one-time basis, the Completion Time for the systems described above from 72 hours to 10 days. These Systems are designed to provide cooling for components essential to the mitigation of plant transients and

accidents. The systems are not initiators of design basis accidents. The proposed ITS changes have been evaluated to assess their impact on normal operation of the systems affected and to ensure that their design basis safety functions are preserved.

A Probabilistic Safety Assessment (PSA) has been performed to assess the risk impact of an increase in Completion Time from 72 hours to 10 days. Although the proposed one-time change results in an increase in Core Damage Frequency (CDF) and Large Early Release Frequency (LERF), the value of these increases are considered as small (CDF) and very small (LERF) in the current regulatory guidance.

Therefore, granting this LAR [License Amendment Request] does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does not create the possibility of a new or different type of accident from any accident previously evaluated.

The proposed license amendment extends, on a one-time basis, the Completion Time for the systems described above from 72 hours to 10 days.

The proposed LAR will not result in changes to the design, physical configuration of the plant or the assumptions made in the safety analysis. Therefore, the proposed change will not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does not involve a significant reduction in the margin of safety.

The proposed license amendment extends, on a one-time basis, the Completion Time for the systems described above from 72 hours to 10 days. The proposed change will allow online repair of Decay Heat Seawater pump RWP–3B to restore the pump to full qualification which will improve its reliability and useful lifetime, thus increasing the long term margin of safety of the system.

The proposed LAR will reduce the probability (and associated risk) of a plant shutdown to repair a Decay Heat Services Seawater pump. To ensure defense-in-depth capabilities and the assumptions in the risk assessment are maintained during the proposed one-time extended Completion Time, CR–3 will continue the performance of 10 CFR 50.65(a)(4) assessments before performing maintenance or surveillance activities and no maintenance activities of other risk sensitive equipment beyond that required for the refurbishment activity will be scheduled concurrent with the repair activity. Other compensatory actions that will be implemented include: operator attention to the importance of protecting the operable redundant train and support systems will be increased, selection of beneficial Makeup Pump configurations, no elective maintenance will be scheduled in the switchyard, and the establishment of fire watches.

As described above in Item 1, a PSA has been performed to assess the risk impact of an increase in Completion Time. Although the proposed one-time change results in an increase in Core Damage Frequency (CDF), and Large Early Release Frequency (LERF), the value of these increases is considered as small (CDF) and very small (LERF) in the current regulatory guidance.

Therefore, granting this LAR does not involve a significant reduction in the margin of safety.

Based on the above, Progress Energy Florida, Inc. (PEF) concludes that the proposed LAR presents a no significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and accordingly, a finding of ''no significant hazards consideration'' is justified.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David T. Conley, Associate General Counsel II—Legal Department, Progress Energy Service Company, LLC, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Section Chief: Michael L. Marshall.

Nuclear Management Company, LLC, Docket No. 50–331, Duane Arnold Energy Center, Linn County, Iowa

Date of amendment request: October 29, 2004.

Description of amendment request: The proposed amendment would revise Technical Specification 3.1.8, ''Scram Discharge Volume (SDV) Vent and Drain Valves,'' to allow a vent or drain line with one inoperable valve to be isolated instead of requiring the valve to be restored to Operable status within 7 days.

The NRC staff issued a notice of opportunity for comment in the **Federal Register** on February 24, 2003 (68 FR 8637), on possible amendments to revise the action for one or more SDV vent or drain lines with an inoperable valve, including a model safety evaluation and model no significant hazards consideration (NSHC) determination, using the consolidated line-item improvement process. The NRC staff subsequently issued a notice of availability of the models for referencing in license amendment applications in the **Federal Register** on April 15, 2003 (68 FR 18294). The licensee affirmed the applicability of the model NSHC determination in its application dated October 29, 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:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

A change is proposed to allow the affected SDV vent and drain line to be isolated when there are one or more SDV vent or drain lines with one valve inoperable instead of requiring the valve to be restored to operable status within 7 days. With one SDV vent or drain valve inoperable in one or more lines, the isolation function would be maintained since the redundant valve in the affected line would perform its safety function of isolating the SDV. Following the completion of the required action, the isolation function is fulfilled since the associated line is isolated. The ability to vent and drain the SDV is maintained and controlled through administrative controls. This requirement assures the reactor protection system is not adversely affected by the inoperable valves. With the safety functions of the valves being maintained, the probability or consequences of an accident previously evaluated are not significantly increased.

Criterion 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 does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. Thus, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The proposed change ensures that the safety functions of the SDV vent and drain valves are fulfilled. The isolation function is maintained by redundant valves and by the required action to isolate the affected line. The ability to vent and drain the SDV is maintained through administrative controls. In addition, the reactor protection system will prevent filling of the SDV to the point that it has insufficient volume to accept a full scram. Maintaining the safety functions related to isolation of the SDV and insertion of control rods ensures that the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jonathan Rogoff, Esquire, Vice President, Counsel & Secretary, Nuclear Management Company, LLC, 700 First Street, Hudson, WI 54016.

NRC Section Chief: M. Kotzalas (Acting).

Southern California Edison Company, et al., Docket Nos. 50–361 and 50–362, San Onofre Nuclear Generating Station, Units 2 and 3, San Diego County, California

Date of amendment requests: December 27, 2004.

Description of amendment requests: The requested change will delete Technical Specification (TS) 5.7.1.1.a, ''Occupational Radiation Exposure Report,'' and TS 5.7.1.4, ''Monthly Operating Reports.''

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 December 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 significance hazards consideration.

Attorney for licensee: Douglas K. Porter, Esquire, Southern California Edison Company, 2244 Walnut Grove Avenue, Rosemead, California 91770.

NRC Section Chief: Robert A. Gramm.

Southern California Edison Company, et al., Docket Nos. 50–361 and 50–362, San Onofre Nuclear Generating Station, Units 2 and 3, San Diego County, California

Date of amendment requests: December 27, 2004.

Description of amendment requests: The proposed amendments would revise the San Onofre Nuclear Generating Station (SONGS), Units 2 and 3 accident source term used in the design basis radiological consequences analyses. These license amendments are requested in accordance with the requirements of 10 CFR 50.67, which addresses the use of an Alternative Source Term (AST) at operating reactors, and relevant guidance of Regulatory Guide 1.183. These license amendments represent full-scope implementation of the AST described in Regulatory Guide 1.183.

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 changes to the Facility Operating Licenses for San Onofre Units 2 and 3 credit an Alternative Source Term (AST) for the design basis radiological site boundary and control room dose analyses. This change represents full scope implementation of the AST as described in Regulatory Guide 1.183. The proposed changes to the Facility Operating Licenses also expand the allowed use of fuel failure estimates by Departure from Nucleate Boiling (DNB) statistical convolution methodology from only the reactor coolant pump sheared shaft event to the Updated Final Safety Analysis Report (UFSAR) Chapter 15 non-Loss-of-Coolant-Accident (LOCA) events that assume a loss of flow (*i.e.*, a loss of AC power) and that fail fuel. The proposed changes reflect the parameters used in the radiological consequences calculations for the LOCA, Fuel Handling Accident inside containment (FHA–IC), Fuel Handling Accident in the Fuel Handling Building (FHA–FHB) and pre-trip Steam Line Break Outside Containment (SLB–OC).

The purpose of this proposed change is to change the design requirements for the Control Room Envelope (CRE). This proposed change will allow an increase in the assumed amount of unfiltered air inleakage through the CRE. Currently, design basis radiological consequence analyses assume CRE inleakage of 0 cfm, plus an assumed 10 cubic feet per minute (cfm) inleakage due to ingress and egress into the Control Room. Analyses to support this change demonstrate acceptable post-accident dose consequences in the Control Room assuming 990 cfm of CRE inleakage (plus 10 cfm due to ingress and egress for a total of 1000 cfm).

This proposed change does not affect the precursors for accidents or transients analyzed in Chapter 15 of the San Onofre Units 2 and 3 UFSAR. Therefore, there is no increase in the probability of accidents previously evaluated. The probability remains the same because the accident analyses performed involve no change to a system, component or structure that affects initiating events for any UFSAR Chapter 15 accident evaluated.

A re-analysis of the UFSAR Chapter 15 LOCA, SLB–OC, FHA–IC, and FHA–FHB events was conducted with respect to radiological consequences. This re-analysis was performed in accordance with AST methodology provided in Regulatory Guide (RG) 1.183 and with ARCON96 atmospheric dispersion methodology provided in RG 1.194. The reanalysis consequences were expressed in terms of Total Effective Dose Equivalent (TEDE) dose.

Implementation of the AST methodology, as described in 10 CFR 50.67, specifies control room, exclusion area boundary (EAB), and low population zone (LPZ) dose acceptance criteria in terms of TEDE dose. The dose acceptance criteria for specific events are specified in RG 1.183. The revised analyses for all evaluated events meet the applicable RG 1.183 TEDE dose acceptance criteria for AST implementation.

The previous dose calculations analyzed the dose consequences to thyroid and whole body as a result of postulated design basis events. The previous control room dose calculations were shown to be within the regulatory limits of 10 CFR 50 Appendix A General Design Criterion 19 with respect to thyroid, beta-skin and whole body dose. The previous LOCA and SLB offsite dose calculations were shown to be within the regulatory limits of 10 CFR 100.11 with respect to thyroid and whole body dose. The previous FHA–IC and FHA–FHB offsite dose calculations were shown to be well within (*i.e.*, less than 25 percent of) the regulatory limits of 10 CFR 100.11 with respect to thyroid and whole body dose. RG 1.183 Footnote 7 provides a means to compare the thyroid and whole body dose results of the previous calculations with the TEDE results of the AST calculations. This methodology requires multiplying the previous thyroid dose by 0.03 and adding the product to the previous whole body dose. The resultant

''effective'' TEDE is then compared to the AST TEDE result. This comparison is presented in Table 5–1.

The Table 5–1 comparison shows a decrease in dose consequences when evaluated using AST methodology for all but the LOCA offsite dose receptors. The LOCA EAB dose using AST methodology has increased due to the requirement to calculate the maximum 2-hour window EAB dose versus the previous requirement to calculate the 0 to 2 hour window EAB dose. The LOCA LPZ dose using AST methodology has increased primarily due to changes in the AST Refueling Water Storage Tank (RWST) iodine transport model. Although the LOCA EAB and LPZ doses using AST methodology have increased, they remain significantly below the 25 Rem TEDE offsite dose acceptance criterion.

TABLE 5–1.—COMPARISON OF PREVIOUS AND AST DOSES

Event-dose receptor	''Effective'' TEDE of previous dose analyses (Rem)	AST TEDE (Rem)
FHA–IC:		
Control Room	1.0	2.7 E–01
EAB	2.0	8.0 E–01
LPZ	5.6 E–02	2.3 E–02
FHA–FHB:		
Control Room	3.7 E–01	7.3 E–02
EAB	6.6 E–01	2.1 E–01
LPZ	1.9 E–02	6.1 E–03
LOCA:		
Control Room	4.5	2.7
EAB	3.7	5.1
LPZ	1.2	1.8
SLB–OC:		
Control Room	([1])	2.1
EAB	8.0	4.1
LPZ	([1])	0.1

[1] Not evaluated.

The proposed changes do not increase the probability of an accident previously evaluated. The proposed changes result in dose consequences that, if compared to previous ones, are in most cases decreased and in other cases only slightly increased (using guidance in footnote 7 of RG 1.183). However, the dose consequences of the revised analyses are below the AST regulatory acceptance criteria.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of any 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 implementation of this proposed change does not create the possibility of an accident of a different type than was previously evaluated in the UFSAR. The proposed change credits the AST for the design basis radiological site boundary and control room dose analyses and expands the allowed use of fuel failure estimates by DNB statistical convolution methodology from only the reactor coolant pump sheared shaft event to the UFSAR Chapter 15 non-LOCA events that assume a loss of flow (*i.e.*, a loss of AC power) and that fail fuel. The changes proposed do not change how Design Basis Accident (DBA) events were postulated nor do the changes themselves initiate a new kind of accident with a unique set of conditions. The changes proposed are based on a re-analysis of offsite and control room doses for four design basis accidents. The revised analyses are consistent with the regulatory guidance established in RG 1.183. The revised analyses utilize the most current understanding of source term timing and chemical forms. Through this re-analysis, no new accident initiator or failure mode was identified.

Therefore, this 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.

The implementation of this proposed amendment does not reduce the margin of safety. The alternative source term radiological dose consequence analyses utilize the regulatory acceptance criteria of 10 CFR 50 Appendix A General Design Criterion (GDC) 19 and 10 CFR 50.67, as specified in RG 1.183. These acceptance criteria have been developed for the purpose of use in design basis accident analyses such that meeting these limits demonstrates adequate protection of public health and safety. An acceptable margin of safety is inherent in these licensing limits. The radiological analyses results remain within these regulatory acceptance criteria.

Therefore, there is no significant reduction in the margin of safety as a result of the proposed amendment.

Based on the above, SCE concludes that the proposed amendments present no significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and, accordingly, a finding of ''no significant hazards consideration'' is justified.

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: Douglas K. Porter, Esquire, Southern California Edison Company, 2244 Walnut Grove Avenue, Rosemead, California 91770.

NRC Section Chief: Robert A. Gramm.

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: November 12, 2004.

Description of amendment request: The proposed amendments would revise Technical Specifications 3.1.7, ''Standby Liquid Control (SLC) System,'' for Hatch Units 1 and 2. The proposed amendments would update Figure 3.1.7–1 of Units 1 and 2 TS to reflect the increased concentration of Boron-10 in the solution. Conforming revisions to Bases B 3.1.7, ''Standby Liquid Control (SLC) System'' 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?

This is a proposed change to Figure 3.1.7–1 of the Units 1 and 2 Technical Specifications. This figure is a graph of the weight percent of Sodium Pentaborate solution in the Standby Liquid Control (SLC) Tank, as a function of the gross volume of solution in the tank. The figure is proposed to be changed in order to accommodate an injection of Sodium Pentaborate solution into the reactor, following an ATWS event, such that the concentration of Boron-10 atoms in the reactor will be 800 ppm natural Boron equivalent. This is necessary to accommodate increased cycle energy requirements for the Hatch Units 1 and 2 cores.

The proposed change to the Figure will not increase the probability of an ATWS event because the curve has nothing to do with the prevention of an ATWS event. The new requirements will ensure that, in the future, the core will have adequate shutdown margin to mitigate the consequences of an ATWS event.

Also, no systems or components designed to ensure the safe shutdown of the reactor are being physically changed as a result of this proposed TS change. In fact, no safety related systems or components designed for the prevention of previously evaluated events are being altered by the amendment.

As a result, the probability and consequences of an ATWS event, or any other previously evaluated event, will not increase as a result of this amendment.

2. The proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

This proposed TS revision results in a change to the SLC TS figure 3.7.1–1 requirements. However, this does not result in physical changes to the SLC system. SLC pump operation, maintenance and testing remain the same. Accordingly, no changes to the operation, maintenance or surveillance procedures will result from this TS revision request. Therefore, no new modes of operation are introduced by this TS change.

Since no new modes of operation are introduced, the proposed change does not create the possibility of a new or different type event from any previously evaluated.

3. The proposed change does not involve a significant reduction in the margin of safety.

This proposed TS change is being made to increase the boron concentration requirements of the sodium pentaborate solution injected into the reactor vessel following an Anticipated Transient Without Scram (ATWS) event. The change is necessary due to new fuel designs and higher energy requirements for fuel cycles. Therefore, the change is being made to insure that shutdown requirements can be met for the ATWS event. This will insure the margin of safety with respect to ATWS will continue to be met.

Consequently, this proposed TS change will not result in a decrease 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: 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 Nos. 50–327 and 50–328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of amendment request: October 14, 2004.

Description of amendment request: The requested change will delete Technical Specification (TS) 6.9.1.5 related to the annual ''Occupational Radiation Exposure Report,'' and TS 6.9.1.10, ''Monthly Reactor Operating Report.''

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 14, 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.

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.

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.

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 email to *pdr@nrc.gov*.

Carolina Power & Light Company, Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina; Carolina Power & Light Company, Docket No. 50–261, H.B. Robinson Steam Electric Plant, Unit No. 2, Darlington County, South Carolina

Date of application for amendments: December 19, 2003, as supplemented January 14, 2004.

Brief description of amendments: The amendments allows entry into a mode or other specified condition in the applicability of a technical specification (TS), while in a condition statement and the associated required actions of the TS, provided the licensee performs a risk assessment and manages risk consistent with the program as proposed by the industry's Technical Specification Task Force (TSTF) and is designated TSTF–359.

Date of issuance: January 11, 2005.

Effective date: January 11, 2005.

Amendment Nos.: 233 and 260.

Facility Operating License Nos. DPR–71, DPR–62, and DPR–23.: Amendments change the Technical Specifications.

Date of initial notice in ***Federal Register:*** The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated January 11, 2005.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–286, Indian Point Nuclear Generating Unit No. 3, Westchester County, New York

Date of application for amendment: October 26, 2004, as supplemented on December 22, 2004.

Brief description of amendment: The amendment revises Technical Specification 3.7.11, ''Control Room Ventilation System (CRVS),'' to allow, on a one-time basis, an extension of the allowed outage time to support placement of the CRVS in an alternate configuration for tracer gas testing. The proposed amendment would also allow self-contained breathing apparatus and potassium iodide pills to be used as compensatory measures for the control room operators in the event that the tracer gas test results are not bounded by the dose consequence evaluations.

Date of issuance: January 19, 2005.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment No.: 223.

Facility Operating License No. DPR–64: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** November 8, 2004 (69 FR 64792).

The December 22 letter provided 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 January 19, 2005.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket Nos. 50–352 and 50–353, Limerick Generating Station, Units 1 and 2, Montgomery County, Pennsylvania

Date of application for amendments: November 25, 2003.

Brief description of amendments: The amendments modify the Limerick Generating Station, (LGS) Units 1 and 2, Technical Specifications (TSs) contained in Appendix A to Operating License Nos. NPF–39 and NPF–85, respectively. The amendments add a footnote to the LGS TS 3.4.3.2.e to indicate that reactor coolant system (RCS) pressure isolation valve leakage is excluded from any other allowable RCS operational leakage specified in LGS TS 3.4.3.2.

Date of issuance: January 18, 2005.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment Nos.: 172 and 134.

Facility Operating License Nos. NPF–39 and NPF–85. The amendments revised the TSs.

Date of initial notice in ***Federal Register:*** February 3, 2004 (69 FR 5203).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated January 18, 2005.

No significant hazards consideration comments received: No.

FirstEnergy Nuclear Operating Company, Docket No. 50–440, Perry Nuclear Power Plant, Unit 1, Lake County, Ohio

Date of application for amendment: March 31, 2004.

Brief description of amendment: This amendment revised Technical Specification (TS) requirements for mode change limitations in Limiting Condition for Operation 3.0.4 and Surveillance Requirement 3.0.4 to adopt the provisions of Industry TS Task Force (TSTF) change TSTF–359, ''Increase Flexibility in Mode Restraints.''

Date of issuance: January 6, 2005.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment No.: 131.

Facility Operating License No. NPF–58: This amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** July 6, 2004 (69 FR 40675).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 6, 2005.

No significant hazards consideration comments received: No.

Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit No. 3 Nuclear Generating Plant, Citrus County, Florida

Date of application for amendment: December 19, 2003.

Brief description of amendment: The amendment modifies TS requirements to adopt the provisions of Industry/TS Task Force (TSTF) change TSTF–359, ''Increased Flexibility in Mode Restraints.'' The availability of TSTF–359 for adoption by licensees was announced in the **Federal Register** on April 4, 2003 (68 FR 16579).

Date of issuance: January 11, 2005.

Effective date: As of the date of issuance and shall be implemented within 180 days of issuance.

Amendment No.: 215.

Facility Operating License No. DPR–72: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** February 17, 2004 (69 FR 7523).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 11, 2005.

No significant hazards consideration comments received: No.

Florida Power and Light Company, Docket Nos. 50–250 and 50–251, Turkey Point Plant, Units 3 and 4, Miami-Dade County, Florida

Date of application for amendments: April 23, 2004.

Brief description of amendments: The amendments revise several Technical Specification (TS) Allowed Outage Times for TS 3.3.3, Accident Monitoring Instrumentation, to be consistent with the Completion Times in the related Specification in NUREG–1431, Revision 2, ''Standard Technical Specifications Westinghouse Plants (the Improved Standard Technical Specifications, or ISTS).''

Date of issuance: January 6, 2005.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment Nos: 227 and 223.

Renewed Facility Operating License Nos. DPR–31 and DPR–41: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** May 25, 2004 (69 FR 29767).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated January 6, 2005.

No significant hazards consideration comments received: No.

Nuclear Management Company, LLC, Docket No. 50–331, Duane Arnold Energy Center, Linn County, Iowa

Date of application for amendment: December 23, 2003.

Brief description of amendment: The amendment revises Technical Specification (TS) requirements to adopt the provisions of the TS Task Force (TSTF) change TSTF–359, regarding increased flexibility in mode changes. The availability of TSTF–359 for adoption by licensees was announced in the **Federal Register** on April 4, 2003 (68 FR 16579).

Date of issuance: January 10, 2005.

Effective date: As of the date of issuance and shall be implemented within 120 days.

Amendment No.: 255.

Facility Operating License No. DPR–49: Amendment revises the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 16, 2004 (69 FR 55844).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 10, 2005.

No significant hazards consideration comments received: No.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: September 30, 2004.

Brief description of amendments: The amendments delete Technical Specification (TS) 6.9.1.2, ''Occupational Radiation Exposure Report,'' and TS 6.9.1.5, ''Monthly Operating Reports,'' as described in the Notice of Availability published in the **Federal Register** on June 23, 2004 (69 FR 35067).

Date of issuance: January 5, 2005.

Effective date: As of the date of issuance and shall be implemented within 90 days of issuance.

Amendment Nos.: Unit 1–168; Unit 2–157.

Facility Operating License Nos. NPF–76 and NPF–80: The amendments revise the Technical Specifications.

Date of initial notice in ***Federal Register:*** October 26, 2004 (69 FR 62478).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated January 5, 2005.

No significant hazards consideration comments received: No.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: February 3, 2004 as supplemented by letter dated December 1, 2004.

Brief description of amendments: The amendments modify Technical Specifications (TSs) requirements to adopt the provisions of Industry/TS Task Force (TSTF) change TSTF–359, ''Increase Flexibility in Mode Restraints.'' The availability of TSTF–359 for adoption by licensees was announced in the **Federal Register** on April 4, 2003 (68 FR 16579).

Date of issuance: January 10, 2005.

Effective date: As of the date of issuance and shall be implemented within 30 days of issuance.

Amendment Nos.: Unit 1–170; Unit 2–158.

Facility Operating License Nos. NPF–76 and NPF–80: The amendments revise the Technical Specifications.

Date of initial notice in ***Federal Register:*** March 2, 2004 (69 FR 9865).

The supplement dated December 1, 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 amendments is contained in a Safety Evaluation dated January 10, 2005.

No significant hazards consideration comments received: No.

Notice of Issuance of Amendments to Facility Operating Licenses and Final Determination of No Significant Hazards Consideration and Opportunity for a Hearing (Exigent Public Announcement or Emergency Circumstances)

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 for the amendment 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.

Because of exigent or emergency circumstances associated with the date the amendment was needed, there was not time for the Commission to publish, for public comment before issuance, its usual Notice of Consideration of Issuance of Amendment, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing.

For exigent circumstances, the Commission has either issued a **Federal Register** notice providing opportunity for public comment or has used local media to provide notice to the public in the area surrounding a licensee's facility of the licensee's application and of the Commission's proposed determination of no significant hazards consideration. The Commission has provided a reasonable opportunity for the public to comment, using its best efforts to make available to the public means of communication for the public to respond quickly, and in the case of telephone comments, the comments have been recorded or transcribed as appropriate and the licensee has been informed of the public comments.

In circumstances where failure to act in a timely way would have resulted, for example, in derating or shutdown of a nuclear power plant or in prevention of either resumption of operation or of increase in power output up to the plant's licensed power level, the Commission may not have had an

opportunity to provide for public comment on its no significant hazards consideration determination. In such case, the license amendment has been issued without opportunity for comment. If there has been some time for public comment but less than 30 days, the Commission may provide an opportunity for public comment. If comments have been requested, it is so stated. In either event, the State has been consulted by telephone whenever possible.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendment involves no significant hazards consideration. The basis for this determination is contained in the documents related to this action. Accordingly, the amendments have been issued and made effective 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 application for amendment, (2) the amendment to Facility Operating License, 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 System's (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*.

The Commission is also offering an opportunity for a hearing with respect to the issuance of the amendment. 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, and electronically on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If there are problems in accessing the document, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737, or by e-mail to *pdr@nrc.gov*. If a request for a hearing or petition for leave to intervene is filed by the above date, 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 identify 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 bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner 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.[1] 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 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.

Each contention shall be given a separate numeric or alpha designation within one of the following groups:

1. Technical—primarily concerns/issues relating to technical and/or health and safety matters discussed or referenced in the applications.
2. Environmental—primarily concerns/issues relating to matters discussed or referenced in the environmental analysis for the applications.
3. Miscellaneous—does not fall into one of the categories outlined above.

As specified in 10 CFR 2.309, if two or more petitioners/requestors seek to co-sponsor a contention, the petitioners/requestors shall jointly designate a representative who shall have the authority to act for the petitioners/requestors with respect to that contention. If a petitioner/requestor seeks to adopt the contention of another sponsoring petitioner/requestor, the petitioner/requestor who seeks to adopt the contention must either agree that the sponsoring petitioner/requestor shall act as the representative with respect to that contention, or jointly designate with the sponsoring petitioner/requestor a representative who shall have the

[1] To the extent that the applications contain attachments and supporting documents that are not publicly available because they are asserted to contain safeguards or proprietary information, petitioners desiring access to this information should contact the applicant or applicant's counsel and discuss the need for a protective order.

authority to act for the petitioners/requestors with respect to that contention.

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. Since the Commission has made a final determination that the amendment involves no significant hazards consideration, if a hearing is requested, it will not stay the effectiveness of the amendment. Any hearing held would take place while the amendment is in effect.

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 or 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).

STP Nuclear Operating Company, Docket No. 50–498, South Texas Project, Unit 1, Matagorda County, Texas

Date of amendment request: January 6, 2005.

Description of amendment request: The amendment revises Technical Specification (TS) 3.7.4, ''Essential Cooling Water System,'' and the associated TS for systems supported by the Essential Cooling Water (ECW), to extend the allowed outage time for an additional 7 days for ECW Train B as a one-time change for the purpose of making repairs to the Train B ECW pump.

Date of issuance: January 10, 2005.

Effective date: Effective as of the date of issuance and shall be implemented immediately.

Amendment No.: 169.

Facility Operating License No. NPF–76: Amendment revises the technical specifications.

Public comments requested as to proposed no significant hazards consideration (NSHC): No.

The Commission's related evaluation of the amendment, finding of emergency circumstances, state consultation, and final NSHC determination are contained in a safety evaluation dated January 10, 2005.

Attorney for licensee: A.H. Gutterman, Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW., Washington, DC 20004.

NRC Section Chief: Michael K. Webb, Acting.

Dated at Rockville, Maryland, this 24th day of January 2005.

For the Nuclear Regulatory Commission.

Ledyard B. Marsh,

Director, Division of Licensing Project Management Office of Nuclear Reactor Regulation.

[FR Doc. 05–1574 Filed 1–31–05; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Notice of Availability of Draft NUREG–1800, Revision 1; ''Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants'' and Draft NUREG–1801, Revision 1; ''Generic Aging Lessons Learned (GALL) Report''

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Issuance of draft NUREG–1800 ''Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants'' and draft NUREG–1801, ''Generic Aging Lessons Learned (GALL) Report'' for public comment; and announcement of public workshop.

SUMMARY: The NRC staff is issuing drafts of the revised NUREG–1800; ''Standard Review Plan for License Renewal Applications for Nuclear Power Plants'' (SRP–LR); and the revised NUREG–1801, ''Generic Aging Lessons Learned (GALL) Report'' for public comment. These revised documents describe methods acceptable to the NRC staff for implementing the license renewal rule, Title 10, Code of Federal Regulations part 54 (10 CFR part 54), as well as techniques used by the NRC staff in evaluating applications for license renewals. The NRC is also announcing a public workshop to facilitate gathering public comments on the drafts of these revised documents. These draft documents supersede the preliminary draft documents that were publicly announced and placed on the NRC's Web site at *http://www.nrc.gov/reactors/operating/licensing/renewal/guidance/updated-guidance.html* on September 30, 2004. The NRC is especially interested in stakeholder comments that will improve the safety, effectiveness, and efficiency of the license renewal process.

DATES: Comments may be submitted on revised SRP-LR and the draft GALL Report, accompanied by supporting data, by March 30, 2005. Comments received after this date will be considered, if it is practical to do so, but the NRC staff is able to ensure consideration only for comments received on or before this date. A public workshop is planned for March 2, 2005, at NRC's headquarters and is announced on the NRC's Web site at *http://www.nrc.gov/public-involve/public-meetings/meeting-schedule.html*.

ADDRESSES: Written comments may be submitted to: Chief Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mailstop T–6D59, U.S. Nuclear Regulatory Commission, Washington, DC, 20555–0001. Comments should be delivered to: 11545 Rockville Pike, Rockville, Maryland, Room T–6D59, between 7:30 a.m. and 4:15 p.m. on Federal workdays. Comments may also be provided via e-mail at *NRCREP@NRC.GOV*. The NRC maintains an Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR Reference staff at 1–800–397–4209, or 301–414–4737, or by e-mail to *pdr@nrc.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Jerry Dozier, License Renewal Project

Manager, Office of Nuclear Reactor Regulation, Mail Stop O–11F1, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301 415–1014, or e-mail *jxd@nrc.gov*.

SUPPLEMENTARY INFORMATION:

Draft Standard Review Plan for License Renewal

The NRC staff proposes to revise the July 2001 version of NUREG–1800, ''Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants'' (SRP–LR). The SRP–LR provides guidance to NRC staff reviewers in performing safety reviews of applications to renew licenses of nuclear power plants in accordance with the license renewal rule. The draft SRP–LR is under ADAMS Accession number ML050190137. The SRP–LR is being revised to incorporate lessons learned from the review of a number of previous license renewal applications, as well as to make changes corresponding to the update of the GALL Report. The draft SRP–LR contains four major chapters: (1) Administrative Information; (2) Scoping and Screening Methodology for Identifying Structures and Components Subject to Aging Management Review, and Implementation Results; (3) Aging Management Review Results; and (4) Time-Limited Aging Analyses. In addition, three Branch Technical Positions are in an Appendix to the SRP–LR.

Draft Generic Aging Lessons Learned Report, Revision 1

The Generic Aging Lessons Learned (GALL) Report, Revision 1, is an update to the July 2001 version; the report format is largely unchanged. The GALL Report Volumes 1 and 2 are available under ADAMS accession number ML050270004 and ML050270052, respectively. The adequacy of the generic aging management programs in managing certain aging effects for particular structures and components will continue to be evaluated based on the review of the following ten program elements: (1) Scope of program, (2) preventive actions, (3) parameters monitored or inspected, (4) detection of aging effects, (5) monitoring and trending, (6) acceptance criteria, (7) corrective actions, (8) confirmation process, (9) administrative controls, and (10) operating experience. The GALL Report is a technical basis document for the SRP–LR and should be treated in the same manner as an approved topical report that is applicable generically.

Solicitation of Comments

The comments should include supporting justification in enough detail for the NRC staff to evaluate the need for changes in the guidance, as well as references to the operating experience, industry standards, or other relevant reference materials that provide a sound technical basis for such changes. The NRC is also interested in comments that will improve the clarity of the documents so that the improved guidance will provide a stable and predictable evaluation standard for future renewal applications. Editorial and style comments are not necessary because we expect that the guidance documents will need to be reformatted and edited before they are issued in final form.

Questions for Public Comments

Although the NRC invites public comments on all information contained in these draft documents, responses to the following question are particularly solicited.

The GALL Report evaluates many existing programs for their adequacy to manage aging for license renewal. The license renewal guidance documents reference plant-specific aging management programs (AMP) when it is not clear if an appropriate widely-used (generic) AMP is available. Are there alternative generic AMPs that can be substituted for the plant-specific evaluations that are still referenced in Chapters II–VIII of the GALL Report? The commenter should provide justification to support any suggestions.

Public Workshop

A public workshop is scheduled during the public comment period. Scheduled for March 2, 2005, this workshop will be held in the Commissioners' Hearing Room, O–1G16, at OWFN, the NRC headquarters. The formal meeting notice is available at *http://www.nrc.gov/public-involve/public-meetings/meeting-schedule.html.* It is anticipated that the workshop will provide the participants an opportunity to obtain further information, to ask questions, to make comments to add to the discussion, or otherwise to facilitate the public in formulating and preparing written comments for NRC staff consideration on these revised license renewal guidance documents. To ensure that all of the ideas raised are recorded, the workshop will be transcribed and the NRC staff will prepare a summary report to categorize the comments.

Dated at Rockville, Maryland, this 27th day of January 2005.

For the Nuclear Regulatory Commission.

Pao-Tsin Kuo,

Program Director, License Renewal and Environmental Impacts Program, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 05–1887 Filed 1–31–05; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Submission of Information Collections for OMB Review; Comment Request; Multiemployer Plan Regulations

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for extension of OMB approval.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is requesting that the Office of Management and Budget (OMB) extend approval, under the Paperwork Reduction Act, of collections of information in the PBGC's regulations on multiemployer plans under the Employee Retirement Income Security Act of 1974 (ERISA). This notice informs the public of the PBGC's request and solicits public comment on the collections of information.

DATES: Comments must be submitted by March 3, 2005.

ADDRESSES: Comments should be mailed to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, Washington, DC 20503. Copies of the request for extension (including the collections of information) may be obtained without charge by writing to or visiting the PBGC's Communications and Public Affairs Department, suite 240, 1200 K Street, NW., Washington, DC 20005–4026, or calling 202–326–4040. (TTY and TDD users may call 800–877–8339 and request connection to (202) 326–4040). The regulations on multiemployer plans can be accessed on the PBGC's Web site at *http://www.pbgc.gov.*

FOR FURTHER INFORMATION CONTACT: Deborah C. Murphy, Attorney, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, (202) 326–4024. (For TTY/TDD users, call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to (202) 326–4024.)

SUPPLEMENTARY INFORMATION: 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. OMB has approved and issued control numbers for the collections of information, described below, in the PBGC's regulations relating to multiemployer plans. The PBGC is requesting that OMB extend its approval of these collections of information for three years. Comments should identify the specific part number(s) of the regulation(s) they relate to.

The collections of information for which the PBGC is requesting extension of OMB approval are as follows:

1. Termination of Multiemployer Plans (29 CFR Part 4041A) (OMB Control Number 1212–0020)

Section 4041A(f)(2) of ERISA authorizes the PBGC to prescribe reporting requirements for and other ''rules and standards for the administration of'' terminated multiemployer plans. Section 4041A(c) and (f)(1) of ERISA prohibit the payment by a mass-withdrawal-terminated plan of lump sums greater than $1,750 or of nonvested plan benefits unless authorized by the PBGC.

The regulation requires the plan sponsor of a terminated plan to submit a notice of termination to the PBGC. It also requires the plan sponsor of a mass-withdrawal-terminated plan that is closing out to give notices to participants regarding the election of alternative forms of benefit distribution and to obtain PBGC approval to pay lump sums greater than $1,750 or to pay nonvested plan benefits.

The PBGC uses the information in a notice of termination to assess the likelihood that PBGC financial assistance will be needed. Plan participants and beneficiaries use the information on alternative forms of benefit to make personal financial decisions. The PBGC uses the information in an application for approval to pay lump sums greater than $1,750 or to pay nonvested plan benefits to determine whether such payments should be permitted.

The PBGC estimates that plan sponsors each year (1) submit notices of termination for 10 plans, (2) distribute election notices to participants in 5 of those plans, and (3) submit requests to pay benefits or benefit forms not otherwise permitted for 1 of those plans. The estimated annual burden of the collection of information is 19.2 hours and $12,895.

2. Extension of Special Withdrawal Liability Rules (29 CFR Part 4203) (OMB Control Number 1212–0023)

Sections 4203(f) and 4208(e)(3) of ERISA allow the PBGC to permit a multiemployer plan to adopt special rules for determining whether a withdrawal from the plan has occurred, subject to PBGC approval.

The regulation specifies the information that a plan that adopts special rules must submit to the PBGC about the rules, the plan, and the industry in which the plan operates. The PBGC uses the information to determine whether the rules are appropriate for the industry in which the plan functions and do not pose a significant risk to the insurance system.

The PBGC estimates that at most 1 plan sponsor submits a request each year under this regulation. The estimated annual burden of the collection of information is 1 hour and $4,400.

3. Variances for Sale of Assets (29 CFR Part 4204) (OMB Control Number 1212–0021)

If an employer's covered operations or contribution obligation under a plan ceases, the employer must generally pay withdrawal liability to the plan. Section 4204 of ERISA provides an exception, under certain conditions, where the cessation results from a sale of assets. Among other things, the buyer must furnish a bond or escrow, and the sale contract must provide for secondary liability of the seller.

The regulation establishes general variances (rules for avoiding the bond/escrow and sale-contract requirements) and authorizes plans to determine whether the variances apply in particular cases. It also allows buyers and sellers to request individual variances from the PBGC. Plans and the PBGC use the information to determine whether employers qualify for variances.

The PBGC estimates that each year, 11 employers submit, and 11 plans respond to, variance requests under the regulation, and 2 employers submit variance requests to the PBGC. The estimated annual burden of the collection of information is 1 hour and $4,881.

4. Reduction or Waiver of Complete Withdrawal Liability (29 CFR Part 4207) (OMB Control Number 1212–0044)

Section 4207 of ERISA allows the PBGC to provide for abatement of an employer's complete withdrawal liability, and for plan adoption of alternative abatement rules, where appropriate.

Under the regulation, an employer applies to a plan for an abatement determination, providing information the plan needs to determine whether withdrawal liability should be abated, and the plan notifies the employer of its determination. The employer may, pending plan action, furnish a bond or escrow instead of making withdrawal liability payments, and must notify the plan if it does so. When the plan then makes its determination, it must so notify the bonding or escrow agent.

The regulation also permits plans to adopt their own abatement rules and request PBGC approval. The PBGC uses the information in such a request to determine whether the amendment should be approved.

The PBGC estimates that each year, 100 employers submit, and 100 plans respond to, applications for abatement of complete withdrawal liability, and 1 plan sponsor requests approval of plan abatement rules from the PBGC. The estimated annual burden of the collection of information is 25.5 hours and $27,500.

5. Reduction or Waiver of Partial Withdrawal Liability (29 CFR Part 4208) (OMB Control Number 1212–0039)

Section 4208 of ERISA provides for abatement, in certain circumstances, of an employer's partial withdrawal liability and authorizes the PBGC to issue additional partial withdrawal liability abatement rules.

Under the regulation, an employer applies to a plan for an abatement determination, providing information the plan needs to determine whether withdrawal liability should be abated, and the plan notifies the employer of its determination. The employer may, pending plan action, furnish a bond or escrow instead of making withdrawal liability payments, and must notify the plan if it does so. When the plan then makes its determination, it must so notify the bonding or escrow agent.

The regulation also permits plans to adopt their own abatement rules and request PBGC approval. The PBGC uses the information in such a request to determine whether the amendment should be approved.

The PBGC estimates that each year, 1,000 employers submit, and 1,000 plans respond to, applications for abatement of partial withdrawal liability and 1 plan sponsor requests approval of plan abatement rules from the PBGC. The estimated annual burden of the collection of information is 250.5 hours and $275,000.

6. Allocating Unfunded Vested Benefits to Withdrawing Employers (29 CFR Part 4211) (OMB Control Number 1212–0035)

Section 4211(c)(5)(A) of ERISA requires the PBGC to prescribe how plans can, with PBGC approval, change the way they allocate unfunded vested benefits to withdrawing employers for purposes of calculating withdrawal liability.

The regulation prescribes the information that must be submitted to the PBGC by a plan seeking such approval. The PBGC uses the information to determine how the amendment changes the way the plan allocates unfunded vested benefits and how it will affect the risk of loss to plan participants and the PBGC.

The PBGC estimates that 5 plan sponsors submit approval requests each year under this regulation. The estimated annual burden of the collection of information is 10 hours.

7. Notice, Collection, and Redetermination of Withdrawal Liability (29 CFR Part 4219) (OMB Control Number 1212–0034)

Section 4219(c)(1)(D) of ERISA requires that the PBGC prescribe regulations for the allocation of a plan's total unfunded vested benefits in the event of a ''mass withdrawal.'' ERISA section 4209(c) deals with an employer's liability for *de minimis* amounts if the employer withdraws in a ''substantial withdrawal.''

The reporting requirements in the regulation give employers notice of a mass withdrawal or substantial withdrawal and advise them of their rights and liabilities. They also provide notice to the PBGC so that it can monitor the plan, and they help the PBGC assess the possible impact of a withdrawal event on participants and the multiemployer plan insurance program.

The PBGC estimates that there is at most 1 mass withdrawal and 1 substantial withdrawal per year. The plan sponsor of a plan subject to a withdrawal covered by the regulation provides notices of the withdrawal to the PBGC and to employers covered by the plan, liability assessments to the employers, and a certification to the PBGC that assessments have been made. (For a mass withdrawal, there are 2 assessments and 2 certifications that deal with 2 different types of liability. For a substantial withdrawal, there is 1 assessment and 1 certification (combined with the withdrawal notice to the PBGC).) The estimated annual burden of the collection of information is 4 hours and $7,152.

8. Procedures for PBGC Approval of Plan Amendments (29 CFR Part 4220) (OMB Control Number 1212–0031)

Under section 4220 of ERISA, a plan may within certain limits adopt special plan rules regarding when a withdrawal from the plan occurs and how the withdrawing employer's withdrawal liability is determined. Any such special rule is effective only if, within 90 days after receiving notice and a copy of the rule, the PBGC either approves or fails to disapprove the rule.

The regulation provides rules for requesting the PBGC's approval of an amendment. The PBGC needs the required information to identify the plan, evaluate the risk of loss, if any, posed by the plan amendment, and determine whether to approve or disapprove the amendment.

The PBGC estimates that 3 plan sponsors submit approval requests per year under this regulation. The estimated annual burden of the collection of information is 1.5 hours.

9. Mergers and Transfers Between Multiemployer Plans (29 CFR Part 4231) (OMB Control Number 1212–0022)

Section 4231(a) and (b) of ERISA requires plans that are involved in a merger or transfer to give the PBGC 120 days' notice of the transaction and provides that if the PBGC determines that specified requirements are satisfied, the transaction will be deemed not to be in violation of ERISA section 406(a) or (b)(2) (dealing with prohibited transactions).

This regulation sets forth the procedures for giving notice of a merger or transfer under section 4231 and for requesting a determination that a transaction complies with section 4231.

The PBGC uses information submitted by plan sponsors under the regulation to determine whether mergers and transfers conform to the requirements of ERISA section 4231 and the regulation.

The PBGC estimates that there are 35 transactions each year for which plan sponsors submit notices and approval requests under this regulation. The estimated annual burden of the collection of information is 8.75 hours and $7,663.

10. Notice of Insolvency (29 CFR Part 4245) (OMB Control Number 1212–0033)

If the plan sponsor of a plan in reorganization under ERISA section 4241 determines that the plan may become insolvent, ERISA section 4245(e) requires the plan sponsor to give a ''notice of insolvency'' to the PBGC, contributing employers, and plan participants and their unions in accordance with PBGC rules.

For each insolvency year under ERISA section 4245(b)(4), ERISA section 4245(e) also requires the plan sponsor to give a ''notice of insolvency benefit level'' to the same parties.

This regulation establishes the procedure for giving these notices. The PBGC uses the information submitted to estimate cash needs for financial assistance to troubled plans. Employers and unions use the information to decide whether additional plan contributions will be made to avoid the insolvency and consequent benefit suspensions. Plan participants and beneficiaries use the information in personal financial decisions.

The PBGC estimates that 1 plan sponsor gives notices each year under this regulation. The estimated annual burden of the collection of information is 1 hour and $3,828.

11. Duties of Plan Sponsor Following Mass Withdrawal (29 CFR Part 4281) (OMB Control Number 1212–0032)

Section 4281 of ERISA provides rules for plans that have terminated by mass withdrawal. Under section 4281, if nonforfeitable benefits exceed plan assets, the plan sponsor must amend the plan to reduce benefits. If the plan nevertheless becomes insolvent, the plan sponsor must suspend certain benefits that cannot be paid. If available resources are inadequate to pay guaranteed benefits, the plan sponsor must request financial assistance from the PBGC.

The regulation requires a plan sponsor to give notices of benefit reduction, notices of insolvency and annual updates, and notices of insolvency benefit level to the PBGC and to participants and beneficiaries and, if necessary, to apply to the PBGC for financial assistance.

The PBGC uses the information it receives to make determinations required by ERISA, to identify and estimate the cash needed for financial assistance to terminated plans, and to verify the appropriateness of financial assistance payments. Plan participants and beneficiaries use the information to make personal financial decisions.

The PBGC estimates that plan sponsors each year give benefit reduction notices for 2 plans and give notices of insolvency benefit level and annual updates, and submit requests for financial assistance, for 28 plans. Of those 28 plans, the PBGC estimates that plan sponsors each year give notices of insolvency for 4 plans. The estimated

annual burden of the collection of information is 1 hour and $553,477.

Issued in Washington, DC, this 12th day of January 2005.

Stuart A. Sirkin,

Director, Policy, Research and Analysis Department, Pension Benefit Guaranty Corporation.

[FR Doc. 05–1844 Filed 1–31–05; 8:45 am]

BILLING CODE 7708–01–P

OFFICE OF PERSONNEL MANAGEMENT

Comment Request for OMB Review of an Extension of the Nonforeign Area Cost-of-Living Allowance Price and Background Surveys

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Office of Personnel Management (OPM) seeks comments on its intention to request an extension of two currently approved information collections. OPM uses the two collections, a Price Survey and a Background Survey, to gather data it uses to determine cost-of-living allowances the Government provides to certain Federal employees in Alaska, Hawaii, Guam and the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. OPM conducts Price Surveys in the Washington, DC, area on an annual basis and once every 3 years in each allowance area on a rotating basis. Prior to these surveys, OPM conducts Background Surveys that are similar to the Price Survey, but much more limited in scope. OPM uses the results of the Background Surveys to prepare for the Price Surveys.

DATES: Submit comments on or before April 4, 2005.

ADDRESSES: Send or deliver comments to Donald J. Winstead, Deputy Associate Director for Pay and Performance Policy, Office of Personnel Management, Room 7H31, 1900 E Street NW., Washington, DC 20415–8200; fax (202) 606–4264, or e-mail: *cola@opm.gov*.

SUPPLEMENTARY INFORMATION: Office of Management and Budget (OMB) approval of the Nonforeign Area Cost-of-Living Allowance (COLA) Price Survey and Background Survey will expire on May 31, 2005. The Office of Personnel Management (OPM) plans to request OMB approval for a 3-year extension of these currently approved information collections and is seeking comments prior to submitting the collections to OMB for review.

Comments are particularly invited on whether (1) these collections of information are necessary for the proper performance of OPM functions, (2) they will have practical utility, (3) our estimate of the public burden of these collections of information is accurate and based on valid assumptions and methodology, and (4) there are ways in which we can minimize respondent burden of the collections of information through the use of appropriate technological collection techniques or other forms of information technology.

For copies of this proposal, contact Mary Beth Smith-Toomey on (202) 606–8358, fax (202) 418–3251, or e-mail *mbtoomey@opm.gov*. Please include a mailing address with your request.

Overview of Information Collections

Title: Nonforeign Area Cost-of-Living Allowance Price Survey and Background Survey.

OMB Control Number: 3206–0199.

Summary: OPM uses the COLA Price Survey to collect price data in survey areas located in the nonforeign allowance areas and in the Washington, DC, area. The allowance areas are located in Alaska, Hawaii, Guam and the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. OPM conducts Price Surveys annually in the DC area and once every 3 years in the allowance areas on a rotating basis. OPM uses the COLA Background Survey to collect information to identify the services, items, quantities, outlets, and locations OPM will survey in the Price Surveys. OPM also uses Background Surveys to collect information on local trade practices, consumer buying patterns, taxes and fees, and other economic characteristics related to living costs. OPM conducts Background Surveys annually on a limited basis.

Need/Use for Surveys: The COLA Price Survey is necessary for collecting living-cost data OPM uses to determine COLAs received by General Schedule, U.S. Postal Service, and certain other Federal employees in the allowance areas. OPM uses the survey results to compare prices in the allowance areas with prices in the Washington, DC, area and to derive COLA rates where local living costs significantly exceed those in the DC area. The COLA Background Survey is necessary to determine the continued appropriateness of items, services, and businesses selected for the annual price surveys. OPM uses the information collected under the Background Survey to identify items to be priced and the outlets at which OPM will price the items in the Price Surveys.

Respondents: OPM will survey selected retail, service, realty, and other businesses and local governments in the allowance areas and in the Washington, DC, area. OPM will contact approximately 2,000 establishments in each annual Price Survey and approximately 100 establishments in each annual Background Survey. Participation in the surveys is voluntary.

Reporting and Recordkeeping Burden: Based on experience, OPM estimates that the average Price Survey interview takes approximately 6 minutes, for a total burden of 200 hours. Also based on experience, OPM estimates that the average Background Survey interview will take approximately 6.5 minutes, for a total burden of 11 hours.

Office of Personnel Management.

Kay Coles James,

Director.

[FR Doc. 05–1728 Filed 1–31–05; 8:45 am]

BILLING CODE 6325–39–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Courtside products, Inc.; Order of Suspension of Trading

January 28, 2005

It appears to the Securities and Exchange Commission that the public interest and the protection of investors require a suspension of trading in the securities of Courtside Products, Inc. (''Courtside''). The Commission is concerned that Courtside may have unjustifiably relied on Rule 504 of Regulation D of the Securities Act of 1933 in conducting an unlawful distribution of its securities which failed to comply with the resale restrictions of Regulation D. Courtside, a company that has made no public filings with the Commission or the NASD, is quoted on the Pink Sheets under the ticker symbol CSDP, and has recently been the subject of spam e-mail touting the company's shares.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above listed company is suspended for the period from 9:30 a.m. e.s.t. January 28, 2005 through 11:59 p.m. e.s.t., on February 10, 2005.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 05–1910 Filed 1–28–05; 3:01 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51068; File No. SR–BSE–2005–02]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Its Instant Liquidity Access Rules

January 21, 2005.

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 January 7, 2005, the Boston Stock Exchange, Inc. (''Exchange'' or ''BSE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule as described in Items I and II below, which Items have been prepared by the Exchange. The proposed rule change has been filed by the Exchange as a non-controversial filing pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules regarding Instant Liquidity Access (''ILA'').

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 is available on the BSE's Web site *(http://www.bostonstock.com)*, at the BSE's Office of the Secretary, and at the Commission's Public Reference Room. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend a section of the Rules of the Board of Governors of the Boston Stock Exchange (''BSE Rules'') relating to ILA. In Chapter I, Section 3 of the BSE Rules ''Instant Liquidity Access (ILA) Order'' is defined as ''a round-lot limit order of no less than 100, nor more than 1000, shares priced at the Exchange's published offer (in the case of a buy) or at the Exchange's published bid (in the case of an order to sell), which a member or member organization has entered for immediate execution in accordance with, and to the extent provided by, Chapter XXXIII, Section 8 (Instant Liquidity Access) of these Rules.'' The Exchange is proposing to remove the phrase ''nor more than 1000'' from the definition, thereby removing any size restriction of ILA orders, aside from the requirement that they be round-lot orders of at least 100 shares.

When the ILA rules were originally drafted, the Exchange built certain protections, including the 1000 share size limit of an ILA order, into its rules to provide Exchange specialists time to adjust to the new type of execution being offered through ILA. The Exchange and its specialists have now had several months of experience with ILA, and both Exchange customers and specialists have requested that various aspects of the ILA rules be changed so that ILA can be utilized for a larger percentage of orders. For example, the Exchange recently filed a rule proposal with the Commission to remove rule language which prevented orders being entered by one customer in intervals less than thirty seconds.[5] The concern in that filing centered on the potential for rapid-fire orders overwhelming the BSE specialists. However, the BSE has addressed that concern through systemic enhancements which, according to ILA rules, automatically cancel an ILA order if it cannot be immediately executed. Accordingly, because systemic enhancements have obviated the need for such a restriction, the Exchange sought to abolish the limitation.

Similarly, in the present proposal, systemic enhancements have made the 1000 share limitation unnecessary. The Exchange's BEACON trading system is able to respond to orders of all sizes equally and there is no need for a size limitation. Accordingly, the BSE and its specialists seek to encourage more customers to utilize ILA, and thereby have their orders, regardless of size, instantly executed.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act[6] in general, and Section 6(b)(5)[7] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and is not designed to permit unfair discrimination between customers, brokers, or dealers, or to regulate by virtue of any authority matters not related to the administration of the Exchange.

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

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated the proposed rule change as one that: (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 of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6)[9] thereunder.

The Commission, consistent with the protection of investors and the public interest, has determined to make the proposed rule change effective as of the

[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] *See* Securities Exchange Act Release No. 51031 (January 12, 2005), 70 FR 3404 (January 24, 2005) (SR–BSE–2004–46).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(a).

[9] 17 CFR 240.19b–4(f)(6).

date of this order.[10] The Commission believes that the proposal could provide investors with orders larger than 1000 shares with more efficient and orderly executions.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the proposed 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.

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 E-mail to *rule-comments@sec.gov.* Please include File Number SR–BSE–2005–02 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 SR–BSE–2005–02. 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/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 such filing also will be available for inspection and copying at the principal office of the BSE. 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–BSE–2005–02 and should be submitted on or before February 22, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–359 Filed 1–31–05; 8:45 am]

BILLING CODE 8010–01–U

[10] For purposes only of waiving the 30-day operative period, the Commission has considered the rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51069; File No. SR–BSE–2005–05]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change Relating to Position Limits and Exercise Limits on the Boston Options Exchange for Options on Standard and Poor's Depositary Receipts

January 21, 2005.

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 January 20, 2005, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. In addition, the Commission is granting accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Boston Options Exchange Rules (''BOX Rules'') to increase position limits and exercise limits for options on Standard and Poor's Depositary Receipts (''SPDRs''). The text of the proposed rule change is available on the Exchange's Web site (*http://www.bostonstock.com*), at the BSE's Office of the Secretary, and at the Commission's Public Reference Room.

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 had received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The BSE began trading options on SPDRs on January 10, 2005 on the Boston Options Exchange. Currently, under BOX Rules Chapter III Section 7 and Section 9, position limits and exercise limits for options on SPDRs are 75,000 contracts on the same side of the market. The Exchange proposes to amend Supplementary Material .01 to Section 7 of Chapter III and Supplementary Material .01 to Section 9 of Chapter III of the BOX Rules to increase position limits and exercise limits for options on SPDRs to 300,000 contracts on the same side of the market.

Given the expected institutional demand for options on SPDRs, the BSE believes the current equity position limit of 75,000 contracts to be too low and a deterrent to the successful trading of the product. Options on SPDRs are 1/10th the size of options on the Standard and Poor's 500 Index (''SPX'').[3] Thus, a position limit of 75,000 contracts in SPDR options is equivalent to a 7,500 contract position limit in SPX options. Traders who trade SPDR options to hedge positions in SPX options are likely to find a position limit of 75,000 contracts in SPDR options too restrictive, which may adversely affect BOX's ability to provide liquidity in this product.

Comparable products such as options on the Nasdaq-100 Index Tracking Stock (''QQQ'') are subject to a 300,000-contract limit.[4] The BSE proposes that

[1] 15 U.S.C. 78s(b)(1).

[2] 2 17 CFR 240.19b–4.

[3] Options on SPX are traded on the Chicago Board Options Exchange.

[4] *See* Supplementary Material .01 to Section 7 of Chapter III and Supplementary Material .01 to Section 9 of Chapter III of the BOX Rules.

options on SPDRs similarly be subject to position limits and exercise limits of 300,000 contracts. The Exchange believes that increasing position limits and exercise limits for SPDR options would lead to a more liquid and competitive market environment for SPDR options that would benefit customers interested in this product.

Consistent with the reporting requirement for QQQ options, the Exchange would require that each Options Participant [5] that maintains a position on the same side of the market in excess of 10,000 contracts in the SPDR option class, for its own account or for the account of a customer, report certain information.[6] This data would include, but would not be limited to, the option position, whether such position is hedged and if so, a description of the hedge and if applicable, the collateral used to carry the position. In addition, the general reporting requirement for customer accounts that maintain a position in excess of 200 contracts would remain at this level for SPDR options.[7]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b) of the Act [8] in general, and Section 6(b)(5) of the Act,[9] in particular, in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. 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–BSE–2005–05 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–BSE–2005–05. 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 Section. Copies of such filing also will be available for inspection and copying at the principal office of the BSE. 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–BSE–2005–05 and should be submitted on or before February 22, 2005.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder, applicable to a national securities exchange,[10] and, in particular, the requirements of Section 6(b)(5) of the Act.[11] Specifically, the Commission finds that the proposed rule change should ensure that the Exchange's position limits and exercise limits on SPDR options provide its members with sufficient flexibility to participate in the market for such options in a manner that should provide greater depth and liquidity for all market participants.

The Commission finds good cause for approving this proposed rule change prior to the thirtieth day after publication of notice thereof in the **Federal Register**. Specifically, the Commission believes that granting accelerated approval to the proposed rule change should permit greater depth and liquidity in the SPDR options market that should benefit all market participants, including retail investors. Because the higher position limits and exercise limits mirror those that the Commission has previously approved for like products, the Commission believes it is consistent with Sections 6(b)(5) [12] and 19(b)(2) [13] of the Act to approve the BSE's proposed rule change on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[14] that the proposed rule change (SR–BSE–2005–05) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–361 Filed 1–31–05; 8:45 am]

BILLING CODE BILLING CODE 8010–01–U

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51076; File No. SR–PCX–2004–125]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Pacific Exchange, Inc. Relating to Exchange Fees and Charges

January 25, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

[5] Defined in Section 1(40) of Chapter I of the BOX Rules.

[6] *See* Section 10(b) of Chapter III of the BOX Rules.

[7] *See* Section 10(a) of Chapter III of the BOX Rules.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 10 In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(2).

[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

(''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 21, 2004, the Pacific Exchange, Inc. (''PCX'' 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. On January 12, 2005, the Exchange filed Amendment No. 1 to the proposed rule change. On January 13, 2005, the Exchange filed Amendment No. 2 to the proposed rule change. 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 Exchange proposes to amend its Schedule of Fees and Charges For Exchange Services (''Schedule'') in order to eliminate the Shortfall Fee and corresponding Shortfall Credit and the Designated Options Examining Authority (''DOEA'') fee, add a clarifying change to the $500 application fee for a request for a waiver pursuant to PCX Rule 2.5(c)(4) and make certain administrative changes. The text of the proposed rule change is available on the Exchange's Web site *(http://www.pacificex.com/legal/legal_pending.html)*, at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend its Schedule in order to eliminate the Shortfall Fee, as well as the corresponding Shortfall Credit, and the DOEA fee, add a clarifying change to the $500 application fee for a request for a waiver pursuant to PCX Rule 2.5(c)(4) and make certain administrative changes.

The Shortfall Fee and Credit

The ''Shortfall Fee'' is a fee that is charged on the volume difference between 12% of the total national market share in an option issue for one month and the percentage executed by the Lead Market Maker (''LMM''). The current Shortfall Fee is $0.35 per contract. An LMM is currently entitled to a ''Shortfall Credit'' of $0.35 per contract for any top 120 equity option issues the LMM trades where the PCX volume in the issue is higher than 12% of the scaled national volume in that issue for that month. The volume base for the Shortfall Credit is the PCX monthly volume for the issue less 12% of the scaled monthly industry volume for each qualifying issue. The Shortfall Credit may be used by an LMM only to offset a Shortfall Fee the LMM incurs for the same month and may not be used to offset other fees, or be carried forward or applied retroactively to the Shortfall Fee the LMM has incurred or will incur for other months. For the purpose of calculating the Shortfall Fee, the national market share of any equity option industry volume is capped at 2.9 million contracts per day. Shortfall Fee billing commences after an issue completes the first four full months of trading under an LMM.

The Exchange is proposing to eliminate the Shortfall Fee and the corresponding Shortfall Credit in their entirety. The Exchange believes that the elimination of the Shortfall Fee is appropriate in order to make the PCX more competitive and to add liquidity to the marketplace. The Exchange intends to provide all LMMs with a rebate for fees paid in the months of October and November 2004.

DOEA Fee

Previously, the PCX contracted with the NASD to conduct all DOEA examinations for the Exchange. The Exchange would pass along the cost of the examination plus 17% to the entity that was examined. NASD has stopped providing this service to the Exchange, and the Exchange no longer monitors any firms that require DOEA examinations. Accordingly, the Exchange is proposing to eliminate the DOEA fee from the Schedule.

$500 Application Fee for a Request for a Waiver Pursuant to PCX Rule 2.5(c)(4)

The Exchange's Shareholder and Registration Services Department has received numerous questions about the application of the $500 application fee for a request for a waiver pursuant to PCX Rule 2.5(c)(4). Option Trading Permit Holders (''OTP Holders'') and applicants have expressed a desire for further clarification as to the circumstances under which they would be subject to the fee. The purpose of the fee is to allow the Exchange to recover costs associated with independently verifying each justification given by an applicant as to why a waiver should be granted.[3] The fee does not apply to circumstances where the Exchange only has to verify that an applicant has successfully completed an examination. Therefore, the Exchange is proposing to add clarifying language to the Schedule that states the fee does not apply when the request only involves validating that an applicant has successfully completed a qualifying examination.

Administrative Changes

The Exchange is proposing certain changes to the Schedule that will eliminate typographical errors, correct grammatical errors and amend calendar references. In addition, the Exchange is proposing certain clarifying language that is designed to make the Schedule easier to comprehend. Specifically, the Exchange is clarifying that for the Vendor Equipment Room Usage Fee, firms not using a full cabinet will not pay the full fee. Instead such firms will pay a pro rata portion thereof.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[4] in general, and furthers the objectives of Section 6(b)(4) of the Act[5] in particular, in that the proposal provides for the equitable allocation of reasonable dues, fees and other charges among the Exchange's OTP Holders and other persons using the Exchange's facilities for trading option contracts.

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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 50742 (November 29, 2004), 69 FR 70488 (December 6, 2004) (SR–PCX–2004–101).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

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

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [6] and Rule 19b–4(f)(2) thereunder,[7] because the proposed rule change establishes or changes a due, fee or other charge applicable only to a member of the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act.[8]

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–PCX–2004–125 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–PCX–2004–125. 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 Exchange. 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-PCX–2004–125 and should be submitted on or before February 22, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–360 Filed 1–31–05; 8:45 am]

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[6] 15 U.S.C. 78s(b)(3)(A)(ii).

[7] 17 CFR 240.19b–4(f)(2).

[8] For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers that period to commence on January 13, 2005, the date the Exchange filed Amendment No. 2 to the proposed rule change. *See* 15 U.S.C. 78s(b)(3)(C).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51080; File No. SR–Phlx–2004–51]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto Relating to Phlx Regulation 5, Visitors and Applicants

January 26, 2005.

On October 7, 2004, the Philadelphia Stock Exchange, Inc. (''Phlx'' 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 proposed rule change to update Phlx Regulation 5, Visitors and Applicants, enacted as a rule of order and decorum under Phlx Rule 60. On December 6, 2004, Phlx filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on December 22, 2004.[4] The Commission received no comments on the proposal.

Phlx is amending its Phlx Regulation 5 to more accurately reflect its current practices. The Exchange amended Phlx Regulation 5 in 1992 to create an ''applicant'' status for prospective Exchange members.[5] A person who fell into the applicant category was issued an Applicant Access Card and Floor Badge that would allow for unescorted floor access until the application process was complete. Phlx no longer issues such Applicant Access Cards and Floor Badges to applicants, but instead requires applicants to register as on-floor trading personnel pursuant to Phlx Rule 620(b), Trading Floor Registration. Applicants are now issued the same access cards as are issued to Phlx members, and their access to the floor is governed by Phlx Rule 620(b), rather than Regulation 5. Phlx proposes to return Regulation 5 to its pre-1992 wording, which governs only guest access to the floor. Phlx members who do not adhere to the procedures set forth in Regulation 5 would be subject to sanction.

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.[6] In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act [7] because ensuring that unauthorized persons do not have improper access to the Exchange floor is consistent with the protection of investors and the public interest.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, [8] that the proposed rule change (File No. SR–Phlx–2004–51), as amended, be, and it hereby is, approved.

[1] 5 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced the original filing in its entirety. Amendment No. 1 clarified that violations of Regulation 5 would be enforced against members and not the guests themselves, and added a description for the Applicant Access Card.

[4] *See* Securities Exchange Act Release No. 50851 (December 14, 2004), 69 FR 76816.

[5] *See* Securities Exchange Act Release No. 30416 (February 26, 1992), 57 FR 7836 (March 4, 1992) (approving File No. SR–Phlx–91–06).

[6] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–367 Filed 1–31–05; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

Bay Partners LS Fund, L.P., License No. 09/79–0423; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Bay Partners LS Fund, L.P., 10600 N. De Anza Boulevard, Suite 100, Cupertino, CA 95014, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 107.730). Bay Partners LS Fund, L.P. proposes to provide equity/debt security financing to IPWireless, Inc. The financing is contemplated for operating expenses and for general corporate purposes.

The financing is brought within the purview of § 107.730(a)(1) of the Regulations because Bay Partners SBIC II, L.P., John Freidenrich, Neal Dempsey, Christopher Noble and Loring Knoblauch, all Associates of Bay Partners LS Fund, L.P., own more than ten percent of IPWireless, Inc.

Notice is hereby given that any interested person may submit written comments on the transaction to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Dated: January 12, 2005.

Jaime Guzman-Fournier,

Acting Associate Administrator for Investment.

[FR Doc. 05–1775 Filed 1–31–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Region IX Regulatory Fairness Board; Public Federal Regulatory Enforcement Fairness Hearing

The Small Business Administration Region IX Regulatory Fairness Board and the SBA Office of the National Ombudsman will hold a Public Hearing on Tuesday, March 1, 2005 at 8:30 a.m. at the City of Anaheim, Gordon Hoyt Center, 201 South Anaheim Blvd., 2nd floor, Anaheim, CA 92805, phone (714) 765–4323, to receive comments and testimony from small business owners, small government entities, and small non-profit organizations concerning regulatory enforcement and compliance actions taken by federal agencies.

Anyone wishing to attend or to make a presentation must contact Dace Pavlovskis in writing or by fax, in order to be put on the agenda. Dace Pavlovskis, District Counsel, SBA Santa Ana District Office, 200 Santa Ana Blvd., Suite 700, Santa Ana, CA 92701, phone (714) 550–7420 Ext. 3601, fax (202) 481–0901, e-mail: *Dace.Pavlovskis@sba.gov.*

For more information, see our Web site at *http://www.sba.gov/ombudsman.*

Dated: January 26, 2005.

Peter Sorum,

Senior Advisor, Office of the National Ombudsman.

[FR Doc. 05–1774 Filed 1–31–05; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 4983]

Certification Under Section 584(b) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2005 (Div. D, P.L. 108–447)

Pursuant to the authority vested in me as Secretary of State, including under section 584(b) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2005 (Div. D, P.L. 108–447), I hereby certify that:

1. The role of the Guatemalan military has been limited, in doctrine and practice, to substantially those activities in defense of Guatemala's sovereignty and territorial integrity that are permitted by the 1996 Peace Accords, and that the Government of Guatemala is taking steps to pass a new governing law of the Army (Ley Constitutiva del Ejercito).

2. The Guatemalan military is cooperating with civilian judicial authorities, including providing full cooperation on access to witnesses, documents and classified intelligence files, in investigations and prosecutions of military personnel who have been implicated in human rights violations and other criminal activity.

3. The Government of Guatemala is working with the United Nations to resolve legal impediments to the establishment of the Commission for the Investigation of Illegal Groups and Clandestine Security Organizations (CICIACS), so that CICIACS can effectively accomplish its mission of investigating and bringing to justice illegal groups and members of clandestine security organizations.

4. The Government of Guatemala is continuing its efforts to make the military budget process transparent and accessible to civilian authorities and to the public, for both present and past expenditures.

5. The Government of Guatemala is working to facilitate the prompt establishment of an office in Guatemala of the United Nations High Commissioner for Human Rights with the unimpeded authority to investigate and report on human rights in Guatemala.

6. The Government of Guatemala is taking steps to increase its efforts to combat narcotics trafficking and organized crime.

This certification shall be published in the **Federal Register** and copies shall be transmitted to the appropriate committees of Congress.

Dated: January 25, 2005.

Colin L. Powell,

Secretary of State, Department of State.

[FR Doc. 05–1846 Filed 1–31–05; 8:45 am]

BILLING CODE 4710–29–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Performance-Based Operations Aviation Rulemaking Committee

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of public meeting.

SUMMARY: This document announces a public meeting in which the Federal Aviation Administration (FAA) and members of the Performance-Based Operations Aviation Rulemaking Committee (PARC) will discuss the activities of the PARC since the Federal Aviation Administrator chartered the group in February 2004.

DATES: The public meeting will be held February 23–24, 2005, in Phoenix, AZ, and will begin at 9 a.m. each day. Registration will begin at 8:30 a.m. each day.

ADDRESSES: The public meeting will be held at Honeywell International Inc., 21111 N. 19th Ave., Phoenix, AZ.

You can find an electronic copy of informational materials for the meeting,

[9] 17 CFR 200.30–3(a)(12).

including a detailed agenda, on the PARC knowledge sharing network at *http://ksn.faa.gov/km/avr/parc/parc/default.aspx* beginning February 15, 2005. For access to the network, contact Olga Legoshina, Flight Technologies and Procedures Division, as listed in the section titled **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: You should direct questions regarding the logistics of the meeting to Olga Legoshina, Flight Technologies and Procedures Division, AFS–400, Federal Aviation Administration, 470 L'Enfant Plaza, Suite 4102, Washington, DC 20024; telephone (202) 385–4606; facsimile (202) 385–4653. You should direct questions regarding the PARC to Dave Nakamura, Boeing Air Traffic Management, CNS Technical Standards and Requirements, PO Box 3707 MS 07–25, Seattle, WA 98124; telephone (425) 829–7006; facsimile (425) 294–1076, e-mail: *dave.nakamura@boeing.com*.

SUPPLEMENTARY INFORMATION: The public meeting will be held at Honeywell International Inc., 21111 N. 19th Ave., Phoenix, AZ.

The purpose of the meeting is for the FAA and PARC members to discuss the activities of the PARC since the FAA Administrator chartered the group in February 2004. The general discussion items include: (1) The PARC Mission and its role; and (2) where the PARC is and where it is going. Specific topics will include the FAA's Roadmap for Performance-based Navigation; Special Aircraft and Aircrew Authorization Required (SAAR) procedures; General Required Navigation Performance (RNP) procedure criteria; Area Navigation (RNAV) approach criteria; Performance-Based Communications; and Human Factors.

Attendance at the Public Meeting

The FAA should receive requests from people who wish to attend the public meeting no later than February 17, 2005. You should submit such requests to Olga Legoshina, Flight Technologies and Procedures Division, as listed in the previous section titled **FOR FURTHER INFORMATION CONTACT**.

Background

The FAA has committed to implementing performance-based airspace operations. Given this commitment, there are significant issues with industry dynamics; new technologies; new aircraft types/capabilities and configurations and current operations; airspace use; airports; infrastructure; economics; and the environment. These complex issues mandate a comprehensive review and possible revision of existing regulatory criteria and guidance materials. Where existing criteria and guidance is inadequate or nonexistent, there will be the requirement to develop and implement new regulatory criteria and the guidance material needed by all stakeholders. The PARC provides a forum for the U.S. aviation community to discuss, prioritize, and resolve issues, provide direction for U.S. flight operations criteria, and produce U.S. consensus positions for global harmonization. The FAA Administrator issued the PARC charter on February 19, 2004. The PARC charter expires February 19, 2006, unless sooner terminated or extended by the Administrator.

Public Meeting Procedures

Persons who plan to attend the meeting should be aware of the following procedures set up for this meeting:

1. There will be no admission fee or other charge to attend or to participate in the public meeting. The meeting will be open to all people who have asked in advance to attend the meeting or who register on the day of the meeting (between 8:30 a.m. and 9:00 a.m.), subject to availability of space in the meeting room.
2. Representatives from the FAA and PARC members will conduct the public meeting.
3. Sign and oral interpretation can be made available at the meeting, as well as an assistive listening device, if requested 10 calendar days before the meeting.

Issued in Washington, DC, on January 24, 2005.

James J. Ballough,

Director, Flight Standards Service.

[FR Doc. 05–1757 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7363]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemption; request for comments.

SUMMARY: This notice publishes the FMCSA decision to renew the exemption from the vision requirement in the Federal Motor Carrier Safety Regulations for Mr. Willie F. Adams. The FMCSA has statutory authority to exempt individuals from vision standards if the exemptions granted will not compromise safety. The agency has concluded that granting this exemption will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemption for this commercial motor vehicle (CMV) driver.

DATES: This decision is effective February 1, 2005. Comments from interested persons should be submitted by March 3, 2005.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FMCSA–2000–7363 by any of the following methods:

- *Web Site: http://dms.dot.gov*. Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Room PL–401, Washington, DC 20590–0001.
- *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.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number for this notice. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to 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 FURTHER INFORMATION CONTACT: Mary D. Gunnels, Office of Bus and Truck Standards and Operations, (202) 366–4001, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 8 a.m. to 5 p.m.,

e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: *Public Participation:* The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help guidelines under the ''help'' section of the DMS Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov*.

Exemption Decision

Under 49 U.S.C. 31315 and 31136(e), the FMCSA may renew an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381. This notice addresses Mr. Willie F. Adams, who has requested renewal of his exemption in a timely manner. The FMCSA has evaluated his application for renewal on its merits and decided to extend the exemption for a renewable two-year period.

This exemption is extended subject to the following conditions: (1) That Mr. Adams have a physical exam every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that Mr. Adams is otherwise physically qualified under 49 CFR 391.41; (2) that Mr. Adams provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that Mr. Adams provide a copy of the annual medical certification to the employer for retention in his driver's qualification file and retain a copy of the certification on his person while driving for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be valid for two years unless rescinded earlier by the FMCSA. The exemption will be rescinded if: (1) Mr. Adams fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e).

Basis for Renewing the Exemption

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two-year periods. In accordance with 49 U.S.C. 31315 and 31136(e), Mr. Adams has satisfied the entry conditions for obtaining an exemption from the vision requirements (65 FR 45817, 65 FR 77066, and 67 FR 71610). He has requested timely renewal of the exemption and has submitted evidence showing that the vision in his better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of his record of safety while driving with his vision deficiency over the past two years indicates he continues to meet the vision exemption standards. These factors provide an adequate basis for predicting his ability to continue to drive safely in interstate commerce. Therefore, the FMCSA concludes that extending the exemption for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Comments

The FMCSA will review comments received at any time concerning Mr. Adams' safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31315 and 31136(e). However, the FMCSA requests that interested parties with specific data concerning his safety record submit comments by March 3, 2005.

In the past the FMCSA has received comments from Advocates for Highway and Auto Safety (Advocates) expressing continued opposition to the FMCSA's procedures for renewing exemptions from the vision requirement in 49 CFR 391.41(b)(10). Specifically, Advocates objects to the agency's extension of the exemptions without any opportunity for public comment prior to the decision to renew, and reliance on a summary statement of evidence to make its decision to extend the exemption of each driver.

The issues raised by Advocates were addressed at length in 69 FR 51346 (August 18, 2004). The FMCSA continues to find its exemption process appropriate to the statutory and regulatory requirements.

Issued on: January 24, 2005.

Pamela M. Pelcovits,

Director, Policy, Plans, and Program Development.

[FR Doc. 05–1755 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Reports, Forms, and Record Keeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** document with a 60-day comment period was published on September 29, 2004 [69 FR 58219].

DATES: Comments must be received on or before March 3, 2005.

FOR FURTHER INFORMATION CONTACT: Carlita Ballard at the National Highway Traffic Safety Administration, Office of Planning and Consumer Standards, (NVS–131), 202–366–0307, 400 Seventh Street, SW., Room 5320, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: 49 CFR Part 542; Procedures for Selecting Lines to be Covered by the Theft Prevention Standard.

OMB Control Number: 2127–0539.

Type of Request: Request for public comment on a previously approved collection of information.

Abstract: The Anti Car Theft Act of 1992 amended the Motor Vehicle Theft Law Enforcement Act of 1984 (P.L. 98–547) and requires this collection of information. One component of the theft prevention legislation required the Secretary of Transportation (delegated to the National Highway Traffic Safety

Administration NHTSA)) to promulgate a theft prevention standard for the designation of high-theft vehicle lines. Provisions delineating the information collection requirements include section 33104, which requires NHTSA to promulgate a rule for the identification of major component parts for vehicles having or expected to have theft rate above the median rate for all new passenger motor vehicles sold in the United States, as well as with major component parts that interchangeable with those having high-theft rates.

The specific lines and parts to be identified are to be selected by agreement between the manufacturer and the agency. If there is a disagreement of the selection, the statute states that the agency shall select such lines and parts, after notice to the manufacturer and an opportunity for written comment.

In a final rule published on April 6, 2004, the Federal Motor Vehicle Theft Prevention Standard was extended to include all passenger cars and multipurpose passenger vehicles with a gross vehicle weight rating of 6,000 pounds or less, and to light duty trucks with major parts that are interchangeable with a majority of the covered major parts of multipurpose passenger vehicles. The final rule becomes effective September 1, 2006.

Affected Public: Business or other for-profit.

Estimated Total Annual Burden: 45 hours.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th street, NW., Washington, DC 20503, Attention: NHTSA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A Comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued in Washington, DC on January 25, 2005.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. 05–1759 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[DOCKET NO. NHTSA 2005–20046; Notice 1]

Bridgestone/Firestone North America Tire, LLC. Receipt of Application for Decision of Inconsequential Noncompliance

Bridgestone/Firestone North America Tire, LLC has determined that approximately 757 size P175/65R14, Bridgestone WS50Z tires do not meet the labeling requirements mandated by Federal Motor Vehicle Safety Standard (FMVSS) No. 109, ''New Pneumatic Tires.''

Pursuant to 49 U.S.C. 30118(d) and 30120(h), Bridgestone/Firestone has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR Part 573, ''Defect and Noncompliance Reports.'' FMVSS No. 109 (S4.3 (e)) requires that each tire shall have permanently molded into or onto both sidewalls the actual number of plies in the sidewall, and the actual number of plies in the tread area if different.

The noncompliance with S4.3 (e) relates to the sidewall markings. Bridgestone/Firestone Nasu, Japan Plant produced approximately 937 tires with incorrect markings during the DOT weeks of 2702, 1203, and 1303. The noncompliant tires were marked: ''2 STEEL & 1 PLY.'' The correct marking required by FMVSS No. 109 is as follows: ''2 STEEL & 1 PLY & 1 NYLON.''

Bridgestone/Firestone stated that the noncompliant tires were actually constructed with more polyester sidewall plies than indicated on the sidewall marking. Therefore, Bridgestone/Firestone believes this noncompliance is particularly unlikely to have an adverse affect on motor vehicle safety and is clearly inconsequential in that regard. The noncompliant tires meet or exceed all performance requirements of FMVSS No. 109 and will have no impact on the operational performance or safety of vehicles on which these tires are mounted.

Interested persons are invited to submit written data, views, and arguments on the application described above. Comments should refer to the docket number and be submitted to: U.S. Department of Transportation, Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. It is requested that two copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date, will also be filed and will be considered to the extent possible. When the application is granted or denied, the notice will be published in the **Federal Register** pursuant to the authority indicated below. Comment closing date: March 3, 2005.

(49 U.S.C. 301118, 301120; delegations of authority at 49 CFR 1.50 and 501.8)

Issued on: January 25, 2005.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. 05–1758 Filed 1–31–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from GATX Rail (WB512–10—12/17/04), for permission to use certain data from the Board's Carload Waybill Samples. A copy of this request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to this request, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

FOR FURTHER INFORMATION CONTACT: Mac Frampton, (202) 565–1541.

Vernon A. Williams,

Secretary.

[FR Doc. 05–1818 Filed 1–31–05; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from The Bookings Institution (WB971—1/5/05), for permission to use certain data from the Board's Carload Waybill Samples. A copy of this request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to this request, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

FOR FURTHER INFORMATION CONTACT: Mac Frampton, (202) 565–1541.

Vernon A. Williams,

Secretary.

[FR Doc. 05–1819 Filed 1–31–05; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–792X]

Railroad Switching Service of Missouri, Inc.—Abandonment Exemption—in St. Louis County, MO

On January 12, 2005, Railroad Switching Service of Missouri, Inc. (RSSM), a Class III rail carrier, filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon its entire line of railroad extending from a point of connection with Norfolk Southern Railway Company (NS) at or near Broad Street (milepost 0) to terminus at the publishing facility of the St. Louis Post-Dispatch (milepost 1.89), a distance of 1.89 miles, in St. Louis, St. Louis County, MO. The line traverses United States Postal Service Zip Code 63101 and includes the station of St. Louis.

The line does not contain federally granted rights-of-way. Any documentation in RSSM's possession will be made available promptly to those requesting it.

In this proceeding, RSSM is proposing to abandon a line that constitutes its entire rail system. When issuing abandonment authority for a railroad line that constitutes the carrier's entire system, the Board does not impose labor protection, except in specifically enumerated circumstances. *See Northampton and Bath R. Co.—Abandonment*, 354 I.C.C. 784, 785–86 (1978) (*Northampton*). Therefore, if the Board grants the petition for exemption, in the absence of a showing that one or more of the exceptions articulated in *Northampton* are present, no labor protective conditions will be imposed.

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by May 2, 2005.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,200 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than February 22, 2005. Each trail use request must be accompanied by a $200 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB–792X and must be sent to: (1) Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001; and (2) Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1890, Chicago, IL 60604–1112.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Services at (202) 565–1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on our Web site at ''*http://www.stb.dot.gov*.''

Decided: January 26, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 05–1817 Filed 1–31–05; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Public Meeting of the President's Advisory Panel on Federal Tax Reform

AGENCY: Department of the Treasury.

ACTION: Notice of meeting.

SUMMARY: This notice advises all interested persons of the initial public meeting of the President's Advisory Panel on Federal Tax Reform.

Background: Executive Order 13369 (January 7, 2005) established the President's Advisory Panel on Federal Tax Reform. The Order provides that the purpose of the Advisory Panel shall be to submit to the Secretary of the Treasury a report with revenue neutral policy options for reforming the Federal Internal Revenue Code. The options should (a) simplify Federal tax laws to reduce the costs and administrative burdens of compliance with such laws; (b) share the burdens and benefits of the Federal tax structure in an appropriately progressive manner while recognizing the importance of homeownership and charity in American society; and (c) promote long-run economic growth and job creation, and better encourage work effort, saving, and investment, so as to strengthen the competitiveness of the United States in the global marketplace. At least one option submitted by the Advisory Panel should use the Federal income tax as the base for its recommended reforms.

Purpose: This is the first meeting of the Advisory Panel. The meeting will include background information presentations concerning the Federal tax system.

Comments: Interested parties are invited to attend the meeting; however, no public comments will be heard at this meeting. The public will be provided additional opportunities to submit comments regarding issues of tax reform at later dates. Any written comments with respect to this meeting must be submitted by mail to The President's Advisory Panel on Federal Tax Reform, 1440 New York Avenue,

NW., Suite 2100, Washington, DC 20220. An electronic address will be provided as soon as it is available. All written comments will be made available to the public.

Records: Records are being kept of Advisory Panel proceedings and will be available at the Internal Revenue Service's FOIA Reading Room at 1111 Constitution Avenue, NW., Room 1621, Washington, DC 20024. The Reading Room is open to the public from 9 a.m. to 4 p.m., Monday through Friday except holidays. The public entrance to the reading room is on Pennsylvania Avenue between 10th and 12th streets. The phone number is (202) 622–5164 (not a toll-free number). Advisory Panel documents, including meeting announcements, agendas, and minutes, will also be available on the Advisory Panel's Web site, which is currently under construction.

DATES: The meeting will be held on Wednesday, February 16, 2005, at 10 a.m.

ADDRESSES: The meeting will be held at the Ronald Reagan Building & International Trade Center Amphitheater, Concourse Level, 1300 Pennsylvania Avenue, NW., Washington, DC 20004. Seating will be available to the public on a first-come, first-served basis.

FOR FURTHER INFORMATION CONTACT: Mark S. Kaizen, Designated Federal Officer, (202) 283–7900 (not a toll-free call).

Dated: January 28, 2005.

Mark S. Kaizen,

Designated Federal Officer.

[FR Doc. 05–1961 Filed 1–31–05; 8:45 am]

BILLING CODE 4810–25–P

Federal Register

Tuesday,
February 1, 2005

Part II

Department of Homeland Security
Office of Personnel Management

5 CFR Chapter XCVII and Part 9701

Department of Homeland Security Human Resources Management System; Final Rule

DEPARTMENT OF HOMELAND SECURITY

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Chapter XCVII and Part 9701

RIN 3206–AK31 and 1601–AA–19

Department of Homeland Security Human Resources Management System

AGENCY: Department of Homeland Security; Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS or the Department) and the Office of Personnel Management (OPM) are issuing final regulations to establish a new human resources management system within DHS, as authorized by the Homeland Security Act of 2002. The affected subsystems include those governing basic pay, classification, performance management, labor relations, adverse actions, and employee appeals. These changes are designed to ensure that the Department's human resources management system aligns with its critical mission requirements without compromising the statutorily protected civil service rights of its employees.

DATES: *Effective Date:* March 3, 2005.

FOR FURTHER INFORMATION CONTACT: At OPM: Ronald P. Sanders, 202–606–9150; at DHS: Kay Frances Dolan, 202–357–8200.

SUPPLEMENTARY INFORMATION:

Table of Abbreviations

AFGE—American Federation of Government Employees
ALJ—Administrative Law Judge
Compensation Committee—Homeland Security Compensation Committee
DHS—Department of Homeland Security
FLRA—Federal Labor Relations Authority
FMCS—Federal Mediation and Conciliation Service
FSIP—Federal Service Impasses Panel
GAO—Government Accountability Office (former General Accounting Office)
GS—General Schedule
HR—Human Resources
HSLRB—Homeland Security Labor Relations Board
MRO—Mandatory Removal Offense
MRP—Mandatory Removal Panel
MSPB—Merit Systems Protection Board
NAAE—National Association of Agriculture Employees
NFFE—National Federation of Federal Employees
NTEU—National Treasury Employees Union
OPM—Office of Personnel Management
SES—Senior Executive Service
SL—Senior Level
SRC—DHS Human Resource Management Senior Review Committee
ST—Scientific or Professional Positions
TSA—Transportation Security Administration

Table of Contents

This supplementary information section is organized as follows:

- Introduction
- The Case for Action
  - Pay and Classification
  - Performance Management
  - Labor-Management Relations
  - Adverse Actions and Appeals
- Summary of the Design Process
- The Meet and Confer Process
- Major Issues
  - Specificity of the Regulations
  - Pay for Performance
  - Management Rights/Scope and Duty to Bargain
  - Adverse Actions and Appeals
  - Mandatory Removal Offenses
- Response to Specific Comments and Detailed Explanation of Regulations
  - Subpart A—General Provisions
  - Section 9701.101—Purpose
  - Section 9701.102—Eligibility and Coverage
  - Summary of Coverage Eligibility Chart
  - Section 9701.103—Definitions
  - Section 9701.105—Continuing Collaboration
  - Section 9701.106—Relationship to Other Provisions
  - Section 9701.107—Program Evaluation
  - Subpart B—Classification
  - General Comments
  - Section 9701.201—Purpose
  - Section 9701.203—Waivers
  - Section 9701.204—Definitions
  - Section 9701.211—Occupational Clusters
  - Section 9701.212—Bands
  - Section 9701.222—Reconsideration of Classification Decisions
  - Section 9701.232—Special Transition Rules for Federal Air Marshal Service
  - Subpart C—Pay and Pay Administration
  - General Comments
  - Section 9701.301—Purpose
  - Section 9701.303—Waivers
  - Section 9701.304—Definitions
  - Section 9701.311—Major Features
  - Section 9701.312—Maximum Rates
  - Section 9701.314—Department of Homeland Security Responsibilities
  - Section 9701.321—Structure of Bands
  - Section 9701.322—Setting and Adjusting Rate Ranges
  - Section 9701.323—Eligibility for Pay Increase Associated with a Rate Range Adjustment
  - Section 9701.331—General
  - Section 9701.332—Locality Rate Supplements
  - Section 9701.333—Special Rate Supplements
  - Section 9701.334—Setting and Adjusting Locality and Special Rate Supplements
  - Section 9701.335—Eligibility for Pay Increase Associated with a Supplement Adjustment
  - Section 9701.342—Performance Pay Increases
  - Section 9701.343—Within Band Reductions
  - Section 9701.344—Special Within Band Increases for Certain Employees
  - Section 9701.345—Developmental Pay Adjustments
  - Section 9701.346—Pay Progression for New Supervisors
  - Section 9701.353—Setting Pay Upon Promotion
  - Section 9701.356—Pay Retention
  - Section 9701.361—Special Skills Payment
  - Section 9701.362—Special Assignment Payments; and 9701.363 Special Staffing Payments
  - Summary of Special Rate Supplements and Special Payments Provisions
  - Section 9701.373—Conversion of Employees to the DHS Pay System
  - Section 9701.374—Special Transition Rules for the Federal Air Marshal Service
  - Subpart D—Performance Management
  - General Comments
  - Section 9701.401—Purpose
  - Section 9701.403—Waivers
  - Section 9701.404—Definitions
  - Section 9701.405—Performance Management Systems
  - Section 9701.406—Setting and Communicating Performance Expectations
  - Section 9701.407—Monitoring Performance
  - Section 9701.408—Developing Performance
  - Section 9701.409—Rating Performance
  - Section 9701.410—Rewarding Performance
  - Section 9701.412—Performance Review Boards
  - Subpart E—Labor-Management Relations
  - General Comments
  - Section 9701.501—Purpose
  - Section 9701.502—Rules of Construction
  - Section 9701.503—Waivers
  - Section 9701.504—Definitions
  - Section 9701.505—Coverage
  - Section 9701.506—Impact on Existing Agreements
  - Section 9701.508—Homeland Security Labor Relations Board
  - Section 9701.509—Powers and Duties of the HSLRB and 9701.510—Powers and Duties of the Federal Relations Authority
  - Section 9701.511—Management Rights
  - Section 9701.512—Obligation to Confer
  - Section 9701.513—Exclusive Recognition of Labor Organizations
  - Section 9701.515—Representation Rights and Duties
  - Section 9701.516—Allotments to Representatives
  - Section 9701.517—Unfair Labor Practices
  - Section 9701.518—Duty to Bargain, Confer, and Consult in Good Faith
  - Section 9701.519—Negotiation Impasses
  - Section 9701.521—Grievance Procedures
  - Section 9701.522—Exceptions to Arbitration Awards
  - Section 9701.527—Savings Provision
  - Subpart F—Adverse Actions
  - General Comments
  - Section 9701.601—Purpose
  - Section 9701.602—Waivers
  - Section 9701.603—Definitions
  - Section 9701.604—Coverage
  - Section 9701.605—Standard for Action
  - Section 9701.606—Mandatory Removal Offenses

Section 9701.608—Departmental Record
Section 9701.609—Suspension and Removal
Section 9701.614—Savings Provision
Subpart G—Appeals
Section 9701.701—Purpose
Section 9701.702—Waivers
Section 9701.704—Coverage
Section 9701.705—Alternative Dispute Resolution
Section 9701.706—MSPB Appellate Procedures
Section 9701.707—Appeals of Mandatory Removal Action
Section 9701.709—Savings Provision
• Next Steps
• Moving Forward
• Regulatory Requirements
E.O. 12866—Regulatory Review
Regulatory Flexibility Act
E.O. 12988—Civil Justice Reform
E.O. 13132—Federalism

Introduction

The Secretary of Homeland Security, Tom Ridge, and the Director of the Office of Personnel Management, Kay Coles James, jointly prescribe this final regulation to establish a flexible and contemporary system for managing the Department's human resources (HR). This system has been developed pursuant to a process based on principles articulated by OPM and affirmed by DHS that called for extensive and continuing collaboration with employees and employee representatives. In addition, DHS and OPM have engaged in unprecedented outreach to the public as well as to the Congress and other key stakeholders. As provided by Public Law 107–296 (the Homeland Security Act, signed into law by President George W. Bush on November 25, 2002), the system preserves all core civil service protections, including merit system principles, veterans' preference, and due process. It also protects against discrimination, retaliation against whistleblowers, and other prohibited personnel practices, and ensures that employees may organize and bargain collectively (when not otherwise prohibited by law, including these regulations, applicable Executive orders, and any other legal authority).

This Supplementary Information addresses the following areas:

- The Case for Action
- Summary of the Design Process
- The Meet-and-Confer Process
- Major Issues
- Response to Specific Comments and Detailed Explanation of Regulations
- Next Steps
- Moving Forward

The Case for Action

Since September 11, 2001, this Nation has come together with a unity of purpose that has not been seen or felt since the attack at Pearl Harbor in 1941. Out of that national tragedy emerged a consensus for a comprehensive global war on terrorism. That consensus resulted in the enactment of legislation creating the Department of Homeland Security, and with it, the authority to create a system for managing its human resources that would be flexible and mission-focused without compromising the principles of merit and fitness. Indeed, the Department's mission is to ''lead the *unified* national effort to secure America'' (emphasis added), and its new HR system is aimed at that same result. In order for the Department to sustain that unity of effort, its HR system must also provide for the meaningful participation of employees in its creation, and they must be treated with dignity and respect in its implementation.

These final regulations represent a major step in that historic transformation. They establish a new HR system for the Department of Homeland Security (DHS) that assures its ability to attract, retain, and reward a workforce that is able to meet the critical mission entrusted to it by the American people. As provided by the regulations published here, that system must and does provide for greater flexibility and accountability in the way employees are paid, developed, evaluated, afforded due process, and represented by labor organizations. These regulations respond to comments on a notice of proposed rulemaking published in the **Federal Register** of February 20, 2004 (69 FR 8030). The next step, following the publication of these enabling regulations, is to implement this new system, in continuing collaboration with employee representatives.

The mission of the Department demands that employees and supervisors work together as never before. Managers, supervisors, and employees of the Department must be unified in both purpose and effort if they are to accomplish that mission. And perhaps the most important way to bring about that unity is through an integrated HR system for the Department—a system that assures maximum flexibility and accountability. That system must value, reward, and reinforce high performance, teamwork, commitment to learning and excellence, and selfless service. It must also facilitate communication and collaboration at all levels of the Department. The Secretary and the Director are committed to ensuring that these goals are met.

The mission statement of the Department goes on to state that ''[w]e will prevent and deter terrorist attacks and protect against and respond to threats and hazards to the nation. We will ensure safe and secure borders, welcome lawful immigrants and visitors, and promote the free-flow of commerce.'' No Federal agency has ever had a mission that is so broad, complex, dynamic, and vital. That mission demands unprecedented organizational agility to stay ahead of determined, dangerous, and sophisticated adversaries. The importance of the Department's HR system to achieving that goal has been underscored by the President and the Congress. In signing the Homeland Security Act into law, President Bush emphasized the Department's critical need to ''put the right people in the right place at the right time in the defense of our country'' while ensuring that the rights of the Department's employees ''[a]s federal workers * * * will be fully protected * * *.'' Senator Susan Collins, Chairman of the Senate Committee on Governmental Affairs, said, ''[w]e need to grant the new Secretary appropriate but not unlimited authority to create a flexible, unified new personnel system that meets the Department's unique demands.''

This was the fundamental challenge faced by Secretary Ridge and Director James in designing this new system—to strike a balance between mission-essential flexibility and protection of core civil service principles. Summarized here and discussed at length in the pages that follow are the changes that we believe strike that balance. Many of those changes are significant, and we have highlighted them in the following pages. We believe they respond to the fundamental concerns of the American public, as well as our employees. Where there is a substantial departure from the status quo in this final plan, it is in furtherance of the Department's statutory mission, with the attendant need for a significant investment in communication and understanding on the part of all parties in order to successfully implement those changes.

Pay and Classification. One of the most fundamental changes in the regulations is the creation of a pay-for-performance system for Department employees that will replace the General Schedule. Under this new system, pay increases will be based solely on performance—not time in grade. It also provides for the establishment of a series of occupational clusters and bands in place of the current General Schedule grades and authorizes DHS to

set and adjust the minimum and maximum rates of pay for each band associated with a cluster. In addition, the system establishes locality rate supplements to address local market conditions, as well as special rate supplements to address special recruitment or retention needs. Only those DHS employees whose performance meets or exceeds expectations will be eligible for a performance- and/or market-based pay increase.

Performance Management. The new performance management system for DHS will complement and support the Department's new pay and classification system by ensuring greater accountability for individual performance expectations and organizational results. The regulations simplify performance management, removing many administrative burdens associated with the current system. For example, ''performance expectations'' need no longer be in writing and may take the form of individual, team, and/or work unit goals or objectives, as well as such things as standard operating procedures or manuals, internal rules and directives, and other generally available instructions applicable to an employee's job. However, performance expectations, including those that may affect the employee's retention, must still be communicated to the employee prior to holding the employee accountable for them.

Labor-Management Relations. To ensure that the Department has the flexibility to carry out its vital mission, the regulations, among other things, revise management's rights and its duty to bargain to ensure that the Department can act as and when necessary. Such critical matters as work assignments and deployments are no longer subject to collective bargaining. However, exclusive representatives will still be able to negotiate over significant and substantial changes, as well as appropriate arrangements for employees adversely affected by those changes, under certain specified conditions. Additionally, the regulations create the Homeland Security Labor Relations Board (HSLRB) to address those issues that are most important to accomplishing the DHS mission, with other matters retained by the Federal Labor Relations Authority (FLRA). The revisions strike the right balance between the mission needs of DHS and the meaningful involvement of employees and their representatives.

Adverse Actions and Appeals. Consistent with the Homeland Security Act, the regulations streamline and simplify adverse action and appeals procedures, but without compromising due process for DHS employees. Employees will still receive notice of a proposed adverse action, the right to reply, and the right to appeal to the Merit Systems Protection Board (MSPB). We have also revised the proposed regulations to raise the burden of proof in adverse actions from ''substantial'' to ''preponderance,'' and to permit arbitration of adverse actions as an option for bargaining unit employees. In addition, the regulations now allow MSPB (and arbitrators) to mitigate penalties, but only under certain specified conditions. The final regulations also retain authority for the Secretary to establish a number of mandatory removal offenses (MROs) that have a direct and substantial effect on homeland security and an independent Panel (selected from a list that will include nominees from DHS exclusive representatives and other sources) to hear MRO appeals.

Summary of the Design Process

As the Congress made clear, ''collaborative effort will help secure our homeland.'' DHS and OPM have been committed to a collaborative approach from the beginning. The General Accounting (now Government Accountability) Office (GAO) recognized this in a report last year, stating that ''DHS's and OPM's efforts to design a new human capital system are collaborative and facilitate participation of employees from all levels of the department.'' In a follow-up report issued in June 2004, GAO observed that ''to date, DHS's actions in designing its human capital management system and its stated plans for future work on the system are positioning the department for successful implementation.'' Those actions included an extensive process of deliberation, discussion, and collaboration with employees, representatives of labor organizations, supervisors, managers, and other stakeholders in order to identify ideas and concerns.

This collaborative process was rooted in conversations Director James held with employee representatives even prior to the passage of the Homeland Security Act to propose a fair and principled process for the design of the HR system. The process itself actually began in April 2003, when the Secretary and the Director established a DHS/OPM Design Team composed of Department managers and employees, HR experts from DHS and OPM, and professional staff from the Department's three largest labor organizations: The American Federation of Government Employees, the National Treasury Employees Union, and the National Association of Agriculture Employees.

The 48 members of the Design Team conducted significant research in the areas of pay, performance, classification, labor relations, adverse actions, and appeals reform. The team gathered data from public and private sector organizations; examined and evaluated successful and promising human capital practices; interviewed leading human resources experts, DHS employees and managers; and consulted a Field Team of employees and managers who provided a front-line perspective. Together, as a team, DHS and OPM also held dozens of focus groups, including visits to Norfolk, Atlanta, Detroit, New York, Miami, El Paso, Los Angeles, Seattle, Baltimore, and Washington, DC. Thus, DHS and OPM heard the concerns of thousands of the Department's employees.

The Design Team developed 52 options for the various elements of the Department's HR system. These were presented to a DHS Human Resource Management Senior Review Committee (SRC) on October 20–23, 2003. The SRC, co-chaired by senior DHS and OPM officials, included the presidents of the Department's three largest labor organizations, as well as the heads of some of its largest and most critical line operations. In addition, five non-Federal experts in public administration were designated as technical advisors to the SRC. During the course of two public meetings, the SRC reviewed the various Design Team options, and thereafter its members reported their views to the Secretary and the Director for consideration. In reaching final decisions regarding the new HR system, the Secretary and the Director relied on the SRC's advice and counsel, as well as the public comments received during the SRC proceedings and the wealth of material developed through the Design Team's research.

These extensive and collaborative design efforts all preceded the formal process for developing the new HR system, and went far beyond that required by the Congress in the Homeland Security Act. The Act established a formal process in this regard, officially beginning when the Secretary and the Director published proposed regulations to establish the new DHS HR system in the **Federal Register** on February 20, 2004. That first formal step provided a 30-day period for the public, employees, and employee representatives to review and submit formal comments on the proposed system. More than 3,800 public comments were received and analyzed by DHS and OPM staff. At the specific

request of the Secretary and the Director, the formal comments of labor organizations were given particular attention and consideration. Commenting jointly, the three largest labor organizations rejected the proposed regulations in their entirety. Public, employee, and labor organization comments are summarized in detail in a subsequent section of this Supplementary Information.

The Meet-and-Confer Process

The public comment period was followed by the second step in the formal development process—an additional 30-day period during which representatives of the Department and its major employee organizations were to ''meet and confer'' in order to resolve differences over the proposed regulations wherever possible. That meet-and-confer process began officially on June 14, 2004. On that date, the Secretary and the Director notified Congress in writing that they had not accepted the labor organizations' recommendation to reject the proposed regulations in their entirety. This notification was required by the Homeland Security Act of 2002 (5 U.S.C. 9701(e)(1)(B)(i)). Even before the meet-and-confer process began, however—and in keeping with our determination to work collaboratively with DHS employee representatives—staff from DHS and OPM met informally for several days with representatives of the three largest labor organizations representing DHS employees to discuss the proposed regulations. Our discussions helped us better understand each other's positions and led to several clarifications regarding the proposed regulations.

As authorized by 5 U.S.C. 9701(e)(1)(B)(iii), and in order to facilitate the meet-and-confer process, the Secretary and the Director issued procedures governing the conduct of this process. The procedures provided for five employee organizations to participate in the meet-and-confer process, including one management association; however, the management association declined to participate. The Secretary, in consultation with the Director, also requested the services of the Federal Mediation and Conciliation Service. Under those procedures, officials of the Department and OPM met with employee representatives from June 14 through August 6, 2004, a period well in excess of the statutory requirement. (Including informal sessions that preceded the meet-and-confer process, DHS, OPM, and labor organization representatives met for a total of more than 36 days—this, of course, is in addition to the 6 months that DHS and OPM representatives spent with employee representatives, full-time, during the HR system design process.) The following principals participated in the actual meet-and-confer process:

- One representative from each of the four largest DHS labor organizations: the American Federation of Government Employees (AFGE), the National Treasury Employees Union (NTEU), the National Association of Agriculture Employees (NAAE), and the National Federation of Federal Employees (NFFE);
- Four representatives from DHS, including the Chief Human Capital Officer, an executive from his staff, and two senior line managers from DHS operational components; and
- Two senior executives from the Office of Personnel Management (OPM).

Finally, at the conclusion of the meet-and-confer process, the Secretary and the Director met with the national presidents of the Department's two largest labor organizations (AFGE and NTEU) on September 10, 2004, to provide them with an opportunity to present their issues and concerns directly to the principals. Their presentation led to further revisions to these regulations as described in this **SUPPLEMENTARY INFORMATION**.

As discussed and described in great detail in subsequent sections of this Supplementary Information, we have made substantial revisions to the proposed regulations in response to the many recommendations made by employees, labor organizations, and others during the public comment period. In addition, we listened to the concerns of the employee representatives and adopted many of the proposals made by labor organization representatives during the extensive meet-and-confer process. A careful comparison of the final regulations to those proposed several months ago will show that we have kept our commitment to an open, inclusive, and participatory process that respected and accommodated employee and labor organization perspectives and concerns.

These extensive revisions notwithstanding, substantial disagreements remain over such fundamental issues as performance vs. tenure as a basis for individual pay increases, and the scope and duty to bargain vs. operational flexibility in the assignment and deployment of front-line personnel. These disagreements were underscored during the meet-and-confer process, and despite the exhaustive, good faith efforts by labor organization and management representatives during that process, the parties were simply not able to resolve them. In point of fact, these issues reach to the core of a flexible, contemporary HR system for the Department, and they represent the sort of transformational change envisioned by the Congress and the President when the Homeland Security Act was enacted into law. And because they are so fundamental, no one should be alarmed by these disagreements, take them as a sign of bad faith on the part of any party, or view them as an indication that the meet-and-confer process failed. Reasonable and honorable people may disagree, especially over such issues as these, but we believe the extensive involvement of employees and employee representatives over the course of the last 18 months added tremendous value—and that the process worked.

While the regulatory process precluded us from agreeing on final regulatory language during the meet-and-confer process, we believe we did reach agreement with the participating labor organizations on numerous substantive issues. Because we could not ''sign off'' on these agreements, as we would in a traditional collective bargaining process, we have tried to exercise caution in characterizing the results. We believe this understates the extent of the conceptual agreements and understandings reached during the process, which we have tried to reflect in the Supplementary Information section of this notice. Thus, where we make the statement ''we agreed'' in the text of this Supplementary Information, we are referring to agreements reached by OPM and DHS in the regulatory process, rather than to agreements reached between management and labor organization representatives during the meet-and-confer process.

Major Issues

Our analysis of the more than 3,800 comments received during the public comment period, as well as the many issues extensively discussed during the subsequent meet-and-confer process, revealed a set of major issues that elicited the most (or most substantive) comments, especially from key stakeholders. They are (1) specificity of the regulations, (2) pay for performance, (3) management rights/scope and duty to bargain, (4) adverse actions and appeals, and (5) mandatory removal offenses. Because these issues are critical to understanding the objectives of the Department's new HR system, we have given them particular attention in the following pages.

1. Specificity of the Regulations

One of the most significant issues raised by employees, labor organizations, and some Members of Congress had to do with the basic structure of the regulations. As jointly prescribed by DHS and OPM, parts of the final regulations establish broad policy parameters for the Department's HR system but leave many of the details of that system to DHS implementing directives. Many of the commenters, especially labor organizations, expressed concern about this fact, arguing that the proposed regulations lacked sufficient detail, and they recommended that the regulations include far greater specificity.

These comments and concerns focused almost exclusively on three of the subparts in the proposed regulations—those dealing with classification, pay, and performance management (subparts B, C, and D, respectively). Those subparts were (and remain) relatively general in nature, and they expressly provide for the Department to develop and issue directives implementing their precepts subsequent to the promulgation of these regulations. In contrast, the subparts dealing with labor relations, adverse actions, and appeals (subparts E, F, and G, respectively) are quite detailed, requiring little in the way of implementing directives.

In response to these comments, and as a result of the meet-and-confer process, we have added greater detail to the subparts at issue—particularly subpart C. However, even with added detail, all three of the subparts at issue retain their original structure in the final regulations, establishing a general policy framework to be supplemented by detailed Departmental implementing directives. Comments notwithstanding, we believe that this is the appropriate approach. In these final regulations which have the full force and effect of law, we have intentionally adopted a structure that mirrors the very statutes that they replace. Moreover, this structure provides the Department the flexibility it requires in implementing an HR system of this scope and complexity.

In this regard, the provisions of title 5, U.S. Code, governing classification, pay, and performance management establish general policies and authorities, with the details left to OPM to regulate. For example, 5 U.S.C. chapter 51 establishes the General Schedule (GS) classification system but leaves to OPM the definition of occupational series and families and the development and promulgation of detailed job grading standards and qualification requirements—presently encompassing hundreds of detailed classification standards and qualifications requirements (note that those standards and requirements are not subject to public notice and comment under the Administrative Procedure Act). Subpart B of these regulations, which now replaces 5 U.S.C. chapter 51, follows suit, establishing the basic ''architecture'' of the Department's job classification system—that is, its core elements and parameters—but it leaves the specific definition of occupational clusters and bands and the development of job grading standards to Departmental implementing directives (all subject to OPM review and coordination). Chapters 53 and 43 of title 5, U.S. Code, follow the same pattern and so too do the subparts that replace them—subparts C and D, respectively.

While commenters did not express concern about the structure of subparts E, F, and G, dealing with labor relations, adverse actions, and appeals, respectively, they too reflect their statutory underpinnings. Like their ''legacy'' chapters in title 5 (chapters 71, 75, and 77, respectively), they are extremely detailed and, except for procedures for the operation of the two adjudicating bodies that they establish, they require little in the way of implementing directives.

While the final regulations retain their basic structure as originally proposed, we have added detail in subparts B, C, and D as a result of public comment and the meet-and-confer process. These additions are documented at length in our responses to the detailed comments that follow. However, some of them are worth highlighting. For example, in subpart C, we have included specific policies governing pay adjustments upon promotion from a lower pay band to a higher one; pay progression for employees in entry/developmental pay bands; limits on reductions in basic pay for performance or conduct reasons; pay adjustments for employees on pay retention; and the impact of an ''unacceptable'' performance rating on an individual's pay. Similarly, subpart D now includes additional detail regarding requirements for setting and communicating performance expectations (especially those that may affect an employee's retention) and policies dealing with rating and rewarding performance.

According to labor organization feedback during the final stages of the meet-and-confer process, these additions still fall short of the detail they recommend. Labor organization comments in this regard focus primarily on process, asserting that by including greater detail in the proposed regulations, they would have been given an opportunity to participate and provide input to the final regulations via the statutory meet-and-confer process set forth in 5 U.S.C. 9701(e). Among other things, that statutory process requires the Department and OPM to provide employee organizations with an opportunity to comment on proposed regulations and thereafter, meet with DHS and OPM officials (under the auspices of the Federal Mediation and Conciliation Service, if necessary) in an attempt to resolve any concerns and disagreements. As the labor organizations and other commenters have correctly pointed out, the proposed regulations did not provide for an analogous opportunity with respect to the issuance of implementing directives. This became a major topic of discussion during the meet-and-confer process, with labor organizations insisting that DHS and OPM either include all implementing details in these final regulations, or subject Department implementing directives to collective bargaining.

We did not adopt either alternative. Including such detail in these regulations would be inconsistent with the ''legacy'' statutes that they replace and contrary to our best judgment—based on years of experience administering those statutes. Moreover, such detail would result in untenable rigidity in a Department whose mission requires just the opposite. In authorizing these regulations, Congress mandated that we develop a human resources system that is ''flexible'' (*see* 5 U.S.C. 9701(b)(1)); indeed, of all of the various objectives set by Congress for this system in the Homeland Security Act, flexibility was the very first it enumerated, and unnecessary and excessive detail in subparts B, C, and D would undermine that objective.

Collective bargaining is also inappropriate for the development of implementing directives. First, Congress could have provided for collective bargaining to develop directives, but did not. Instead, it expressly provided for a meet-and-confer process as a way of providing for labor organization involvement, and there is no evidence whatsoever that it intended that Departmental implementing directives be collectively bargained; rather, Congress clearly provided for ''continuing collaboration'' (but implicitly, not collective bargaining or ''meet and confer'') in this regard. Moreover, we note that no labor organization enjoys exclusive

recognition at the Department level—indeed, labor organizations represent fewer than 40 percent of the Department's eligible civilian workforce; granting labor organizations the right to collectively bargain implementing directives that cover all of the Department's employees would be inappropriate.

However, from the beginning DHS and OPM have recognized the value of involving employees and their representatives in the design of this system and included this as one of our guiding principles. Moreover, as noted previously, 5 U.S.C. 9701(e)(1)(D) requires the Department and OPM to provide a means for ensuring ''continuing collaboration'' with employee representatives in implementing these regulations. In keeping with those objectives, we have included a ''continuing collaboration'' process at § 9701.105. This is consistent with the statutory provision which states that the Secretary and Director ''shall * * * develop a method for each employee representative to participate in any further planning or development (of the personnel system) which might become necessary.'' The new section now assures employee representative involvement in the development of the Department's implementing directives. Named after the section in the law that requires it, this section provides employee representatives with an opportunity to discuss their views and concerns on implementation and design concepts with DHS officials and/or to review and provide written comments on proposed final draft implementing directives in advance.

In summary, three of the subparts in these final regulations remain relatively general in nature, providing broad policy parameters but leaving much of the details to implementing directives, while three others are specific. We believe that this structure, patterned after the chapters in title 5 that they replace, is appropriate. By providing for detailed implementing directives, the subparts dealing with classification, pay, and performance management provide the Department with the flexibility mandated by Congress, and they do so without compromising the Department's commitment to substantive employee representative involvement in the development of those directives.

2. Pay for Performance

The pay system we described in the proposed regulations was designed to fundamentally change the way we pay employees in the Department of Homeland Security. Instead of a pay system based primarily on tenure and time-in-grade, we proposed a system that bases all individual pay increases on performance. This proposal honors major points that were debated by the Congress and agreed upon with the passage of the Homeland Security Act. In addition, the proposed pay system would be far more market-sensitive than the current pay system. The proposed changes relating to classification, pay, and performance management were designed to achieve these two primary goals.

A number of commenters agreed with the proposal to create a more occupation-specific and market- and performance-based classification and pay system. However, most commenters strongly recommended that we maintain the *status quo*; that is, that DHS continue to rely on the General Schedule (GS) classification and pay system. Many commenters thought that the proposed pay-for-performance system would lower employee morale, increase competition among employees, and undermine teamwork and cooperation. Some also questioned the ability of the Department to successfully implement the proposed system, or of DHS managers to establish and apply performance standards fairly and consistently to pay decisions.

We have retained the system described in the proposed regulations. We believe Congress and the American people expect their public employees to be paid according to how well they perform, rather than how long they have been on the job. They also expect the Department to do everything it can to recruit and retain the most talented individuals it can find to carry out its critical mission. These expectations are difficult, if not impossible, to achieve under the current system. The General Schedule does not provide the opportunity to appropriately reward top performers or to pay them according to their true value in the labor market. Under the General Schedule, performance is rewarded as an exception rather than the rule, and market is defined as ''one size fits all.''

The GS pay system is primarily a longevity-based system—that is, pay increases are linked primarily to the passage of time. While time-in-grade determines eligibility for a GS step increase, it is true that a finding that the employee is performing at an acceptable level of competence is also required. However, this minimal requirement is met by roughly 99 percent of all GS employees. Thus, at any given grade level, the vast majority of employees can expect to automatically receive base pay increases of up to 30 percent over time—in addition to the annual across-the-board pay increases—so long as their performance is ''acceptable.'' Even employees whose performance is unacceptable receive annual across-the-board pay increases that range from 3 to 5 percent, and special rates that are even higher. Over time, even minimally productive employees will progress steadily to the top of the GS pay range, and may end up being paid significantly more than higher performing employees with less time in grade. Such a system cannot be fairly characterized as providing performance-based pay.

The DHS pay-for-performance system, by contrast, is designed to recognize and reward performance in two key ways. First, it establishes the fundamental principle that no employee may receive a base pay or locality rate increase if his or her performance does not at least meet expectations. Unlike the GS system, employees rated unacceptable will not get an annual adjustment. Second, the DHS system provides for individual base pay increases based on an employee's performance, whether by demonstrating requisite competencies at the entry/developmental level or by meeting or exceeding stringent performance expectations at the full performance level. Unlike the GS system, tenure and time-in-grade have no bearing. An employee will progress through the pay range based solely on how well he or she performs.

This concept may be simply summarized: The higher the performance, the higher the pay. This, too, is a fundamental principle of the new system, and we choose the order of these words deliberately. This system does not assume that individuals are motivated by pay, but rather that we have an obligation as an employer to reward the highest performers with additional compensation—however they may be motivated to achieve excellence. The Department has a special responsibility in this regard. Thus, the system we have designed is not a ''performance-for-pay'' system, but a ''pay-for-performance'' system. Nevertheless, we believe it will inspire DHS employees to perform at their best. This is in contrast to the GS system, where it is possible for a high-performing employee to be paid the same, or even less, than a lower performing co-worker.

The 50-plus-year-old GS pay system also is not sufficiently market-sensitive, potentially under-valuing the talents of the Department's most critical employees. Under the GS pay system, all employees in a given geographic location receive the same annual pay adjustment without regard to their

occupation or the level of duties and responsibilities they are expected to perform. This one-size-fits-all approach treats all occupations alike, across the board as well as in particular locations, regardless of market value and competition. Thus, we inevitably end up underpaying employees in some occupations and overpaying others. Even within an occupation, the rigidities of the General Schedule sometimes force us to underpay employees at the entry/developmental grades, with recruiting difficulties and high attrition the result.

The new DHS pay system is designed to be much more market-sensitive. First, it allows DHS, after coordination with OPM, to define occupational clusters and levels of work within each cluster that are tailored to the Department's missions and components. Second, it gives DHS considerable discretion, after coordination with OPM, to set and adjust the minimum and maximum rates of pay for each of those occupational clusters or bands, based on national and local labor market factors and other conditions. Instead of ''one size fits all'' pay rates and adjustments, the system allows DHS to customize those adjustments and optimize valuable but limited resources. This kind of flexibility, which is lacking under the GS pay system, will enable DHS to allocate payroll dollars to the occupations and locations where they are most needed to carry out the Department's mission of protecting the homeland.

Thus, the goals and principles of the new system are sound, and we have confidence that the Department has the capability to effectively execute them. Pay-for-performance systems like that proposed for DHS are not new. Paybanding has been around in the Federal Government since 1980, and the Federal Government has substantial experience in implementing performance-based pay systems (e.g., in demonstration projects). Research shows that employees' attitudes toward such systems change over time, as they gain experience with them. For example, employee support for the *circa* 1980 ''China Lake'' broadbanding/pay-for-performance demonstration project was only 29 percent before the project began, reached 51 percent by 1985, and was 69 percent by 1988. Employee support was 70 percent when Congress made the project permanent in 1994. Today, thousands of Federal employees already are covered by successful performance-based pay systems.

The system we have devised is also consistent with the findings and recommendations of the National Academy of Public Administration in its May 2004 Report, ''Recommending Performance-Based Federal Pay'': ''The basis for managing individual salary increases should be pay-for-performance. This recommendation has been a constant theme in discussions for more than two decades and the principle in every demonstration project that tested new pay policies. The evidence from the projects confirms that pay-for-performance can be successful in federal agencies. The switch to a pay-for-performance policy should be managed as an organizational change because it will alter each agency's culture and contribute to improved performance.'' Thus, this is not a journey into uncharted waters.

We respect the concerns of employees and agree that it is essential to communicate with employees regarding the changes that DHS is making. Experience has shown that one of the best ways to deal with the concerns associated with change is to involve employees and their representatives in the process. As stated in the Preamble to the proposed regulations, DHS is committed to a high degree of employee involvement in developing the details of the new classification, pay, and performance management system, and by its actions to date, it has lived up to that commitment.

The need for employee involvement, however, will not cease with the publication of these regulations. That is why the final regulations provide for the continuing involvement of employee representatives in the development of the detailed directives that will implement this system and in the evaluation of the system. (See §§ 9701.105 and 9701.107.) That is also why the final regulations provide for the establishment of a new Homeland Security Compensation Committee (Compensation Committee) that will involve representatives from the major DHS labor organizations in addressing strategic compensation matters, such as Departmental compensation policies and principles. The Compensation Committee will consider factors such as turnover, recruitment, and local labor market conditions in providing options and recommendations for consideration by the Secretary. (See § 9701.313.) This involvement will enhance the credibility and acceptance of the system.

The new pay system will require numerous decisions to be made on an annual basis, and the Compensation Committee will play a key role. For example, DHS must determine how available budgetary resources should be allocated between market-based adjustments—such as rate range adjustments and adjustments in locality and special rate supplements—and performance pay increases. DHS must determine the overall amount that will be authorized for rate range adjustments in response to changes in the national labor market for specific occupational clusters and bands and the amounts that will be authorized for more targeted market-based adjustments in specific locality pay areas. The Compensation Committee will provide options and/or recommendations for consideration by the Secretary, who will make final decisions.

The Compensation Committee will include a total of 14 members, with 4 ''seats'' reserved for DHS labor organizations granted national consultation rights. OPM will also serve as an *ex officio* member. It will be chaired by DHS's Undersecretary for Management, who will select a facilitator from a list of nominees developed jointly by representatives of the Department and the labor organizations. In addition to making recommendations to the Secretary on strategic compensation matters, the Compensation Committee also will review summary data regarding annual performance payouts authorized under the new system (§ 9701.342). The Compensation Committee is modeled after the Federal Salary Council, which advises the President's Pay Agent (the Secretary of Labor and the Directors of the Office of Management and Budget and the Office of Personnel Management) on the ongoing administration of the locality pay program for GS employees. It is designed to give DHS employees, through the labor organizations that represent them, a real voice in the ongoing administration of the DHS pay-for-performance system.

In summary, we believe the Department's pay-for-performance system is an imperative, essential to DHS's ability to attract, retain, and reward a workforce that is able to meet the high expectations set for it by the American people—the security of our homeland. Its successful implementation is well within the capability of the Department's leadership.

3. Management Rights/Scope and Duty To Bargain

The ability to act quickly is central to the Department's mission—not just in emergency situations but, more importantly, in order to prepare for or prevent emergencies. This principle was critical to President Bush and the Congress throughout the formation of

the legislation and the congressional debate that followed its introduction. This ability to act quickly is necessary even in meeting day-to-day operational demands. The Department must be able to assign and deploy employees, and to introduce the latest security technologies without delay. Congress clearly stated that the Department's HR system must provide the flexibility DHS needs to respond to a variety of vital operational challenges and to carry out its wide-ranging mission.

To achieve this mandate, the proposed regulations revised the management rights and duty to bargain provisions found in 5 U.S.C. chapter 71. We expanded the list of management rights that are prohibited from negotiation to include numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty; and the technology, methods, and means of performing work—those rights that deal directly with the Department's homeland security operations. We also excluded from mandatory negotiations the procedures that the Department would follow in exercising these expanded management rights. And we proposed changes to allow the Department to take action in any of these areas without advance notice to labor organizations and without pre-implementation bargaining.

Without exception, comments received from labor organizations objected to the proposed regulations, arguing that altering the scope of bargaining in any way was contrary to the Homeland Security Act. Further, labor organizations asserted that these changes were not necessary, and that current law already provided the Department with sufficient flexibility to deal with emergencies. Labor organizations did acknowledge the Department's need to take certain actions without pre-implementation bargaining, and during the meet-and-confer process, they proposed a process for accelerated post-implementation bargaining and third-party impasse resolution. Additionally, their proposal would have allowed the Department to temporarily suspend procedural provisions of collective bargaining agreements in situations where there is a direct or substantive connection to protecting homeland security. However, even under those stringent conditions, they insisted that employees automatically be ''made whole'' for any adverse consequences stemming from the suspension, as if management had violated the agreement.

We recognize the good faith effort made by these labor organizations to meet the Department's operational needs. However, their proposals were fundamentally flawed in several respects. We have, therefore, retained the management rights/scope of bargaining provisions in the proposed regulations with some modifications.

With respect to procedures, the proposals offered by the labor organizations do not go far enough. They would still require the Department to bargain, as a mandatory matter, over the procedures it would be required to follow in exercising management rights, especially those that deal directly with its operations. Those procedures can and do constrain such critical actions as the assignment of work, the deployment of personnel, and the staffing of tours of duty. These procedures are negotiable under 5 U.S.C. chapter 71. Labor organizations would have the Department continue that obligation, but with an ''escape clause'' that would allow the Department to suspend those procedures and act under exceptional circumstances.

This is too high a bar. In today's operational environment, the exceptional has become the rule. During the meet-and-confer process, we provided numerous and frequently alarming examples where such negotiated procedures have hindered day-to-day operations—for example, in redeploying personnel from a seaport to an airport to meet an unexpected operational need, port directors today must draw from a pre-established pool of volunteers even if in so doing they would under-staff other critical line functions. Department managers, supervisors, and employees are on the frontlines of the war on terrorism and the efforts to preserve homeland security. The Department must be able to rely on the judgment and ability of these managers and supervisors to make day-to-day decisions—even if this means deviating from established or negotiated procedures. The reality in the Department today is that such deviations would be constant, thereby rendering any negotiated procedures meaningless. Moreover, the Department's managers and supervisors must be able to make split-second decisions to deal with operational realities free of arbitrarily imposed standards.

With respect to post-implementation bargaining, the proposals offered by labor organizations are similarly flawed. While they would allow for management to implement without bargaining in advance over impact and appropriate arrangements for employees adversely affected by the exercise of a management right, they would still require immediate post-implementation negotiations and third-party impasse resolution over such matters. However, the reality of DHS's operational environment today is that change is constant, and as a consequence, so too would be post-implementation negotiations, with the prospect of continuous third-party involvement. These negotiations would be required even in cases where the change has come and gone and/or where its impact was insignificant or insubstantial. The demand on DHS's frontline managers and supervisors to engage in constant post-implementation negotiations would divert them, and other critical resources, from accomplishing the mission. This is unacceptable and inconsistent with the vision for the Department.

Further, under 5 U.S.C. chapter 71, negotiated agreements over appropriate arrangements are binding, under the assumption that those agreements have anticipated future changes. Once again, today's operational environment belies that assumption. Not only are changes necessitated by operational demands constant, but they are also of almost infinite variety. Our frontline managers and supervisors must not be bound by past agreements when they must face current and future exigencies.

Nevertheless, in recognition of the concerns articulated by the participating labor organizations and other commenters, and as a result of the September 10 meeting with the national presidents of AFGE and NTEU, the Secretary and the Director directed that the proposed regulations be revised to ensure the involvement of labor organizations in such matters. First, the regulations provide for management, at the level of recognition, (1) to confer with an appropriate exclusive representative to consider its views and recommendations with regard to procedures that managers and supervisors will follow in the exercise of those management rights that deal directly with operational matters; (2) to meet for up to 30 days in an attempt to reach agreement on such procedures, with the possibility of extensions and third-party assistance; and (3) to deviate from those procedures as necessary. We believe this strikes the right balance between the Department's need for maximum flexibility and speed and the value of labor organization involvement.

Second, as a result of the September 10 meeting with the national presidents of AFGE and NTEU, the Secretary and the Director also directed that the proposed regulations be revised to require post-implementation negotiations over impact and

appropriate arrangements for employees adversely affected by the exercise of a management right. They have also been revised to allow for pre-implementation notice and bargaining on arrangements when operational circumstances permit.

However, to ensure that those negotiations do not distract or divert managers and supervisors from their operational mission, those negotiations are required only when the action or event has a ''significant and substantial'' impact on the bargaining unit as a whole, or on those employees in that part of the bargaining unit affected by the management action. For example, a management action that impacted employees from various locations could trigger negotiations at the level of recognition under this provision, as would a management action that impacted employees in a single district or port covered by a nationwide bargaining unit. Those negotiations must be consistent with the Department's general duty to bargain over conditions of employment, as established by these final regulations. In such instances, bargaining is not required unless the act or event is expected to exceed or has exceeded 60 days, in order to ensure that managers are not bargaining over short-term changes that may become moot before negotiations can even begin. While management is not required to negotiate when the impact is on a single employee, Department managers will be encouraged to address individual employee hardships that result from a management action, whether or not that management action triggers an obligation to bargain. In addition, the revised regulations provide for reimbursement for reasonable, actual, and non-routine expenses incurred as a result of such actions or events.

We have also revised the proposed regulations to require mid-term bargaining over personnel policies, practices, and matters affecting working conditions only insofar that they are ''foreseeable, substantial, and significant in terms of impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.'' For example, in addition to requiring negotiations over bargaining unit-wide changes in working conditions that are ''foreseeable, substantial, and significant,'' this provision would also require bargaining if the change in working conditions was limited to a location(s) or organizational unit(s) below the level of recognition (such as a port or district), insofar as the impact of such a change was otherwise ''foreseeable, substantial, and significant.'' In so doing, we note that this ''substantial and significant'' test is consistent with current FLRA and private sector case law.

In addition, we have limited mid-term bargaining to 30 days. However, in response to the comments of labor organizations, the Secretary and the Director directed that the proposed regulations be amended to allow for binding resolution of mid-term impasses by the HSLRB. We have also reinstated an exclusive representative's right to be present at formal discussions between Department representatives and employees, except when the purpose is to discuss operational matters. These changes are also in keeping with our attempt to strike the right balance between operational demands and the rights of an exclusive representative.

Taken together, the Secretary and the Director believe these revisions meet the Department's mission needs and are consistent with the Homeland Security Act's promise to preserve collective bargaining rights. While labor organizations have argued that any alteration of the scope of bargaining violates the Act, such an interpretation of the law would have the effect of nullifying the Act itself. The Act authorizes the Secretary and the Director to waive and/or modify 5 U.S.C. chapter 71. Clearly, case law interpreting that chapter may be modified, as well, to carry out the language, intent, and purpose of these regulations. The Act also requires that the Department's HR system be flexible, and these regulations fulfill that statutory requirement.

4. Adverse Actions and Appeals

In authorizing the creation of a new human resources system for the Department, Congress specifically required that employees continue to be afforded the protections of due process. It also prohibited any change in the application of existing statutory provisions involving merit principles, prohibited personnel practices, or protection against whistleblower reprisal or discrimination. Recognizing the critical nature of the Department's mission, Congress also stated in 5 U.S.C. 9701(f)(2) that the new system should provide, ''to the maximum extent practicable, for the expeditious handling'' of appeals of disciplinary and performance-based actions.

The proposed regulations included a number of changes to adverse actions and appeals procedures. Consistent with the Homeland Security Act, these changes were intended to simplify and streamline those procedures and provide for greater individual accountability, all without compromising guaranteed due process protections. Greater accountability is particularly critical to the Department. By its very nature, the Department's mission requires an exceptionally high level of workplace order and discipline. For example, the fact that many DHS employees have arrest authority and other enforcement powers means that they, and the Department, have a special responsibility to the public.

With that in mind, the proposed regulations provided for shorter notice for adverse actions, an accelerated MSPB adjudication process, a lower burden of proof to sustain the Department's action, and a bar on any mitigation of penalty by MSPB (except in the case of a prohibited personnel practice), as well as a bar on the arbitration of adverse actions. The proposed regulations also gave the Secretary authority to establish a number of mandatory removal offenses (MRO)—that is, offenses that have such a direct and substantial impact on homeland security that they must carry a mandatory removal penalty. The proposed regulations also created a special, independent panel appointed by the Secretary to adjudicate MROs; if that panel found that an MRO had been committed, the proposed regulations provided that only the Secretary could mitigate the removal of an employee. While Congress gave DHS and OPM the authority to establish an adjudicatory body other than MSPB, the Secretary and the Director decided that with the changes outlined above, DHS could achieve the objectives of the legislation while retaining MSPB for employee adverse action appeals, except for MROs.

Commenters, including the labor organizations participating in the meet-and-confer process, generally expressed concern that these changes, separately and together, would vitiate the due process rights of DHS employees. They argued that the changes would substantially diminish (or in the case of arbitrators eliminate) the authority of third parties such as MSPB to fully and fairly review and adjudicate adverse actions. Commenters, as well as some Members of Congress, expressed particular concern over the proposal to adopt a lower ''substantial evidence'' standard of proof for adverse actions, as well as the proposal to bar MSPB from mitigating the Department's penalty determination in an adverse action, except in the case of a prohibited personnel practice. Labor organizations argued that the right to arbitrate an adverse action was fundamental to collective bargaining, and that by

removing adverse actions from arbitral review, the proposed regulations were inconsistent with statutory guarantees in this regard.

OPM and DHS have carefully considered these comments, including those received from participating labor organizations during the meet-and-confer process. Accordingly, major revisions have been made to the proposed regulations in four areas.

First, while DHS and OPM continue to provide for a shorter, 15-day minimum notice to an employee of a proposed adverse action (compared to a 30-day notice under current law), we have given employees a minimum of 10 days to respond to the charges specified in the notice of proposed adverse action. This reply period runs concurrently with the notice period; it represents an increase over the 5-day reply period initially proposed, as well as the 7-day reply period provided in current law. Employees have a right to be heard before a proposed adverse action is taken against them. This is a fundamental element of due process in adverse actions. This change protects that right while still providing for a more streamlined process. Similarly, in the performance management section of the regulations, we have also ensured that employees are apprised in advance of performance expectations that may affect their retention.

Second, we re-examined the issue of burden of proof and decided to adopt the ''preponderance of the evidence'' standard for all adverse actions, whether conduct-or performance-based, instead of the ''substantial evidence'' standard set forth in the proposed regulations. ''Preponderance of the evidence'' is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. This is the standard that currently applies to conduct actions taken under chapter 75 of title 5. This is a higher standard of proof than ''substantial evidence,'' which currently applies to performance actions taken under chapter 43.

Third, in response to comments from labor organizations and others, the Secretary and the Director decided to provide bargaining unit employees the option of grieving and, subject to the approval of their exclusive representative, arbitrating adverse actions. Thus, consistent with current law, bargaining unit employees may contest an adverse action either by filing an appeal with MSPB or by grieving and arbitrating the matter through any applicable negotiated grievance procedure. However, when adjudicating such adverse actions, arbitrators will be bound by the same rules and standards governing such things as burden of proof and mitigation that these regulations require of MSPB; this has been a matter of law, and the regulations reiterate this requirement to ensure consistent adjudication, regardless of forum. In order to ensure that consistency, the Department's two largest labor organizations at the September 10 meeting recommended the establishment of a mutually acceptable panel of arbitrators who have been trained and qualified to hear adverse action grievances. The Secretary and the Director concurred with this recommendation, and the regulations have been revised accordingly.

Finally, the Secretary and the Director have authorized MSPB (as well as arbitrators) to mitigate penalties in adverse action cases, but only under very limited circumstances. We continue to believe that, because the Department bears full accountability for homeland security, it is in the best position to determine the most appropriate adverse action for poor performance or misconduct. Thus, its judgment in regard to penalty should be given deference.

We are persuaded by the concern expressed by commenters, as well as the national presidents of AFGE and NTEU at the September 10 meeting, that the Department's authority over penalties should not be unlimited. Although there is a presumption that DHS officials will exercise that authority in good faith, the Secretary and the Director concluded that it is appropriate to provide an employee affected by an adverse action with an opportunity to rebut that presumption. In this regard, we are persuaded that providing MSPB (and arbitrators) limited authority to mitigate is an appropriate check regarding the exercise of the Department's imposition of penalties. Accordingly, the final regulations preclude mitigation of the penalty selected by DHS except where, after granting deference to the Department, a determination is made that the penalty is so disproportionate to the basis for the action as to be wholly without justification.

This authority is significantly more limited than MSPB's current mitigation authority under the standard first enunciated in *Douglas* v. *Veterans Administration* (5 M.S.P.R. 280 (1981)). Under that 1981 decision, MSPB stated that it would evaluate agency penalties to determine not only whether they were too harsh or otherwise arbitrary but also whether they were unreasonable under all the circumstances. In practice, this has meant that MSPB has exercised considerable latitude in modifying agency penalties. With this new, substantially more limited standard for MSPB mitigation of penalties selected by DHS, our intent is to explicitly restrict the authority of MSPB to modify those penalties to situations where there is simply no justification for the penalty. MSPB may not modify the penalty imposed by the Department unless such penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, MSPB or an arbitrator may mitigate a penalty where not all of the charges are sustained. The third party's judgment is based on the justification for the penalty as it relates to the sustained charge(s). The regulations are intended to ensure that when a penalty is mitigated, the maximum justifiable penalty must be applied.

With the changes outlined above, we believe we have addressed and resolved the concerns raised by commenters regarding the preservation of due process for DHS employees. Due process is protected under the final regulations. Thus, the adverse actions and appeals procedures set forth in these regulations are ''fair, efficient, and expeditious,'' consistent with congressional direction.

5. Mandatory Removal Offenses

The proposed regulations authorized the Secretary to identify offenses that, because they have a direct and substantial impact on the ability of the Department to protect homeland security, warrant a mandatory penalty of removal from the Federal service. Only the Secretary could mitigate the removal of an employee determined to have committed such a mandatory removal offense (MRO). Employees alleged to have committed these offenses would have the right to advance notice, an opportunity to respond, and a written decision. They would also be entitled to appeal that decision to an independent DHS panel, which could reverse the action but could not mitigate the removal penalty. This panel would be composed of three members, who would be appointed by the Secretary. Two examples of possible mandatory removal offenses were provided and comments were solicited on the best and most effective way to provide notice to all employees well in advance of their application.

Commenters expressed a number of objections to the concept of MROs. Since only two examples of potential MROs were provided in the proposed regulations, they feared that removal could be too harsh a penalty for as-yet-

unspecified offenses and that local management might misuse MROs to target individual employees. They also were concerned that employees would not be given full and complete notice of such offenses prior to their application. Finally, they expressed an overriding concern about the independence and objectivity of the proposed internal DHS panel.

As proposed, an MRO should have a direct and substantial impact on homeland security such that there is ''zero tolerance'' for the offense. Accordingly, we have decided to retain MROs and the Mandatory Removal Panel (MRP). However, in response to comments, the Secretary and the Director directed several modifications to the proposed regulations. First, we understand the concern over the lack of specificity with regard to MROs. During the meet-and-confer process, participating labor organizations expressed a similar concern, but we believe we were able to satisfactorily address most of their objections by providing them a preliminary list of potential mandatory removal offenses, as follows:

- Intentionally or willfully aiding or abetting an act, or potential act, of terrorism.
- Intentionally or willfully purchasing, using, selling, and/or transporting weapons of mass destruction or materials related thereto for the purpose of committing or contributing to a terrorist act.
- Intentionally or willfully allowing the improper transportation or importation of illegal weapons (including but not limited to weapons of mass destruction) or materials to be used for the purpose of committing or contributing to a terrorist act.
- Intentionally or willfully allowing the improper entry of an individual to the U.S. who could compromise, or potentially compromise, homeland security.
- Soliciting or intentionally accepting a bribe or other personal benefit that compromises, or could compromise, homeland security, when the employee knew or reasonably should have known of the compromise or potential compromise.
- Intentionally or willfully misusing and/or divulging law enforcement sensitive or confidential information (including, but not limited to, classified material) to unauthorized recipients that compromises, or could compromise, homeland security, when the employee knew or reasonably should have known of the compromise or potential compromise, subject to applicable whistleblower and free speech protections.
- Intentionally or willfully engaging in activities that compromise, or could compromise, the information, economic, or financial infrastructure of the Federal Government, when the employee knew or reasonably should have known of the compromise or potential compromise.

There is no question that employees must be made aware of the final list of MROs when approved by the Secretary. Both the Secretary and the Director believe that this is a basic issue of fairness and a tenet of an organizational culture that establishes clear accountability. The labor organizations participating in the meet-and-confer process were especially concerned about this issue. Accordingly, we agreed to revise the proposed regulations to provide, at a minimum, that MROs will be (1) identified in advance as part of the Department's implementing directives, (2) publicized via notice in the **Federal Register**, and (3) made known to all employees on an annual basis. These offenses should not be a surprise to anyone. The Secretary also intends to consult with the Department of Justice in preparing the list of offenses for publication.

Labor organizations participating in the meet-and-confer process were also apprehensive that managers could misuse MROs. At their specific suggestion, we agreed to add a requirement that every proposed notice of mandatory removal be approved by a Departmental level official before being issued to the employee. This requirement, combined with the Secretary's authority to mitigate the removal penalty, guards against the potential for such abuse and assures consistency of application.

Finally, labor organizations participating in the meet-and-confer process indicated that assurance regarding the independence of the Panel would improve credibility and acceptance, and help resolve any concerns about due process protections. The Secretary and the Director agreed and directed that the proposed regulations be revised to provide that (1) members will be ''independent, distinguished citizens * * * who are well known for their integrity, impartiality, and expertise in labor or employee relations and law enforcement/homeland security''; (2) the Secretary will select members from a list that will include nominees submitted by labor organizations and other sources; and (3) decisions of the Panel will be subject to MSPB record review and appropriate judicial review under the same criteria applicable to other MSPB decisions. We believe these changes effectively resolve the major concerns regarding MROs and the Panel.

With these changes, the final regulations provide for the independence demanded by commenters while assuring DHS's ability to remove employees who engage in conduct or performance that has a direct and substantial impact on homeland security. The Secretary is accountable to the President and the American people for safeguarding homeland security. No other agency or department bears this burden. These regulations ensure that the Secretary's authority aligns with that responsibility.

Response to Specific Comments and Detailed Explanation of Regulations

Subpart A—General Provisions

Section 9701.101—Purpose

Section 9701.101 explains the overall purpose of the regulations in 5 CFR part 9701 to implement the DHS human resources (HR) management system authorized by 5 U.S.C. 9701. In the proposed regulations, this section provided the design goals of the DHS HR system.

During the meet-and-confer process, participating labor organizations recommended that the regulations be revised to clarify the DHS HR system design goals. We have amended § 9701.101 by moving the system goals to a new paragraph (b) and by revising the goals to be consistent with the ''Guiding Principles'' adopted by the Senior Review Committee in 2003 when reviewing options for the DHS HR system.

Section 9701.102—Eligibility and Coverage

Section 9701.102 of the proposed regulations provided the Secretary with the authority to approve the coverage of specific employee categories under one or more provisions in 5 CFR part 9701. During the meet-and-confer process, the participating labor organizations recommended that the regulations clarify the Secretary's authority to cover (and rescind the coverage of) various employee categories under part 9701 and the coverage eligibility of employee categories. Other commenters requested clarification regarding how employees who are not immediately covered by the new HR system (*i.e.*, as the system is phased in) will be treated. In response to these comments, we have revised and reordered § 9701.102 (and made conforming changes elsewhere in the final regulations) to clarify which categories of employees are eligible for coverage under these regulations, and

we have also clarified the Secretary's authority to make coverage determinations and the timing of such determinations, as follows:

• New § 9701.102(a) (formerly § 9701.102(d)) clarifies that all civilian DHS employees *are eligible for coverage* under one or more subparts of these regulations, except those covered by a provision of law outside the chapters of title 5, United States Code, that DHS may waive under 5 U.S.C. 9701.

• New § 9701.102(b) replaces the proposed § 9701.102(a).

• New § 9701.102(b)(1) provides that subpart A becomes applicable to all eligible employees when the regulations take effect—*i.e.*, 30 days after the date of publication of the final regulations in the **Federal Register**.

• New § 9701.102(b)(2) provides that subparts E, F, and G are applicable to all eligible employees on the effective date established by the Secretary or designee, at his or her sole and exclusive discretion and after coordination with OPM; however, the effective date may not be later than 180 days after the date of publication of the final regulations in the **Federal Register** unless otherwise determined by the Secretary and the Director.

• New § 9701.102(b)(3) provides that, with respect to subparts B, C, and D, the Secretary of DHS (or designee), at his or her sole and exclusive discretion and after coordination with OPM, may apply one or more of these subparts to a specific category or categories of eligible employees at any time. The regulations provide that the Secretary may apply some subparts, but not others, to a specific category or categories of eligible employees and that such coverage determinations may be made effective on different dates.

• New § 9701.102(b)(4) contains the requirement (also included in the proposed regulations) that DHS will notify affected employees and labor organizations of all coverage determinations.

• New § 9701.102(c) provides that until the Secretary makes a coverage determination, DHS employees will continue to be covered by the Federal laws and regulations that would apply to them in the absence of the authorities provided by these regulations. For example, GS employees in DHS will continue to be covered by the laws and regulations governing General Schedule classification and pay (*i.e.*, 5 U.S.C. chapter 51 and 5 U.S.C. chapter 53, subchapter III) until the effective date of the Secretary's decision to cover such employees under the classification and pay provisions authorized by 5 CFR part 9701, subparts B and C.

• New § 9701.102(e) (formerly § 9701.102(c)) clarifies that the Secretary or designee may prescribe implementing directives for converting employees to coverage under title 5 if, at his or her sole and exclusive discretion and after coordination with OPM, coverage under one or more subparts of these regulations is rescinded. (*See Section 9701.103—Definitions* and *Section 9701.105—Continuing collaboration* for additional information on the process for developing implementing directives.) We have also clarified that DHS will notify affected employees and labor organizations in advance of a decision to rescind coverage under these regulations.

In addition, a number of commenters requested clarification regarding the specific categories of employees that are eligible and ineligible for coverage under various subparts of these regulations. The following chart provides additional information on the categories of employees that are eligible (annotated with ''Yes'') and ineligible (annotated with ''No'') for coverage under each subpart of these regulations. The chart and its footnotes must be read together for full coverage information. Employee categories that are eligible for coverage under one or more subparts of these regulations will actually be covered by such subparts only upon approval of the Secretary or designee under § 9701.102(b). DHS will provide advance notice to affected employees and labor organizations regarding coverage decisions.

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Summary of Coverage Eligibility under 5 CFR Part 9701[1]

DHS Organization	Classification (Subpart B)	Pay Administration (Subpart C)	Performance Management (Subpart D)	Labor-Management Relations[2] (Subpart E)	Adverse Actions[3] (Subpart F)	Appeals[3] (Subpart G)
DHS Headquarters	Yes	Yes	Yes	Yes	Yes	Yes
Information Analysis & Infrastructure Protection	Yes	Yes	Yes	Yes	Yes	Yes
Science & Technology	Yes	Yes	Yes	Yes	Yes	Yes
• Employees in the Homeland Security Advanced Research Projects Agency who are appointed and paid under section 307(b)(6) of the Homeland Security Act of 2002	No	No	Yes[4]	Yes	Yes	Yes
Emergency Preparedness & Response[5] (including the Federal Emergency Management Agency)	Yes	Yes	Yes	Yes	Yes	Yes
Border & Transportation Security	Yes	Yes	Yes	Yes	Yes	Yes
U.S. Customs & Border Protection	Yes	Yes	Yes	Yes	Yes	Yes
• Wage Grade	Yes[6]	Yes[6]	Yes	Yes	Yes	Yes
U.S. Immigration & Customs Enforcement (ICE)	Yes	Yes	Yes	Yes	Yes	Yes
• Wage Grade	Yes[6]	Yes[6]	Yes	Yes	Yes	Yes
Federal Law Enforcement Training Center	Yes	Yes	Yes	Yes	Yes	Yes
• Wage Grade	Yes[6]	Yes[6]	Yes	Yes	Yes	Yes

DHS Organization	Classification (Subpart B)	Pay Administration (Subpart C)	Performance Management (Subpart D)	Labor-Management Relations[2] (Subpart E)	Adverse Actions[3] (Subpart F)	Appeals[3] (Subpart G)
Transportation Security Administration (TSA)						
• Screeners	No[7]	No[7]	No[7]	No[7]	No[7]	No[7]
• Federal Air Marshals	No[8]	No[8]	No[8]	No[8]	No[8]	No[8]
• Other employees	No[8]	No[8]	No[8]	No[8]	No[8]	No[8]
U.S. Coast Guard	Yes	Yes	Yes	Yes	Yes	Yes
• Wage Grade	Yes[6]	Yes[6]	Yes	Yes	Yes	Yes
• Academy Faculty	No	No	Yes[9]	Yes	Yes	Yes
U.S. Secret Service	Yes	Yes	Yes	No[10]	Yes	Yes
• Uniformed Division	No	No	Yes	No[10]	Yes	Yes
• Wage Grade	Yes[6]	Yes[6]	Yes	No[10]	Yes	Yes
U.S. Citizenship & Immigration Services	Yes	Yes	Yes	Yes	Yes	Yes

[1]Unless otherwise noted, all employees in each organization are eligible for coverage under all subparts of 5 CFR part 9701. Actual coverage under each subpart is subject to the approval of the Secretary or designee under 5 CFR 9701.102(b). Members of the Senior Executive Service (SES) are eligible for coverage (subject to specific exclusions), but will not be covered under initial program implementation. Members of the uniformed military service, administrative law judges, employees in Executive Schedule positions, and experts and consultants are not eligible for coverage. Employees covered by a provision of law outside chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code, are not eligible for coverage under the applicable subpart(s) replacing those chapters. We also note that some employees are subject to a subpart but may be excluded from coverage under all or some provisions because of eligibility conditions set forth in that subpart.

[2]Labor-management relations regulations in subpart E are not applicable to supervisors or management officials.

[3]Adverse action and appeals subparts do not apply to employees during initial service period, the demotion of a supervisor or manager under 5 U.S.C. 3321, the termination of temporary or term promotions or appointments, SES members, or confidential/policy positions.

[4] Employees are not eligible for any bonus, monetary award, or other monetary incentive except for payments authorized under section 1101 of Public Law 105-261.

[5] Exception: For employees covered by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, DHS may "appoint and fix the compensation of such temporary personnel as may be necessary, without regard to the provisions of title 5 governing appointments in competitive service." (See 42 U.S.C. 5149(b)(1).)

[6] Wage Grade employees are eligible for coverage under subparts B and C (dealing with classification and pay), but will not be covered under these subparts in the initial program implementation.

[7] Under section 111(d) of the Aviation and Transportation Security Act, TSA screeners are employed outside the provisions of title 5, U.S. Code. Thus, they cannot be covered by the DHS HR system established under 5 U.S.C. 9701. However, DHS may direct that the TSA screener personnel system align administratively with the DHS HR system under 5 CFR part 9701, except to the extent that aspects of the DHS system conflict with the statutory authority applicable to TSA screeners.

[8] TSA employees who are not screeners are covered by an independent personnel management system established under the authority of 49 U.S.C. 114(n). Under that authority, TSA nonscreeners are covered by the personnel management system established by the Federal Aviation Administration under 49 U.S.C. 40122, subject to any modifications TSA may make. Under 49 U.S.C. 40122(g), TSA employees are not covered by most provisions in title 5, U.S. Code, including the DHS HR system authority in 5 U.S.C. 9701. Federal Air Marshals (FAMs) are currently TSA employees and have the same status as other TSA nonscreeners ("other employees"), even though they are detailed to ICE. When FAM positions are moved from TSA to ICE, these employees will be eligible for coverage under 5 CFR part 9701, except for the labor relations provisions in subpart E. See special transitional rules for FAMs in 5 CFR 9701.232 and 9701.374 (dealing with classification and pay).

[9] Eligible for coverage under performance management regulations in subpart D, but will not be covered under initial program implementation.

[10] Excluded by 5 U.S.C. 7103(a)(3)(H) and Executive Order 12171 of November 17, 1979.

BILLING CODE 6325–39–C; 4410–10–C

Section 9701.102(e) of the proposed regulations provided that nothing in 5 CFR part 9701 prevents DHS from using an independent discretionary authority to establish a parallel system that follows some or all of the requirements in these regulations for a category of employees ineligible for coverage under 5 U.S.C. 9701, as described in this chart. Commenters recommended that DHS cover all employees by the same HR system provisions. For example, commenters urged DHS to treat employees appointed under the Robert T. Stafford Disaster Relief and Emergency Assistance Act consistently with other employees who are eligible for coverage under these regulations and to recognize the value of the contributions of intermittent employees in emergency disaster assignments by creating an equivalent parallel system for them and closing the gap in compensation between this cadre and regular DHS employees. Conversely, another commenter recommended that such employees not be subject to the new DHS HR system. Other commenters recommended that DHS cover U.S. Coast Guard academy faculty in a parallel system, while keeping its existing HR system intact. Finally, a commenter felt that the Secretary should not be allowed to use independent discretionary authority to establish a parallel system for categories of employees who are ineligible for coverage and that such authority should be subject to congressional approval.

We have redesignated § 9701.102(e) as § 9701.102(f) and revised it to clarify that the Secretary or other authorized DHS official may exercise an independent legal authority to establish a parallel system that follows some or all of the requirements in these regulations for a category of employees who are not eligible for coverage. DHS may decide to treat each employee category that is ineligible for coverage differently. In all cases, DHS may invoke its independent authority to establish a new or parallel pay system for categories of employees ineligible for coverage under these regulations only to the extent provided under such independent legislation and subject to any procedural protections that such legislation provides. For example, DHS may establish a parallel classification and pay system for Stafford Act employees.

Other commenters requested clarification regarding the coverage of members of the Senior Executive Service (SES) and employees in senior-level (SL) and scientific or professional (ST) positions under the classification, pay, and performance management system in subparts B, C, and D of these regulations in light of the new performance management certification requirements under 5 U.S.C. 5307 and the new pay-for-performance system for SES members under 5 U.S.C. 5383.

Section 1322 of the Homeland Security Act of 2002 amended 5 U.S.C. 5307 to provide a higher limit on the aggregate compensation that SES members and employees in SL/ST positions may receive in a calendar year. In addition, section 1125 of the National Defense Authorization Act of 2003 amended 5 U.S.C. chapter 53, subchapter VIII, to establish a performance-based pay system for SES members.

These final regulations provide DHS with discretionary authority to cover SES members and SL/ST employees under the classification, pay, and performance management provisions of 5 U.S.C. part 9701, subparts B, C, and D. (See §§ 9701.202(b)(3) and (4), 9701.302(b)(3) and (4), and 9701.402(a).) The aggregate pay limitation law and regulations under 5 U.S.C. 5307 and 5 CFR part 530, subpart B, cannot be waived and must continue to apply to SES members and SL/ST employees covered by the DHS pay system under 5 CFR part 9701, subpart C. DHS must obtain certification of its performance appraisal system, as required by 5 CFR part 430, subpart D, in order to apply the higher aggregate cap. (*See* § 9701.303(f).)

In addition, § 9701.102(d) of these final regulations (§ 9701.102(b) in the proposed regulations) allows DHS to cover its SES members under a classification, pay, and performance management system under these regulations. However, the provisions of such a system must be consistent with the performance-based features and pay caps that apply to employees covered by the new Governmentwide SES pay-for-performance system under 5 U.S.C. chapter 53, subchapter VIII, and OPM implementing regulations. If DHS wishes to establish a system for SES members that differs from the Governmentwide SES pay-for-performance system, DHS and OPM must issue joint regulations consistent with the requirements of 5 U.S.C. 9701. DHS and OPM will involve SES members and other interested parties in the design and implementation of any new pay system for SES members.

Other commenters requested clarification regarding why Transportation Security Administration (TSA) screeners are not covered by the new system. Commenters stated that the applicability of the regulations to TSA is addressed ambiguously and the regulations do not appear to recognize certain statutory impediments to coverage (whether implemented administratively as a ''parallel system'' or under the coverage of regulation) that differ with respect to screeners and nonscreeners.

Under section 111(d) of the Aviation and Transportation Security Act, TSA screeners are employed outside the provisions of title 5, United States Code. Thus, they cannot be covered by the DHS HR system established under 5 U.S.C. 9701. Similarly, other TSA employees (nonscreeners) are covered by an independent personnel management system established under the authority of 49 U.S.C. 114(n). Under that authority, TSA nonscreeners are covered by the personnel management system established by the Federal Aviation Administration under 49 U.S.C. 40122, subject to any modifications TSA may make. Under 49 U.S.C. 40122(g), TSA employees are not covered by most provisions in title 5, U.S. Code, including the DHS HR system authority in 5 U.S.C. 9701. While TSA employees are excluded from coverage under the HR system established by these regulations, DHS can direct that the TSA personnel systems align administratively with the new DHS HR system except to the extent that aspects of those systems conflict with the statutory authorities applicable to TSA employees.

Commenters also recommended that the regulations be modified to allow DHS to cover administrative law judges (ALJs) and to develop a parallel job evaluation, pay, and performance management system tailored to ALJs consistent with the treatment of DHS SES members and employees in SL/ST positions, including the higher basic pay cap that applies to SES members under § 9701.312(b). The commenters recommended that DHS develop a performance management system that is consistent with the requirements of the Administrative Procedure Act and in line with the guiding principles of the proposed regulations. DHS believes it is desirable to cover its ALJs under the system that applies to other ALJs throughout the Government.

Section 9701.103—Definitions

During the meet-and-confer process, the participating labor organizations requested clarification regarding the exception to the definition of ''employee'' under § 9701.103 of the proposed regulations. We agree that this exception is confusing and have revised 5 CFR part 9701, subpart E, to eliminate the need for the exception language in

§ 9701.103. (See *Section 9701.505—Coverage.*)

During the meet-and-confer process, the participating labor organizations requested that the definition of ''coordination'' be revised so that the OPM coordination process involve employees and employee representatives. Alternatively, the labor organizations recommended that the definition of ''coordination'' be deleted and that all requirements for DHS to coordinate with OPM be replaced with more detailed regulations.

While we understand the desire for the regulations to provide more specificity and assurances on how the HR system will operate, we have not removed the definition of ''coordination'' from these regulations. The regulations must provide DHS with sufficient flexibility to design a classification, pay, and performance management system that can be tailored to DHS's varied mission requirements, performance priorities, and strategic human capital needs.

However, we agree that the DHS HR system must be designed in a transparent and credible manner that involves employees and employee representatives. For this reason, we have added a definition of ''implementing directives'' to § 9701.103. The term ''implementing directives'' is defined as the directives issued by the Secretary or designee at the Department level to carry out any system established under 5 CFR part 9701. Such implementing directives will be developed with the involvement of employee representatives using the continuing collaboration provisions in revised § 9701.105. (*See Section 9701.105—Continuing collaboration.*) In addition, we have made a number of revisions in other sections of these regulations to require DHS to establish implementing directives to carry out the HR authority provided by these regulations.

Section 9701.105—Continuing Collaboration

Section 9701.105 of the proposed regulations provided DHS with the authority to establish internal Departmental directives to further define the design characteristics of any system established under these regulations. During the meet-and-confer process, the participating labor organizations expressed concerns that such directives would be developed without the involvement of employees and employee representatives. The labor organizations recommended that DHS consult with employees and employee representatives before issuing any internal directives.

We agree that the DHS HR system must be designed in a transparent and credible manner and that the development of any internal directives implementing the HR system authorities provided by these regulations involve employees and employee representatives. Although not expressly stated in the proposed regulations, DHS, in the spirit of collaboration used throughout the design process, intends to involve employees and their representatives in the development of the implementing directives. In addition, we have revised and retitled § 9701.105 as ''Continuing collaboration.'' This section requires DHS to issue implementing directives, as newly defined in § 9701.103, to implement these regulations. As required by 5 U.S.C. 9701, employee representatives will be provided with an opportunity to collaborate in developing and issuing these implementing directives. DHS will determine the number of employee representatives that may engage in continuing collaboration and will establish timeframes to provide information and comments. National labor organizations with multiple local labor organizations accorded exclusive recognition will determine how their units will be represented within this framework.

As the Department determines necessary, employee representatives will be provided with an opportunity to discuss their views with DHS officials and/or to submit written comments at initial identification of implementation issues and conceptual design and/or at review of draft recommendations or alternatives. Employee representatives also will be given a copy of the proposed final draft and will be provided with an opportunity for written and/or oral comment. These comments will become part of the record and will be forwarded with the final directive to the Secretary or designee for a final decision. However, nothing in the continuing collaboration process affects the right of the Secretary to determine the content of implementing directives and to make them effective at any time.

As required by the Homeland Security Act, § 9701.105(f) provides that the Secretary and the Director will jointly establish any procedures necessary to carry out the continuing collaboration process as internal rules of Departmental procedure which are not subject to review.

Section 9701.106—Relationship to Other Provisions

Section 9701.106 describes the relationship of the authority provided DHS under 5 U.S.C. 9701 and these regulations to the authorities in other sections of law and regulations. During the meet-and-confer process, the participating labor organizations requested clarification regarding when waived laws and regulations will and will not apply to categories of employees approved for coverage under one or more subparts of these regulations.

We agree and have revised § 9701.106 to clarify that, for the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under the waivable chapters (*i.e.*, chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code), the referenced provisions are not waived but are modified consistent with the corresponding regulations in part 9701, except as otherwise provided in that part or in DHS implementing directives. For example, hazardous duty differentials under 5 U.S.C. 5545(d) are payable only to General Schedule employees covered by 5 U.S.C. chapter 51 and subchapter III of chapter 53. To ensure that DHS employees continue to be eligible for hazardous duty differentials when they convert from the General Schedule to the DHS pay system, they will be deemed to be covered by the referenced General Schedule provisions of law for the purpose of applying section 5545(d). In addition, in applying the back pay law in 5 U.S.C. 5596 to DHS employees covered by subpart G of these proposed regulations (dealing with appeals), the reference in section 5596(b)(1)(A)(ii) to 5 U.S.C. 7701(g) (dealing with attorney fees) is considered to be a reference to a modified section 7701(g) that is consistent with § 9701.706(h).

We also revised paragraph (c) to clarify that the listed provisions in paragraph (c) do not apply to categories of employees upon conversion to a new classification and pay system established under 5 CFR part 9701, subparts B and C.

We also added a new paragraph (a) to clarify that provisions of title 5 are waived or modified to the extent authorized by 5 U.S.C. 9701 to conform with these regulations—*i.e.*, these regulations supersede the corresponding laws they replace. In addition, for clarification purposes, we have restated the rule of construction, which was located in § 9701.502 of subpart E of the proposed regulations, as a general rule of construction applicable to the entire part. However, in so doing, we do not intend to imply that the rule of construction is limited only to that subpart; rather, the express language of

§ 9701.106(a) extends that rule of construction to the entire part.

Section 9701.107—Program Evaluation

During the meet-and-confer process, the labor organizations recommended that the regulations require DHS to conduct ongoing evaluations of these regulations and that employees and employee representatives be involved in such evaluations. Other commenters also recommended that regulations include a formal evaluation of the HR system with implementation goals, including predetermined benchmarks for success.

Consistent with the commitment made in the Preamble to the proposed regulations, DHS intends to conduct evaluations of its HR system. We added a new § 9701.107 to carry out this intent by requiring DHS to establish procedures for evaluating the regulations and their implementation. DHS will provide employee representatives with an opportunity to be briefed and comment on the design and results of the program evaluation. This opportunity includes participation in identifying the scope, objectives, and methodology to be used in the program evaluation and reviewing draft findings and recommendations, subject to any time limits prescribed in DHS's procedures. Involvement in this process does not waive the rights of DHS or the employee representatives under the applicable laws and these regulations.

Subpart B—Classification

General Comments

As a result of concerns expressed during the meet-and-confer process, we have replaced the term ''job evaluation'' with the term ''classification'' throughout these regulations.

Commenters were concerned about the lack of specificity in subpart B of the proposed regulations regarding the structure and rules for the DHS classification system. Commenters found it difficult to ascertain where their positions would fit within the classification framework of occupational clusters and bands. Although some found the classification concepts simple and clear, most commenters felt the proposed regulations were too vague and difficult to understand because of the lack of detailed information on such features as how occupational clusters and bands will be established, which occupations will be assigned to each cluster, how GS grades will ''cross-walk'' to bands, and which positions will be assigned to each band. Because of the lack of details in the proposed regulations, commenters questioned whether the proposed classification system would be fair and credible. Commenters expressed a strong desire that the regulations be more transparent and that DHS closely involve employees and employee representatives in the design of the DHS classification system.

Because of the lack of specificity, commenters recommended a number of amendments to subpart B of the regulations to provide more detailed criteria and conditions for the DHS classification system or to clarify how positions will be converted into the system. The comments included recommendations on and clarifications regarding the criteria for grouping occupations into clusters and the specific occupational clusters DHS will create, how competencies will be identified and used in the system, the definitions of the bands and the criteria DHS will use to assign positions to bands, the purpose of the Senior Expert band and the criteria that DHS will use to promote employees to that band, how manager and team leader positions will be assigned to clusters and bands, how law enforcement officer positions will be treated, the standards DHS will use to qualify and promote employees to higher bands (*e.g.*, time-in-service, formal education requirements), and the process for converting positions to the DHS classification system. In reaction to the lack of detail in the regulations, the labor organizations recommended that the bar on collective bargaining of the DHS classification system under § 9701.205(b) of the proposed regulations be removed.

We understand the desire for the regulations to provide more specificity and assurances regarding how the DHS classification system will operate. However, the regulations must provide DHS with sufficient flexibility to design a classification system with occupational clusters and bands that support the market-based features of the DHS pay system and that can be tailored to DHS's mission requirements and strategic human capital needs. Except as otherwise explained in this section of the **SUPPLEMENTARY INFORMATION,** we have not modified subpart B of the regulations in response to these comments. DHS will consider the suggestions and recommendations made by commenters as it develops implementing directives for the DHS classification system.

We agree that the DHS classification system must be designed in a transparent and credible manner that involves employees and employee representatives. While we have not removed the bar on collective bargaining in § 9701.205, we have made a number of revisions throughout subpart B that require DHS to carry out the new classification system through detailed implementing directives, as defined in § 9701.103. As previously discussed, these implementing directives will be established using the ''continuing collaboration'' provisions in revised § 9701.105. (*See Section 9701.103—Definitions* and *Section 9701.105—Continuing collaboration.*)

Other Comments on Specific Sections of Subpart B

Section 9701.201—Purpose

Section 9701.201 explains the purpose of subpart B, which contains regulations establishing a classification structure and rules for covered DHS employees and positions. During the meet-and-confer process, the participating labor organizations recommended that the definition of ''classification'' under § 9701.204 include a reference to the principle of equal pay for equal work. We agree, but rather than revising this definition, we have added the merit principle of ''equal pay for work of equal value'' to the end of the purpose description in new § 9701.201(a).

For clarification purposes, we also moved § 9701.205(a) in the proposed regulations to a new § 9701.201(b) in the final regulations. We have retitled § 9701.205 as Bar on collective bargaining, consistent with the title of § 9701.305.

Section 9701.203—Waivers

Section 9701.203 of the regulations specifies the provisions of title 5, United States Code, that are waived for employees covered by the DHS classification system established under subpart B. During the meet-and-confer process, the participating labor organizations requested that the regulations clarify when such waivers will be applied. We have amended § 9701.203(a) to clarify that the waivers apply when a category of DHS employees is covered by a classification system established under subpart B.

We also have amended § 9701.203(a) by adding § 9701.222(d) to the list of exceptions to the waiver of 5 U.S.C. chapter 51. See *Section 9701.222—Reconsideration of classification decisions* for additional information on this exception.

Section 9701.204—Definitions

A commenter suggested adding a definition of ''competency'' to § 9701.204 to clarify its meaning in the definition of ''position'' or ''job.'' We agree and have added a definition of ''competencies'' that is identical to the

definition of that term in § 9701.404 concerning the DHS performance management system.

To help respond to commenters' general confusion with the classification provisions, we also have—

- Added a definition of ''basic pay'' that is identical to the definition of that term in § 9701.304 to clarify its use under § 9701.231, regarding conversion into the DHS classification system.
- Revised the definition of ''classification'' to clarify that this term, also referred to as job evaluation, means the process of analyzing and assigning a job or position to an occupational series, cluster, and band for pay and other related purposes.
- Amended the definition of ''occupational cluster'' to clarify that an occupational cluster may include one or more occupational series.

Section 9701.211—Occupational Clusters

Section 9701.211 provides DHS with the authority to establish occupational clusters after coordination with OPM. In response to commenters' concerns about the lack of specificity in the regulations regarding how DHS will define occupational clusters, we have revised § 9701.211 to clarify that DHS must document in writing the rationale, as well as the criteria, for grouping occupations or positions into occupational clusters.

Section 9701.212—Bands

Section 9701.212 provides DHS with the authority to establish one or more bands within each occupational cluster after coordination with OPM. Section 9701.212(a)(1)(iv) of the proposed regulations provided that each occupational cluster may include a Supervisory band reserved primarily for first-level supervisors. Commenters observed that limiting Supervisory bands to first-level supervisors does not adequately accommodate the range of supervisory and managerial positions at DHS that are below the executive level. Some commenters questioned whether the Senior Expert band should be used for other supervisory/managerial levels or team leader positions. Others questioned whether the number of Supervisory bands should be limited above the first-level in an effort to ''flatten-out'' organizational structures. We agree that the description of Supervisory band in the proposed regulations was too narrow. To clarify, we have reordered § 9701.212 and revised § 9701.212(b)(4) (formerly § 9701.212(a)(1)(iv)) to provide that a Supervisory band includes work that may involve hiring or selecting employees, assigning work, managing performance, recognizing and rewarding employees, and other associated duties. DHS will address the number and use of Supervisory bands and the assignment of team leaders to bands in its implementing directives.

Section 9701.212(b) of the proposed regulations provided DHS with the discretionary authority to establish qualification standards and requirements for occupational series, occupational clusters, and/or bands after coordination with OPM. During the meet-and-confer process, the participating labor organizations were concerned that DHS may choose not to establish qualifications standards. To clarify our intent, we have redesignated § 9701.212(b) as § 9701.212(d) and revised this paragraph to require DHS to establish qualifications standards and requirements. Under this provision, DHS has the flexibility to (1) adopt the qualifications standards and requirements issued by OPM and/or (2) establish different qualifications standards and requirements after coordination with OPM. In addition, we have clarified this section to reflect the fact that DHS retains its authority to establish qualification standards under 5 U.S.C. chapters 31 and 33 and implementing regulations.

Section 9701.222—Reconsideration of Classification Decisions

Section 9701.222 of the proposed regulations required DHS to establish policies and procedures for handling an employee's request for reconsideration of classification decisions. The proposed regulations limited reconsideration requests to occupational series or pay system assignment and provided employees no right to appeal classification decisions outside DHS.

Because the proposed regulations provided no authority for independent review of DHS classification decisions, the labor organizations recommended that the regulations be revised to provide bargaining unit employees with the authority to challenge classification determinations through negotiated grievance procedures. They also recommended that employees be provided the right to challenge classification decisions beyond occupational series and pay system assignment. Other commenters advised that DHS's authority to reconsider classification decisions should be appealable to an independent arbitrator.

We agree that the DHS classification system should provide covered employees with the right to a broader scope of review of the classification of their position by an independent third party. We have therefore revised § 9701.222 to provide employees with the right to request that DHS or OPM reconsider the occupational cluster and band assignment as well as the pay system and occupational series of their official position of record at any time. This right is parallel to the classification appeal right of current General Schedule employees under 5 U.S.C. 5112(b). In addition, the regulations require both DHS and OPM to establish implementing directives for reviewing these requests, including, but not limited to, policies on nonreviewable issues, rights of representation, and effective dates of any corrective actions.

Section 9701.222(c) of the regulations allows an employee to request that OPM reconsider a DHS classification reconsideration decision. However, an employee may not request that DHS review an OPM reconsideration decision. If an employee does not request an OPM reconsideration decision, § 9701.222(c) provides that a DHS classification determination is final and not subject to further review or appeal. Section 9701.222(d) provides that OPM's final determination on an employee's request is not subject to further review or appeal. This provision, in conjunction with the waiver exception in § 9701.203(a), is intended to preserve OPM's authority under 5 U.S.C. 5112(b) and 5 U.S.C. 5346(c) to review and issue final classification decisions without judicial review.

During the meet-and-confer process, the participating labor organizations suggested that the regulations authorize retroactive effective dates for promotions if an employee's position is found by OPM to be misclassified. Under the current classification law and regulations (5 U.S.C. chapter 51 and 5 CFR part 511) classification decisions generally may not be made effective retroactively. (*See* 5 CFR 511.701(a)(4).) In addition, the Supreme Court has held that neither the Classification Act under 5 U.S.C. chapter 51 nor the Back Pay Act under 5 U.S.C. 5596 creates a substantive right to back pay for periods of wrongful classifications. (*See United States* v. *Testan,* 424 U.S. 372 (1976).)

OPM regulations at 5 CFR 511.703 provide an exception to this general rule and allow a retroactive effective date if upon classification appeal an employee is found to be wrongfully demoted. Any similar retroactive effective date provisions regarding classification reconsideration decisions will be addressed in DHS's and OPM's policies and procedures for reviewing these requests.

Section 9701.232—Special Transition Rules for Federal Air Marshal Service

Section 9701.232 provides that if DHS transfers Federal Air Marshal Service positions from the Transportation Security Administration (TSA) to another organization within DHS, DHS may cover such positions under a classification system that is parallel to the classification system that was applicable to the Federal Air Marshal Service within TSA. These revised regulations provide that DHS will issue implementing directives on converting Federal Air Marshal Service employees to any new classification system under subpart B, consistent with the conversion rules in § 9701.231.

Labor organization commenters recommended that the regulations provide DHS with the authority to transfer Federal Air Marshal Service positions only if Federal Air Marshals are granted full collective bargaining rights and the ability to join a labor organization of their choice. We disagree. Federal Air Marshals are excluded from collective bargaining by section 1–123 of E.O. 12666, January 12, 1989.

Subpart C—Pay and Pay Administration

General Comments

Commenters expressed concerns about the lack of specificity in subpart C of the proposed regulations on the pay structure and the pay administration rules governing the proposed DHS pay system. Commenters felt the proposed regulations were too vague and difficult to understand because of the lack of detailed information on such issues as how band rate ranges will be established and adjusted, how locality and special pay supplements (hereafter called locality and special rate supplements) will be established and adjusted, and how performance pay pools will be funded and operated. Commenters had difficulty ascertaining how their pay and pay adjustments would be determined under the new system and how individual and team performance would affect pay. They also were concerned that their pay would not keep up with their counterparts in other Federal agencies. Commenters expressed a strong desire that the regulations be more transparent and that DHS closely involve employees and employee representatives in the design of the pay system. Because of the lack of details in the proposed regulations, commenters questioned whether the proposed pay system would be fair and equitable.

Because of the lack of specificity, commenters recommended a number of different amendments to subpart C of the regulations to provide detailed criteria and conditions for setting and adjusting basic rate ranges and granting rate range increases to employees; setting and adjusting locality and special rate supplements and providing for increases in those supplements; addressing staffing issues that may result from geographic pay differences; funding pay pools; determining and granting performance pay increases; setting pay upon promotion, demotion, initial appointment, and other actions; granting within-band pay increases; granting special skills, assignment, and staffing payments; and transitioning and converting employees into the new pay system. In reaction to the lack of specificity, the labor organizations recommended that the regulations be revised to remove the bar on collective bargaining of the DHS pay structure and system in § 9701.305; require the new pay system to be faithful to merit system principles and protect against prohibited personnel practices; require DHS to assess the impact of the system on employees prior to implementation to maximize fairness, uniformity, and objectivity; implement the current locality pay program, modified to be occupation specific; and establish a Department-level compensation board to address and make recommendations on continuing issues regarding the administration of the new pay system. Labor organization commenters felt that such a compensation board would make pay decisions more credible and transparent. Other commenters felt that employees should receive pay increases equivalent to the increases they would have received under the General Schedule.

We understand the desire for the regulations to provide more specificity and assurances regarding how the pay system will operate. However, the regulations also must provide DHS with sufficient flexibility to design a nimble pay system that is performance-sensitive, market-based, and tailored to DHS's performance goals, mission requirements, and strategic human capital needs. Except as otherwise explained in this section of the Supplementary Information, we have not modified subpart C of the regulations in response to these comments.

However, we agree that the DHS pay system must be designed in a transparent and credible manner that involves employees and employee representatives. While we have not removed the bar on collective bargaining in § 9701.305, we made a number of revisions throughout subpart C that require DHS to establish more detailed policies to carry out the new pay system through implementing directives, as defined in § 9701.103. As previously discussed, these implementing directives will be developed using the ''continuing collaboration'' provisions in revised § 9701.105. (*See Section 9701.103—Definitions* and *Section 9701.105—Continuing collaboration*.) DHS will consider the suggestions and recommendations made by commenters as it develops implementing directives for the DHS pay system.

In addition, we agree that labor organization involvement in both the design and administration of the pay system can contribute to its credibility and acceptance with bargaining unit employees. Therefore, we have provided for such involvement by giving the Department's national labor organizations four seats on the newly established Homeland Security Compensation Committee (Compensation Committee). As part of the Compensation Committee, the labor organization representatives and some of the Department's most senior leaders will be able to participate in the development of recommendations and options for the Secretary's consideration on strategic compensation matters such as Departmental compensation policies and principles, the annual allocation of funds between market and performance pay adjustments, and the annual adjustment of rate ranges and locality and special rate supplements. While the Secretary retains the final decisionmaking authority in all of these matters, we believe this degree of labor organization involvement is consistent with our guiding principles. The Department will prescribe procedures governing the membership and operation of the Compensation Committee, including setting schedules for discussions and submission of recommendations. In addition, the establishment of the Compensation Committee will not affect the right of the Secretary to make determinations regarding the annual allocation of funds between market and performance pay adjustments and the annual adjustment of rate ranges and locality and special rate supplements, and to make such determinations effective at any time. See new § 9701.313 of these regulations for additional information.

Finally, as previously discussed, we have added a new paragraph (b) to § 9701.101, which provides the overall criteria for the design of the DHS human resources system, to include a requirement that the system be designed to generate respect and trust and be

based on the principles of merit and fairness embodied in the merit system principles contained in 5 U.S.C. 2301. We also have added a new paragraph (c) to § 9701.301 to require that the DHS pay system, working in conjunction with the performance management system established under subpart D, be designed to incorporate a number of elements, including adherence to the merit system principles, and that it must be implemented and managed in a fair, transparent, and inclusive manner. These criteria are based on similar criteria that Congress recently enacted with respect to chapters 47, 54, and 99 of title 5, United States Code.

Other Comments on Specific Sections of Subpart C

Section 9701.301—Purpose

In addition to the new § 9701.301(c) discussed in the General Comments section, we also have added a new paragraph (b) to § 9701.301 to clarify that any pay system under subpart C must be established in conjunction with the classification system described in subpart B. This addition is consistent with a similar provision in § 9701.201(b).

Section 9701.303—Waivers

Section 9701.303(a) specifies the provisions of title 5, United States Code, that are waived for employees covered by the DHS pay system established under subpart C. During the meet-and-confer process, the participating labor organizations requested that the regulations clarify when such waivers will be applied. We have amended § 9701.303(a) to clarify that the waivers apply when a category of DHS employees is covered by a pay system established under subpart C. We have also reordered some of the paragraphs in this section for clarification.

Section 9701.303(c)(2) of the proposed regulations raised the limitation on rates of basic pay payable under 5 U.S.C. 5373—for categories of DHS employees whose pay is fixed by administrative action—to the rate for level III of the Executive Schedule, consistent with the level III basic pay cap that applies to employees paid under the DHS pay system established under subpart C of these regulations. (See § 9701.312 of these regulations.) Currently, 5 U.S.C. 5373 provides a basic pay limitation equal to the rate for Executive Level IV. During the meet-and-confer process, the participating labor organizations requested clarification regarding which categories of employees were covered by the pay limitation under 5 U.S.C. 5373. In reordering this section, we have redesignated paragraph (c)(2) as paragraph (c) and revised it to clarify that the pay limitation under 5 U.S.C. 5373 applies to DHS employees whose pay is set by administrative action, such as Coast Guard Academy faculty. We note that 5 U.S.C. 5373 does not apply to employees covered by a pay system established under subpart C. The basic pay limitation for employees covered by subpart C is provided in § 9701.312.

Section 9701.303(c)(3) of the proposed regulations revised 5 U.S.C. 5379 to provide DHS with the authority to establish a student loan repayment program for DHS employees. During the meet-and-confer process, the participating labor organizations requested clarification regarding the process for establishing a new student loan repayment authority. In reordering this section, we have redesignated paragraph (c)(3) as paragraph (d) and revised it to provide that a DHS student loan repayment program under this authority will be established by implementing directives (as defined in § 9701.103). In addition, we have revised § 9701.303(d) to clarify that DHS will coordinate those implementing directives with OPM.

Section 9701.304—Definitions

The definition of ''control point'' has been removed consistent with the removal of the control point provisions in § 9701.321 and other sections of the regulations. (See *Section 9701.321—Structure of bands.*) We have added a definition of ''competencies'' that is identical to the definition of that term in § 9701.404 concerning the DHS performance management system. This is consistent with the addition of that term to the definitions section in subpart B. (See *Section 9701.204—Definitions.*) We have added a reference to the description of ''performance expectations'' in § 9701.406(c) to clarify the use of that term in the definitions of ''rating of record'' and ''unacceptable performance'' in § 9701.304. As a result of comments made during the meet-and-confer process, we have added a definition of ''modal rating'' to explain the use of this term in revised § 9701.342(a)(2). Finally, we have deleted the definition of ''unacceptable rating of record'' as unnecessary.

Section 9701.311—Major Features

Section 9701.311 requires that a DHS pay system established under subpart C include a number of specific features. Commenters noted that the term ''rate'' appeared to be missing after ''basic pay'' in paragraph (b). We agree and have inserted the term in § 9701.311(b).

Section 9701.312—Maximum Rates

Section 9701.312 provides that DHS may not pay an employee covered by a pay system established under subpart C a rate of basic pay in excess of the rate for level III of the Executive Schedule. This section further provides that DHS may establish the maximum annual rate of basic pay at the rate for level II of the Executive Schedule for members of the SES if DHS obtains the certification required under 5 U.S.C. 5307(d). Commenters observed that this proposed basic pay limitation and other features of the pay system proposal will not resolve the pay compression and limitation issues for senior law enforcement officers.

The rate of pay received by senior law enforcement officers and other employees who earn premium pay under 5 U.S.C. chapter 55 is subject to a special limitation in 5 U.S.C. 5547. This limitation is not affected by these regulations. Under 5 U.S.C. 9701(c)(2), DHS is prohibited from waiving the premium pay limitation or any other premium pay provision authorized under 5 U.S.C. chapter 55. See also the discussion of changes made in § 9701.332(c) to clarify that locality and special rate supplements are considered basic pay for the purpose of applying the limitation in § 9701.312 in *Section 9701.332—Locality rate supplements.*

Section 9701.314—DHS Responsibilities

Section 9701.313 of the proposed regulations provided a list of DHS's overall responsibilities in implementing the pay system established under subpart C. This section has been redesignated as § 9701.314 due to the insertion of a new § 9701.313, Homeland Security Compensation Committee. (*See* the discussion of new § 9701.313 under *General Comments.*)

Section 9701.321—Structure of Bands

Section 9701.321 provides DHS with the authority to establish basic pay rate ranges for bands after coordination with OPM. In the proposed regulations, this section also provided DHS with the authority to establish control points within bands to limit the initial pay-setting or pay progression of employees. The labor organizations expressed concerns about the control point provisions. They felt that control points could prevent employees who are meeting or exceeding performance expectations from achieving the same level of pay they could receive under the current system. They recommended that the regulations be modified to require that control point policies be collectively bargained.

We have removed the provisions concerning control points in §§ 9701.321(a) and (d) and 9701.342(d)(3), as well as the definition of ''control point'' in § 9701.304 of the proposed regulations, as it is not our intention to unduly limit pay progression.

Section 9701.321(c) of the proposed regulations provided DHS with the authority to establish different basic pay rate ranges for employees in a band who are stationed in locations outside the 48 contiguous States. Commenters requested clarification regarding how basic pay rate ranges for employees stationed outside the 48 contiguous States will be determined. Other commenters were concerned that employees working in Hawaii, Puerto Rico, Alaska, and other nonforeign areas and foreign areas would never see another annual pay increase because funding will be used for performance pay increases and that employees in such areas will not receive any locality rate supplement. During the meet-and-confer process, the participating labor organizations asked whether locality rate supplements under § 9701.332 would apply to employees stationed outside the 48 contiguous States and what protections would be offered to replicate the current pay-setting criteria for employees in these locations.

We have removed paragraph (c) from § 9701.321. We have also removed paragraph (d) from § 9701.322, which provided DHS with the authority to provide basic pay rate range adjustments in locations outside the 48 contiguous States that differ from the adjustments within the 48 States. Under the revised regulations, employees in a band who are stationed in locations outside the 48 contiguous States will be covered by the same basic pay ranges as other employees in that band who are stationed within the 48 States. In addition, under §§ 9701.332 and 9701.333, and after coordination with OPM, DHS may establish locality or special rate supplements for employees stationed outside the 48 contiguous States. Employees stationed in locations outside the 48 contiguous States also will continue to be entitled to foreign and nonforeign area cost-of-living allowances and other differentials and allowances under 5 U.S.C. chapter 59, as applicable.

Section 9701.322—Setting and Adjusting Rate Ranges

Section 9701.322 provides DHS with the authority to set and adjust the basic pay rate ranges of bands after coordination with OPM. Section 9701.322(b) of the proposed regulations provided DHS with the authority, after coordination with OPM, to determine the effective date of newly set or adjusted band rate ranges and stated that, generally, ranges will be adjusted annually. The labor organizations recommended that the regulations be amended to guarantee that basic rate ranges will be adjusted annually and normally become effective in January.

We have revised § 9701.322(a) to clarify that DHS may set and adjust rate ranges on an annual basis. In addition, we have revised § 9701.322(b) to provide that, unless DHS determines that a different date is needed for operational reasons, annual adjustments to basic rate ranges will become effective on or about the same date as the annual General Schedule pay adjustment authorized by 5 U.S.C. 5303.

Section 9701.322(c) provides that DHS may provide different rate range adjustments for different occupational clusters. A commenter requested clarification regarding whether the pay ranges will vary between occupational clusters. We have clarified paragraph (c) to provide that DHS may establish different rate ranges and rate range adjustments for different bands.

As previously discussed, we also have removed paragraph (d) from § 9701.322, which provided DHS with the authority to provide basic pay rate range adjustments in locations outside the 48 contiguous States that differ from the adjustments within the 48 States. (See *Section 9701.321—Structure of bands.*) Paragraph (e) in the proposed regulations has been redesignated paragraph (d) in these final regulations.

Section 9701.323—Eligibility for Pay Increase Associated With a Rate Range Adjustment

Section 9701.323(a) of the proposed regulations provided that an employee who meets or exceeds performance expectations must receive an increase in basic pay equal to the percentage value of any increase in the minimum rate of the employee's band resulting from a basic rate range adjustment under § 9701.322. Section 9701.323(b) provides that an employee who has an unacceptable rating of record may not receive a pay increase as a result of a rate range adjustment. During the meet-and-confer process, the participating labor organizations requested that the regulations clarify which type of pay increase paragraph (a) covers and when eligible employees would be entitled to such a pay increase.

We agree and have revised § 9701.323(a) to clarify that when a band rate range is adjusted under § 9701.322, employees covered by that band are eligible for an individual pay increase if they meet or exceed performance expectations. We also clarified that for an employee receiving a retained rate, the amount of the pay increase is determined under § 9701.356. (*See Section 9701.356—Pay retention.*) We have also redesignated paragraph (b) as paragraph (c) for clarification purposes.

The labor organizations also recommended that § 9701.323(a) be revised to provide that an employee who meets or exceeds expectations must receive an increase in pay equal to either (1) the percentage value of any increase in the minimum rate of the employee's band resulting from a rate range adjustment (as stated in the proposed regulations) or (2) the percentage value equal to the average of the increase in the minimum rate and the increase in the maximum rate of the employee's band, whichever is greater.

We have not revised § 9701.323(a) in response to this recommendation. Under § 9701.322(d), DHS has the authority to adjust the minimum and maximum rates of band ranges by different percentages. This will allow DHS, for example, to increase the maximum rate by a greater percentage than the minimum rate in response to labor market factors that warrant a broader rate range for a particular occupational category. However, § 9701.323 requires DHS to increase the pay of eligible employees by only the percentage value of any increase in the minimum rate of the band. As a result, DHS has greater opportunities to enhance employee pay through the use of performance pay increases under § 9701.342. Providing greater opportunities for high performers to earn pay increases will help DHS be more competitive in the labor market, since in the private sector high performers are generally provided with larger pay increases.

We also note that increases in the maximum rate may be unrelated to changes in the labor market and, thus, should not be used to determine the general increase for DHS employees. For example, DHS may decide that a rate range is too narrow to appropriately recognize high performers and extend the range by 10 percent. That does not mean that all eligible employees in the band should receive a 10 percent increase.

Commenters also requested that § 9701.323(a) be revised to make the payment of the annual adjustment nondiscretionary. We have not adopted this recommendation. These regulations authorize DHS to establish a contemporary pay system that is more performance-sensitive to help achieve

and sustain a high performance culture. Providing annual basic pay increases only to employees whose performance meets or exceeds expectations will help support this goal. This policy is consistent with the findings of the National Academy of Public Administration (NAPA) in its May 2004 report, ''Recommending Performance-Based Federal Pay.'' The NAPA report states that most private sector companies base all pay adjustments on performance.

Section 9701.323(b) of the proposed regulations provided that the ''denial'' of a pay increase associated with a rate range adjustment is not considered an adverse action under subpart F. To clarify our intent, we have revised this paragraph (now redesignated as paragraph (c)) to state that if an employee's pay remains unchanged because he or she has received an unacceptable rating of record, the ''failure to receive a pay increase'' is not an adverse action.

Section 9701.323(c) of the proposed regulations provided that if an employee does not have a rating of record for the purpose of granting a pay increase under § 9701.323(a), the employee is deemed to meet or exceed performance expectations. During the meet-and-confer process, the participating labor organizations asked that the regulations be revised to provide that such determinations be based on the employee's most recent rating of record.

We agree that this provision must be clarified. Therefore, we have redesignated paragraph (c) as paragraph (b) and revised it to provide that an employee without a rating of record for the most recently completed appraisal period must be treated in the same manner as an employee who meets or exceeds performance expectations and is entitled to receive an increase based on the rate range adjustment under § 9701.323(a).

Section 9701.323(d) of the proposed regulations provided DHS with the authority to adopt policies under which an employee who is initially denied a pay increase under this section based on an unacceptable rating of record may receive a delayed increase after demonstrating improved performance. The regulations provided that any such delayed increase would be made effective prospectively.

During the meet-and-confer process, the participating labor organizations expressed a concern that certain employees would fall below the minimum pay rate for their bands if they were at or near the low end of the band and were denied a rate range increase as a result of an unacceptable rating of record. They also expressed a concern that the proposed regulations allow managers to continuously rate employees unacceptable and indefinitely deny them pay increases. The labor organizations believe that DHS, and not its employees, should bear the burden of proof in any action that denies employees a rate range increase. The labor organizations also argued that any pay system that allows certain employees to be paid below the minimum rate set for a band is not truly a market-based system.

Other commenters suggested that if an employee loses a pay increase due to poor performance, the increase should be restored automatically when performance becomes satisfactory as an incentive to become successful. Commenters expressed a need for less manager discretion and more policy governing the granting of previously denied pay increases based on performance improvement. The commenters were concerned that the lack of clear policy may result in disparate use of this authority and increased grievances and equal employment opportunity (EEO) complaints.

We agree with some of these concerns and have revised the regulations as follows:

- We have added a new § 9701.324, *Treatment of employees whose rate of basic pay does not fall below the minimum rate of their band.* This section provides that an employee who initially does not receive a pay increase under § 9701.323 based on an unacceptable rating of record, and whose rate does not fall below the minimum rate of the band, must receive a delayed increase after demonstrating performance that meets or exceeds performance expectations, as reflected in a new rating of record. Any such delayed increase will be made effective on the first day of the first pay period beginning on or after the date the new rating of record is issued.
- We have added new § 9701.325, *Treatment of employees whose rate of basic pay falls below the minimum rate of their band.* Paragraph (a) of this section requires that in the case of an employee who does not receive a pay increase under § 9701.323 DHS must (1) initiate action within 90 days after the date of the rate range adjustment to demote or remove the employee in accordance with the adverse action procedures under subpart F, or (2) if the employee demonstrates performance that meets or exceeds performance expectations within 90 days after the date of the rate range adjustment, issue a new rating of record and adjust the employee's pay prospectively.
- Paragraph (b) of new § 9701.325 provides that if DHS fails to initiate a removal or demotion action under paragraph (a) within 90 calendar days after the date of a rate range adjustment, the employee becomes entitled to the minimum rate of his or her band rate range on the first day of the first pay period beginning on or after the 90th day following the date of the rate range adjustment.

We do not agree that managers should be required to initiate an adverse action whenever employees are rated unacceptable. Unless such a rating results in an employee being paid below the minimum band rate, an employee's ability to grieve his or her performance rating is sufficient protection against unfair or inaccurate ratings.

The labor organizations also recommended that § 9701.323(d) be revised to require that delayed increases must be retroactively effective if there is a management error in assessing an unacceptable rating or when a rating is overturned on appeal. We did not make a change in the regulations in response to this comment. If an employee does not receive a pay adjustment because of an error in assessing an unacceptable rating, when the rating error is corrected, the employee is entitled to receive any pay increase associated with the correct rating. This pay increase must be made effective retroactive to the effective date of the incorrectly denied increase and is subject to back pay under 5 U.S.C. 5596.

Section 9701.331—General

Section 9701.331 of the proposed regulations provided that basic pay ranges under the new DHS pay system may be supplemented by locality or special rate supplements. During the meet-and-confer process, the participating labor organizations asked that the regulations provide that payment of such supplements to employees be mandatory.

We agree that locality and special rate supplements should be paid in appropriate circumstances and have revised § 9701.331 to clarify this point. We do not agree that such payments should be mandatory, but have revised § 9701.331 to clarify that DHS may pay locality or special rate supplements in appropriate circumstances. For example, DHS may decide that a locality rate supplement is unnecessary for nonforeign or foreign areas or that a different pay flexibility (e.g., recruitment bonuses, retention allowances, or special staffing payments under § 9701.363) will better address a

particular staffing problem instead of establishing a special rate supplement. DHS must retain the flexibility under §§ 9701.332 and 9701.333 to establish locality rate supplements for geographic areas and occupational clusters when warranted by mission requirements, labor market conditions, and other factors and special rate supplements when warranted by current or anticipated recruitment and/or retention needs.

Section 9701.332—Locality Rate Supplements

Section 9701.332(a) and (b) provides DHS with the authority to establish locality rate supplements and set the boundaries of locality pay areas after coordination with OPM. The regulations provide DHS with the authority to establish different locality rate supplements for different occupational clusters or for different bands within an occupational cluster.

Commenters recommended that § 9701.332 be revised so that locality rate supplements are based on cost-of-living factors instead of the cost of labor, such as through the use of Chamber of Commerce analyses and data on median housing costs in each geographic area. We do not agree. Generally, employers set pay based on the labor market to be sufficiently competitive to avoid staffing problems. Paying above what is necessary to be competitive in the labor market does not make economic sense. If you have a market-based pay system, but grant additional pay for high living costs, you no longer have market-based rates. Also, living costs are very difficult to measure.

If DHS experiences recruitment or retention problems due to living costs in a particular geographic area, other pay flexibilities are available to address such problems. For example, DHS could establish a special rate supplement under § 9701.333 of these regulations or a special staffing payment under § 9701.363 to address staffing problems for a particular category of employees in a given geographic area. DHS also may use recruitment and relocation bonuses under 5 U.S.C. 5753, retention allowances under 5 U.S.C. 5754, and other flexibilities to address staffing problems that may be caused by cost-of-living factors.

Section 9701.332(b) of the proposed regulations provided that if DHS does not use the locality pay areas established by the President's Pay Agent under 5 U.S.C. 5304, it may make boundary changes by regulation or other means. We have revised this paragraph to clarify that DHS may, after coordination with OPM, establish and adjust different locality pay areas within the 48 contiguous States or new locality pay areas outside the 48 contiguous States by regulation. We note that while the final regulations provide DHS with the discretion to establish new or different locality pay areas within and outside the 48 States, DHS will likely adopt the locality pay areas established under 5 U.S.C. 5304 for the purpose of establishing locality rate supplements under § 9701.332.

Section 9701.332(c) lists the purposes for which locality rate supplements are considered basic pay. During the meet-and-confer process, the participating labor organizations requested clarification regarding whether the purposes for which locality rate supplements are treated as basic pay will be different from the purposes for which locality payments under 5 U.S.C. 5304 are treated as basic pay. Another commenter encouraged the consistent treatment of locality supplements as basic pay across the Department.

Under § 9701.332(c), the purposes for which locality rate supplements are considered basic pay include all of the purposes that apply to locality payments under 5 U.S.C. 5304 and 5 CFR part 531, subpart F. We agree that the treatment of locality rate supplements as basic pay should be consistent throughout the Department and only as provided in these regulations, DHS implementing directives, or other laws or regulations, consistent with the requirements in § 9701.332(c). We have revised § 9701.332(c)(6) (as redesignated from § 9701.332(c)(5) in the proposed regulations) to clarify that locality rate supplements may be considered basic pay for the purpose of other payments and adjustments under subpart C only if specified by DHS in implementing directives, consistent with the new definition of ''implementing directives'' in § 9701.103 and the requirement for continuing collaboration with employee representatives in developing implementing directives under § 9701.105. (See *Section 9701.103—Definitions and Section 9701.105—Continuing collaboration*.)

In addition, we inserted a new § 9701.332(c)(5) to clarify that locality rate supplements (and special rate supplements, by reference under § 9701.333) are considered basic pay for the purpose of applying the maximum rate limitation under § 9701.312. The remaining paragraphs (c)(5) through (c)(7) of the proposed regulations are redesignated as paragraphs (c)(6) through (c)(8).

Section 9701.333—Special Rate Supplements

Section 9701.333 provides DHS with the authority to establish special rate supplements after coordination with OPM that provide higher levels of pay for subcategories of employees in an occupational cluster if warranted by current or anticipated recruitment or retention needs. The proposed regulations provided DHS with the authority to establish rules for implementing such supplements. This section also provides that special rate supplements are considered basic pay for the same purposes as locality rate supplements under § 9701.332(c) and for the purpose of computing cost-of-living allowances and post differentials in nonforeign areas under 5 U.S.C. 5941.

A commenter encouraged consistent treatment of special rate supplements as basic pay across the Department. We agree that the treatment of special rate supplements as basic pay should be consistent throughout the Department and only as provided in these regulations, DHS implementing directives, or other laws or regulations, consistent with the requirements for locality rate supplements under § 9701.332(c), as revised in these regulations.

Section 9701.334—Setting and Adjusting Locality and Special Rate Supplements

Section 9701.334 of the proposed regulations provided that locality and special rate supplements would ''generally'' be reviewed on an annual basis in conjunction with a rate range adjustment under § 9701.322. Consistent with the changes in revised § 9701.322(a), we have revised § 9701.334(b) to require DHS to review established supplements for possible adjustment on an annual basis in conjunction with a rate range adjustment.

Section 9701.335—Eligibility for Pay Increase Associated With a Supplement Adjustment

We have revised § 9701.335(a) to clarify that when a locality or special rate supplement is adjusted under § 9701.334, an employee is entitled to the pay increase resulting from that adjustment if the employee meets or exceeds performance expectations. This is consistent with part of the revision of § 9701.323(a), which clarifies when an employee is entitled to receive a basic rate range adjustment. (See *Section 9701.323—Eligibility for pay increase associated with a rate range adjustment*.)

Commenters felt that the payment of locality rate supplements should not be discretionary. They argued that locality pay was not designed to reward performance, but to close a salary gap between Federal and non-Federal employees.

The locality rate supplement authority in the DHS regulations is specifically designed to respond to occupation-specific labor market conditions among geographic areas and to support DHS's and OPM's desire to establish a contemporary pay system that is more performance-sensitive to help achieve a high performance culture. Providing locality rate supplement increases only to employees whose performance meets or exceeds expectations will help support this goal and will help DHS become more competitive in recruiting and retaining high performing employees.

Section 9701.335(b) of the proposed regulations provided that an employee who has an unacceptable rating of record may not receive a pay increase as a result of an increase in a locality or special rate supplement. Paragraph (b) of the proposed regulations also provided DHS with the authority to determine the method of preventing a pay increase in this circumstance, including by reducing the employee's rate of basic pay by the amount necessary to prevent an increase.

During the meet-and-confer process, the participating labor organizations expressed concerns about the regulations providing DHS with the authority to reduce the rate of basic pay for an employee with an unacceptable rating of record without adverse action protections in order to offset an increase in a locality or special rate supplement. They expressed the belief that reducing basic pay for unacceptable performance should be considered an adverse action under subpart F even if the employee's total locality or special rate supplement-adjusted pay rate does not change as a result of the basic pay reduction.

We redesignated paragraph (b) as paragraph (c). We revised the language to provide that if an employee has an unacceptable rating of record at the time of an increase in a locality or special rate supplement, the employee will not receive an increase in the applicable supplement. Basic pay will not be reduced under this authority. We have also revised this paragraph to clarify our intent that if an employee's pay remains unchanged because he or she has received an unacceptable rating of record, the failure to receive a pay increase associated with a supplement adjustment is not an adverse action.

Section 9701.335(c) of the proposed regulations provided that if an employee does not have a rating of record for the purpose of granting a pay increase associated with a supplement adjustment, the employee is deemed to meet or exceed performance expectations. We have redesignated paragraph (c) as paragraph (b). We revised this paragraph, consistent with the revision of § 9701.323(b), to provide that an employee without a rating of record must be treated in the same manner as an employee who meets or exceeds performance expectations. (*See Section 9701.323—Eligibility for pay increase associated with a rate range adjustment.*)

Section 9701.335(d) of the proposed regulations provided DHS with the authority to adopt policies under which an employee who is initially denied a pay increase under this section based on an unacceptable rating of record may receive a delayed increase after demonstrating improved performance. During the meet-and-confer process, the participating labor organizations questioned whether a denial of a pay increase as a result of an increase in a locality or special rate supplement could cause an employee's pay to fall below the minimum rate of the band. The labor organizations questioned how long an employee's pay rate could be below the minimum band rate without requiring management to take some action (e.g., demotion or removal).

It is possible for an employee's locality or special rate supplement-adjusted pay rate to fall below the locality or special rate supplement-adjusted minimum band rate as a result of a denial of a supplement increase under § 9701.335(c). We agree with the labor organizations' concern about requiring DHS to take action in this situation. Therefore, we revised and moved paragraph (d) to a new § 9701.336, *Treatment of employees whose pay does not fall below the minimum adjusted rate of their band.* This new section provides the requirements for paying a delayed supplement increase after the employee demonstrates performance that meets or exceeds performance expectations, consistent with the changes made in new § 9701.324. We also have added a new § 9701.337, *Treatment of employees whose rate of pay falls below the minimum adjusted rate of their band.* Paragraph (a) of this new section requires DHS to take specific actions within 90 days after the employee's pay rate falls below the adjusted band minimum rate. Paragraph (b) provides that if DHS does not take action within 90 days, the employee's pay rate must be set at the adjusted band minimum rate. This new section is consistent with new § 9701.325 on pay increases associated with rate range adjustments. (See *Section 9701.323—Eligibility for pay increase associated with a rate range adjustment.*)

Section 9701.342—Performance Pay Increases

Section 9701.342(a) provides an overview of the DHS performance-based pay system for employees in a Full Performance or higher band based on ratings of record assigned under a performance management system established under subpart D. We have moved the sentence concerning the rating of record used as a basis for a performance pay increase to a separate paragraph (a)(2). In reaction to concerns about DHS's authority to issue a new rating of record for an employee if the employee's current performance is not consistent with his or her most recent rating of record, we have revised new paragraph (a)(2) to clarify that the employee's supervisor (or other rating official) may make such determinations and prepare any new rating of record. This new language is consistent with the language used in § 9701.409(b) regarding rating employee performance. We note that the definition of ''rating of record'' in §§ 9701.304 and 9701.404 states that a rating of record is prepared at the end of an appraisal period or to support a pay determination under subpart C of these regulations (or other rules). Because DHS plans to make pay determinations shortly after issuing ratings of record at the end of the appraisal period, we anticipate that DHS will rarely need to issue supplemental ratings of record to support pay decisions.

New paragraph (a)(2) also clarifies that if an employee does not have a rating of record, DHS will use the modal rating received by other employees covered by the same pay pool during the most recent rating cycle to determine the employee's performance pay increase. This change is consistent with other revisions of the regulations on determining the pay increases and adjustments for employees without a rating of record. (See § 9701.342(f) and (g).)

Section 9701.342(c) provides DHS with the authority to establish point values that correspond to the performance rating levels established by the performance management system under subpart D. These point values will be used to determine performance pay increases. This section also provides DHS with authority to establish a point value pattern for each

pay pool and requires DHS to assign zero points to any employee with an unacceptable rating of record.

One commenter recommended that DHS not limit its pay-for-performance options to only the point value system defined in the proposed regulations. The commenter was concerned about unintended consequences of the proposed system that would require regulatory changes to address those consequences. The commenter recommended that the regulations allow alternative pay-for-performance systems to be adopted within major components, subject to DHS objectives, criteria, and approval.

We understand the commenter's desire that the regulations provide DHS with the flexibility to develop different types of pay-for-performance systems tailored to the performance and mission requirements of individual DHS components and not be limited to the proposed point value system. However, in developing the regulations for the DHS pay system, we balanced the need for flexibility with the need for a system that generates respect and trust and is credible and transparent. Subpart C of the regulations provides the parameters and criteria for the point value system in sufficient specificity so that managers, employees, and employee representatives can better understand how performance pay increases will be determined and paid. At the same time, the regulations allow DHS to tailor the point value system to the mission and performance needs of individual components and the specific performance requirements and priorities of individual positions and occupations.

Another commenter requested clarification regarding the logic of establishing different point value patterns by pay pool, as provided in § 9701.342(c)(2). The regulations provide DHS with the flexibility to establish different point value patterns for each pay pool so that each pay pool can better reflect the performance goals, objectives, and priorities of the employees and organizations covered. This matter will be further clarified in implementing directives.

Section 9701.342(d) provides DHS with the authority to determine the value of performance points (as a percentage of basic pay or as a fixed dollar amount), the amount of an employee's performance payout, and the effective dates of performance pay adjustments. This paragraph also specifies that a performance payout may not cause an employee's rate of basic pay to exceed the maximum basic rate of the band and provides DHS with the authority to pay excess amounts as lump-sum payments.

Commenters were concerned that if more employees receive higher ratings, the value of the payout for each employee lessens. We acknowledge that this is a consequence of this type of pay-for-performance system. A point value system requires managers to make distinctions in ratings if they want to grant the highest performers the greatest pay increases. In keeping with our guiding principles, this type of system is designed to place greater emphasis on making distinctions among employees' performance.

Commenters also were concerned that lump-sum payments are taxed at a greater percentage than a basic pay increase and will not have the same lasting effect over time as a basic pay increase. We have removed the language from § 9701.342(d)(3) that stated that the payment of performance payouts as basic pay increases is subject to any applicable control point within a band, consistent with the removal of control point provisions elsewhere in the regulations. (See *Section 9701.321—Structure of bands.*) Lump-sum performance payouts may be paid in lieu of basic pay increases only when an employee's rate of basic pay would otherwise exceed the band maximum rate. While tax withholdings may be greater in the short term, lump-sum payments are not taxed at a higher rate than any other form of income. Also, consistent with other changes in the regulations that clarify how DHS will grant pay increases to retained rate employees, we have added a new paragraph (d)(5) to § 9701.342 to clarify that for an employee receiving a retained rate under § 9701.356, DHS will issue implementing directives (as defined under § 9701.103) to provide that a lump-sum performance payout may not exceed the amount that may be received by an employee in the same pay pool with the same rating of record who is at the maximum rate of the band.

Another commenter suggested that the regulations allow all employees on certain ''teams'' (or offices) to receive a bonus based on a percentage of their pay when the team achieved its goals. Team awards, such as goalsharing awards, are generally paid under 5 U.S.C. chapter 45, which is not waived by these regulations. DHS continues to have the flexibility to grant group or team-based awards and bonuses under this authority.

Section 9701.342(e) specifies the circumstances under which performance payouts may be prorated. Section 9701.342(f) of the proposed regulations provided for the payment of performance pay increases for employees upon reemployment after performing honorable service in the uniformed services.

During the meet-and-confer process, the participating labor organizations requested that § 9701.342(e)(2) clarify, as necessary, the circumstances in which it would be illegal to prorate performance payouts for employees in a leave-without-pay status. We have revised § 9701.342(e)(2) to clarify that DHS may not prorate performance payouts for employees in a leave-without-pay status while performing honorable service in the uniformed services or while in a workers' compensation status, as provided in paragraphs (f) and (g) of this section. In addition, DHS may issue implementing directives regarding the proration of performance payouts for employees in other circumstances.

During the meet-and-confer process, the participating labor organizations recommended that § 9701.342(f) be revised to clarify how DHS will set the rate of basic pay for employees upon reemployment after performing honorable service in the uniformed services and how intervening performance pay adjustments for such employees would be determined upon reemployment. We have revised § 9701.342(f) of the proposed regulations to require DHS to issue implementing directives (as defined in § 9701.103) governing how it will set the rate of basic pay for employees upon reemployment and that DHS will credit the employee with intervening rate range adjustments under § 9701.323(a), developmental pay adjustments under § 9701.345, and performance pay adjustments under § 9701.342 based on the employee's last rating of record. The regulations clarify that, for an employee without a rating of record, DHS will use the modal rating received by other employees in the same pay pool. Paragraph (f) also clarifies that employees returning from qualifying service in the uniformed services and returning to duty after receiving injury compensation will receive the full value of their next performance pay increase associated with their rating of record.

As a result of the labor organization's comments, we also have added a new paragraph (g) to § 9701.342 to address pay setting and determining intervening performance pay adjustments for employees upon reemployment after being in a workers' compensation status. The provisions in new paragraph (g) are identical to the provisions in revised § 9701.342(f) regarding setting pay for employees upon reemployment after

performing honorable service in the uniformed services.

Section 9701.343—Within Band Reductions

Section 9701.343 provides DHS with the authority to reduce an employee's rate of basic pay within a band for unacceptable performance or conduct under the adverse action procedures in subpart F of these regulations. During the meet-and-confer process, the participating labor organizations were very concerned that the proposed regulations provided DHS with the authority to reduce an employee's pay within a band without limit. We have revised § 9701.343 to provide that a within-band reduction in basic pay may not be greater than 10 percent, as discussed during the meet-and-confer process. The regulations continue to provide that a within-band reduction may not cause an employee's rate of basic pay to fall below the minimum rate of the employee's band. (*See* related discussion at *Section 9701.354—Setting pay upon demotion*.)

Commenters observed that §§ 9701.343 and 9701.357(a) appeared to be inconsistent regarding the ability of an employee with an unacceptable rating of record to be paid less than the minimum rate of his or her band. We have revised the regulations to clarify that § 9701.357(a) does not apply in the case of an employee who does not receive a pay increase based on an unacceptable rating of record under § 9701.343.

Other commenters felt that pay reductions should not be permitted for any reason and that pay reductions do not improve performance and have greater impact on an employee's family than on the employee. We do not agree. We understand that pay reductions can adversely affect an employee's family. However, DHS feels it is necessary to retain flexibility to reduce the pay of an unacceptable performer in order to achieve and retain a high performing workforce.

Section 9701.344—Special Within-Band Increases for Certain Employees

Section 9701.344 of the proposed regulations provided DHS with the authority to approve special basic pay increases for employees in a Senior Expert band who possess exceptional skills in critical areas or who make exceptional contributions to mission accomplishment. A commenter recommended that the within-band increase provision be available in all bands. The commenter felt that this would be a useful management tool in all pay bands, particularly with reference to recognizing and retaining top performers. We have revised this section to allow DHS to issue implementing directives (as defined in § 9701.103) to provide special within-band basic pay increases for employees in a Full Performance or higher band. We also have revised this section to clarify that such increases may not be based on length of service.

The labor organizations asked that the regulations clarify what constitutes ''exceptional skills'' or ''exceptional contributions'' for any particular occupation, with labor organization involvement. We did not revise the regulations to define or clarify these terms. This specificity is better suited for DHS implementing directives regarding the use of special within-band pay increases. DHS implementing directives may provide that such increases may be used to help recruit or retain employees demonstrating extraordinary performance or as an incentive for employees with exceptional skills to accept increased responsibility.

During the meet-and-confer process, the participating labor organizations requested clarification regarding the differences between special within-band increases for employees in a Senior Expert band, special rate supplements under § 9701.333, special skills payments under § 9701.361, special assignment payments under § 9701.362, and special staffing payments under § 9701.363. See the comparison chart under the section entitled *Section 9701.361—Special skills payment; Section 9701.362—Special assignment payments;* and *Section 9701.363—Special staffing payments* for information on each of these special pay flexibilities.

Section 9701.345—Developmental Pay Adjustments

Section 9701.345 of the proposed regulations provided DHS with the authority to establish policies and procedures for adjusting the pay of employees in an Entry/Developmental band. During the meet-and-confer process, the participating labor organizations requested that the regulations clarify how employees will progress through an Entry/Developmental pay band. The labor organizations also recommended that the regulations require that increments of pay progression link to identified levels of knowledge, competencies, and skills. Another commenter noted that DHS must provide the necessary means to attain the requisite skills and competencies to advance within the Entry/Developmental band, either through on-the-job opportunities or formal training. The same commenter expressed the view that without clearly defined and funded means to do this (*i.e.*, career development and employee training and education), employees may not be able to gain skills and grow as necessary to move up within the band and be promoted out of the band. The commenter suggested that the regulations mandate the establishment of a policy for adjusting pay within the Entry/Developmental pay band and that employees who more quickly attain requisite skills and competencies be accelerated in their advancement.

We have revised § 9701.345 to clarify that DHS will issue implementing directives (as defined in § 9701.103) regarding pay adjustments for employees in the Entry/Developmental band. The regulations provide that such directives may require employees to meet certain standardized assessment points as part of a formal training/developmental program. The regulations also clarify that in administering pay progression plans, DHS may use measures that link pay progression to the demonstration of knowledge, skills, and abilities (KSAs)/competencies.

In addition, we have revised § 9701.373 to provide DHS with the authority to issue implementing directives governing the conversion of employees currently in career ladder positions into Entry/Developmental bands. (See *Section 9701.373—Conversion of employees to the DHS pay system*.)

Section 9701.346—Pay Progression for New Supervisors

A number of commenters were concerned about the ability of supervisors to apply the new DHS pay system provisions. Commenters felt that training for supervisors and employees will be critical to the equitable application of the new pay-for-performance system and in conducting performance reviews.

We have added a new § 9701.346 regarding pay progression for new supervisors that requires DHS to issue implementing directives requiring an employee newly appointed to or selected for a supervisory position to meet certain assessment or certification points as part of a formal training/developmental program. In administering performance pay increases under § 9701.342 for new supervisors, the regulations provide DHS with the authority to take into account the employee's success in completing a formal training/developmental program in addition to his or her performance.

Section 9701.353—Setting Pay Upon Promotion

Section 9701.353 of the proposed regulations provided that upon promotion DHS must provide an increase in an employee's rate of basic pay equal to the greater of (1) 8 percent, or (2) the amount necessary to reach the minimum rate of the higher band. During the meet-and-confer process, the participating labor organizations were concerned that this section of the regulations provided a promotion pay increase that is less than the normal increase for a GS two-grade interval promotion. Other commenters also expressed this concern. The labor organizations also requested that the regulations clarify the policies DHS will issue regarding pay-setting upon promotion and how pay will be set upon promotion for an employee receiving a retained rate.

We have revised this section of the regulations as follows:

- Under § 9701.353(a), DHS must increase an employee's rate of basic pay upon promotion to a higher band by at least 8 percent, but pay may not be set less than the minimum rate of the higher band.
- Under § 9701.353(b), DHS will issue implementing directives providing for an increase other than that specified in paragraph (a) in certain situations. We also removed the pay-setting criteria under § 9701.353(b)(3) for an employee who was demoted and is then repromoted back to the higher band because these kinds of rules are better suited for DHS implementing directives.
- Under § 9701.353(c), we revised the promotion pay-setting rule for retained rate employees, consistent with the change in § 9701.353(a).

Section 9701.354—Setting Pay Upon Demotion

Section 9701.354 of the proposed regulations provided DHS with the authority to prescribe rules governing how to set an employee's pay upon demotion. During the meet-and-confer process, the participating labor organizations were very concerned that the proposed regulations provided DHS with the authority to reduce an employee's pay upon demotion without limit. We have revised § 9701.354 to provide that a reduction in basic pay upon demotion under adverse action procedures may not exceed 10 percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band.

Section 9701.356—Pay Retention

Section 9701.356(a) of the proposed regulations provided DHS with the authority to prescribe policies governing the application of pay retention. Section 9701.356(c) provided that a retained rate is a frozen rate that is not adjusted in conjunction with rate range adjustments. During the meet-and-confer process, the participating labor organizations recommended that the rules for providing a rate range adjustment for employees receiving a retained rate be consistent with the rules for GS retained rate employees. We have revised § 9701.356 to provide that in applying the basic rate range adjustment provisions under § 9701.322, any increase in the rate of basic pay for an employee receiving a retained rate is equal to one-half of the percentage value of any increase in the minimum rate of the employee's band.

Section 9701.361—Special Skills Payments; Section 9701.362—Special Assignment Payments; and Section 9701.363—Special Staffing Payments

Sections 9701.361, 9701.362, and 9701.363 provide DHS with the flexibility to authorize three different types of special payments to employees possessing certain skills (special skills payments) or serving on certain special assignments (special assignment payments) or to address significant recruitment or retention problems (special staffing payments). Such payments may be paid at the same time as basic pay or in periodic lump-sum payments, are not considered basic pay for any purpose, and may be terminated or reduced at any time.

During the meet-and-confer process, the participating labor organizations requested clarification regarding the differences among these special payments and how these payments differ from special rate supplements under § 9701.333 and special within-band increases under § 9701.344. Other commenters also requested that the regulations clarify the purposes of these payments and how they will be used by DHS. The following chart provides additional information on the purpose and criteria for granting special rate supplements and special within-band increases. Other features of these special payments are also highlighted. In addition, the chart provides illustrative examples of these special payments. Nothing in this chart obligates DHS to authorize these payments for any particular category of employees.

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Summary of Special Rate Supplements and Special Payments Provisions

	Special Rate Supplements § 9701.333	Special Within-Band Increases § 9701.344	Special Skills Payments § 9701.361	Special Assignment Payments § 9701.362	Special Staffing Payments § 9701.363
Definition	Provides higher pay levels for subcategories of employees within an occupational cluster if warranted by current or anticipated recruitment and/or retention needs. *Similar to special salary rates used today*	Within-band increases for employees in a Full-Performance or higher band established under § 9701.212 who possess exceptional skills in critical areas or who make exceptional contributions to mission accomplishment.	Additional payments for special skills for which the incumbent is trained and ready to perform at all times.	Additional payments for employees serving on special assignments in positions placing significantly greater demands on the employee than other assignments within the employee's band.	Additional payments for employees serving in positions for which DHS is experiencing or anticipates significant recruitment or retention problems.
Illustrative Examples	Police officers in high labor cost areas	Research and development scientist with cutting edge technology	Foreign language, K-9 handler, or information technology (critical infrastructure)	Leading a security team at a major event or performing undercover work	Remote/isolated location where amenities are not readily available or locations where housing costs are unusually high
Payment Provision	Treated as basic pay for the same purposes as locality rate supplements and for computing cost-of-living allowances and post differentials in nonforeign areas under 5 U.S.C. 5941.	Treated as basic pay. Addition to performance pay increases; does not affect the performance pay pool associated with that band. Increases may be made at any time	Not treated as basic pay for any purpose. May be terminated or reduced at any time without triggering pay retention or adverse action procedures. Payments may be made at the same time as basic pay or in periodic lump-sum payments.		

	Special Rate Supplements § 9701.333	Special Within-Band Increases § 9701.344	Special Skills Payments § 9701.361	Special Assignment Payments § 9701.362	Special Staffing Payments § 9701.363
Criteria	DHS to establish implementing directives after coordination with OPM.	DHS to establish implementing directives.	DHS to establish implementing directives to include amount of payments, eligibility conditions, performance and/or service agreement requirements, etc.		

BILLING CODE 6325–39–C; 4410–10–C

Commenters also requested that the regulations be revised to make special skills payments under § 9701.361 and special assignment payments under

§ 9701.362 nondiscretionary. We do not agree. The special skills and special assignment payment authorities are designed to provide DHS with additional pay flexibility to address specific human capital needs. For example, DHS may wish to establish a special assignment payment for employees performing temporary emergency or mission critical duties in an identified geographic location or component where employees do not normally perform such duties. However, DHS may choose not to pay this special assignment payment to employees working in a different geographic location or organization who regularly perform these same duties. Requiring the nondiscretionary use of special skills or special assignment payments would reduce DHS's ability to use these pay flexibilities in strategic ways.

Section 9701.373—Conversion of Employees to the DHS Pay System

Section 9701.373(e) of the proposed regulations provided the Secretary with the discretionary authority to make one-time pay adjustments for GS and prevailing rate employees when they are converted to the DHS pay system. The labor organizations recommended that the regulations be amended to require (1) within-grade increase buy-ins as basic pay adjustments and (2) career-ladder increase buy-ins as a basic pay adjustment upon conversion of employees into the new pay system. Other commenters were concerned that employees currently in GS career-ladder positions who are converted into the new pay system have no guarantee of receiving increases comparable to what they would have received under the GS system. We have not revised the regulations to require DHS to pay a within-grade increase or career-ladder increase buy-in payment to employees converted into the new DHS pay system. As we stated in the Preamble to the proposed regulations, DHS employees will be converted at their current rate, adjusted on a one-time, pro rata basis for the time spent toward their next within-grade increase. As provided in revised § 9701.373(e), DHS will issue implementing directives for such pay adjustments, including the rules governing eligibility, pay computations, and timing of payments.

We also agree that DHS employees in career-ladder positions prior to conversion into an Entry/Developmental band under the new pay system (1) will be converted at their current rate, adjusted on a one-time, pro rata basis for the time spent toward their next within-grade increase, and (2) will also receive pay increases equivalent to the promotion pay increases they would have received under their previous pay system when they otherwise would have been eligible. These increases will continue until DHS establishes a formal pay progression plan for such employees. As provided in revised § 9701.373(f), DHS will issue implementing directives governing the conversion of employees into the Entry/Developmental band, including rules regarding employee eligibility, pay computations, and the timing of such payments.

Section 9701.374—Special Transition Rules for Federal Air Marshal Service

Section 9701.374 of the proposed regulations provided DHS with the authority to cover Federal Air Marshal Service positions under a system that is parallel to the pay system that was applicable to the Federal Air Marshal Service within the TSA if DHS transfers such positions from TSA to another organization within DHS. DHS may modify that system after coordination with OPM. This section also provides DHS with the authority to establish rules for converting Federal Air Marshal Service positions to any new pay system consistent with the conversion rules under § 9701.373.

The labor organizations recommended that this section be deleted. They felt that Federal Air Marshal Service transition rules must be promulgated in regulations. We do not agree. However, we have revised § 9701.374 to clarify that DHS will issue implementing directives on converting Federal Air Marshal Service employees to any new pay system, consistent with the new definition of ''implementing directive'' under § 9701.103 and the requirement for ''continuing collaboration'' before issuing implementing directives under § 9701.105. (*See Section 9701.103—Definitions* and *Section 9701.105—Continuing collaboration*.)

Subpart D—Performance Management

General Comments

In response to commenters' general concerns regarding the clarity of the regulations, we have reorganized subpart D, Performance Management. We have also removed redundancies from and clarified the regulatory text.

By far the greatest concern regarding the proposed performance management regulations expressed by commenters related to fairness. This concern was expressed in a variety of ways, including the following:

- Subjectivity of the rater, consistency of rater, rater favoritism, rater bias, and potential for cronyism;
- Managers will be buried in paperwork in evaluating employees;
- The fact that managers are no longer required to use written performance plans, performance elements, and standards is potentially problematic;
- This system does nothing to hold supervisors accountable;
- There needs to be monitoring of performance by leaders through all levels of the organization to ensure that decisions are made based on principle, equality and fair-mindedness; and
- To the greatest extent possible and in the quickest time practical, align the DHS HR governance structure so that all employees are covered by the same performance management and pay systems.

The regulations make every attempt to ensure that the performance management system(s) will be fair. First, the regulations adopt guiding principles based on the performance management system criteria that Congress has recently enacted with respect to chapters 47, 54, and 99 of title 5, United States Code. These principles require any performance management system(s) established by DHS to be fair, credible, and transparent, and to adhere to the merit system principles found in 5 U.S.C. 2301. Furthermore, DHS has always been committed to extensive training for managers, supervisors, and employees so that they understand the requirements of the performance management system. The training of managers and supervisors is of particular concern and will focus on how to establish and communicate performance expectations and how to assess employee performance. Finally, the Department is committed to creating a performance culture in DHS that creates and sustains a high performance organization.

Another concern that is related to fairness deals with the ability to accurately measure employee performance. Commenters believe it will be difficult to evaluate employees whose performance is not measurable. Many commenters feel this will be particularly difficult when dealing with law enforcement employees. They expressed the following concerns:

- The proposed rule does not take into consideration the unique and distinctive work performed by the Department's law enforcement employees;
- Law enforcement jobs are not measurable or are difficult to measure by tangible means; and
- Focusing on measurable performance creates an incentive for law enforcement officers to focus on quantity rather than quality.

The regulations specifically allow for a wide variety of ways to capture performance expectations. (*See* § 9701.406(c) of the final regulations.) DHS, using the continuing collaboration process, will identify the most appropriate approach, or establish separate performance management systems, if needed, for different groups of employees.

Commenters recommended that DHS include proper training programs for managers regarding performance reviews and funding for training programs. Some suggested that military supervisors will need to be trained on performance appraisal. Other commenters believe training managers to do performance management will not improve managers' ability to rate employees. Several changes have been made in the regulations to address these issues. As stated previously, DHS is committed to training managers, supervisors, and employees in the new performance management system(s).

Commenters also suggested that there should be a formal evaluation of any performance management system. Both the proposed and final regulations include a requirement for the evaluation of any performance management system established by DHS. (*See* § 9701.410(b) of the final regulations.) This evaluation requirement addresses the system's compliance with these regulations and DHS implementing directives and policies, as well as the system's effectiveness.

Another commenter made several suggestions that deal with the broader aspects of performance management, as compared to the narrower aspects of performance appraisal/evaluation. Most of these suggestions, by their nature, relate to the operation of the performance management system that DHS will establish through implementing directives. As such, they are not specifically addressed by these enabling regulations. These comments will be taken into account by DHS as it develops its implementing directives.

Other Comments on Specific Sections of Subpart D

Section 9701.401—Purpose

Section 9701.401 provides for the establishment of at least one DHS performance management system and sets out the guiding principles that govern it. These guiding principles are based on the criteria that Congress recently enacted with respect to chapters 47, 54, and 99 of title 5, U.S. Code.

Section 9701.403—Waivers

Section 9701.403 specifies the provisions of title 5, U.S. Code, and title 5, Code of Federal Regulations, that are waived for employees covered by the DHS performance management system(s) established under subpart D. We have amended § 9701.403 to clarify that these waivers become effective only after a decision is made to convert specific categories of DHS employees to a new performance management system(s) established under this subpart.

Section 9701.404—Definitions

One commenter suggested that we define ''supervisor'' as a management official who oversees the daily work assignments of an employee within a well-defined management structure. We believe the term ''supervisor'' is well understood and does not require a specific definition for the purpose of this subpart of the regulations.

During the meet-and-confer process, the participating labor organizations suggested that the definition of ''performance measures'' in the proposed regulations be deleted and replaced by a definition of ''performance standards'' based on current law and regulations. In response, we have added a definition of ''performance expectations'' that encompasses the concept of performance standards. Also in response to discussions during the meet-and-confer process, we have revised the definition of ''competencies'' to substitute ''other characteristics'' for ''attributes'' required by a position.

Section 9701.405—Performance Management Systems

Section 9701.405 has been renamed to clarify that it provides the requirements for performance management systems within the Department of Homeland Security. Several commenters had specific ideas and recommendations for the design and operation of performance management systems, including employee involvement, linkage to the Department's strategic plan, meaningful distinctions in performance, reasonable transparency, and appropriate accountability. Many of the requirements previously addressed in this section of the proposed regulations are now covered by the guiding principles found in the purpose section, § 9701.401. The guiding principles address the concerns raised by the commenters. We have revised the regulations to remove redundancies and reorganized the remaining requirements for clarity.

Other commenters made suggestions regarding specifying the length of time for appraisal periods and the minimum period before a rating can be given. The proposed regulations were silent on any specified time periods. No change has been made, and the regulations continue to provide DHS with the flexibility to determine whether its needs are best met by specifying the time periods in its implementing directives or by delegating that system feature to DHS components.

Section 9701.406—Setting and Communicating Performance Expectations

Section 9701.406 provides the requirements and guidelines for communicating with employees regarding their performance. The proposed regulations addressed the form performance expectations could take. Commenters made very specific suggestions regarding how to amend various provisions regarding the nature and form of the performance expectations. Some of these are included in the performance management system requirements in § 9701.405, and the rest are addressed in the following paragraphs. We have reorganized § 9701.406 for clarity. To underscore one of the guiding principles of these regulations, we have given primacy to aligning performance expectations with DHS's operating mission and organizational goals and measures.

During the meet-and-confer process, the participating labor organizations agreed that performance expectations need not be in writing. We have revised the regulations to clarify our intent that performance expectations must be communicated to the employee prior to holding the employee accountable for them. The regulations also have been revised to state that, notwithstanding this requirement, employees are always expected to demonstrate appropriate standards of conduct, behavior, and professionalism, such as civility and respect for others.

Other commenters made suggestions regarding the purpose and content of performance expectations. These comments reflect concerns about management's ability to change work assignments swiftly and a concern that DHS's mission will make it difficult to set goals at the individual level. We believe the proposed regulations provided sufficient detail in this regard, and the final regulations preserve that detail. The remainder of the comments relate to the operation of the

performance management system and will best be addressed in DHS implementing directives or operating procedures.

Section 9701.407—Monitoring Performance

Section 9701.407 establishes the basic responsibility for supervisors to monitor employee and organizational performance and inform employees of their progress in meeting their performance expectations. We have renamed the section to clarify that it includes providing feedback to employees. Commenters had concerns about the frequency and timeliness of the feedback provided to employees and the form it might take. During the meet-and-confer process the participating labor organizations made a number of proposals in this regard. We have revised the section to include the requirement that feedback must be timely and to provide for one or more interim reviews.

Section 9701.408—Developing Performance

Section 9701.408 addresses two aspects of developing or improving performance; the first addresses the continual improvement that is part of a high performance culture, and the second addresses remedial improvement and dealing with poor performance. The section has been retitled, *Developing performance and addressing poor performance.*

For § 9701.408(a), commenters had suggestions for specific language changes and also suggested the inclusion of a requirement for an individual development plan. We decided to leave individual development plans optional. DHS is committed to designing specific development programs for Entry/Developmental band employees (*see* § 9701.345) and could address individual development plans for other employees in its implementing directives or operating procedures.

Regarding § 9701.408(b), some commenters suggested requiring an improvement period before an adverse action based on unacceptable performance can be taken. The proposed regulations provided for an improvement period as one of several options available to address or correct unacceptable performance prior to taking an adverse action. We continue to believe that an improvement period should be an option, but not a requirement, of the new system.

Section 9701.409—Rating Performance

Section 9701.409 establishes the requirements regarding rating and rewarding employee performance, including the rating levels that may be used by DHS performance management systems, the purposes for which ratings may be issued, and a prohibition of any forced distribution of ratings. Therefore, the section has been retitled, *Rating and rewarding performance.*

A commenter suggested that the removal of a pass/fail performance rating system is a step in the right direction. However, during the meet-and-confer process, participating labor organizations supported the continued use of pass/fail ratings for employees in the Entry/Developmental band and proposed that the final regulations provide for pass/fail ratings in other situations. While we continue to believe that, as a general matter, pass/fail ratings are incompatible with a pay-for-performance system, we have adopted that suggestion. The regulations now require the use of at least three summary rating levels for most employees, but permit DHS to use pass/fail appraisal systems for employees in the Entry/Developmental band or in other bands under extraordinary circumstances as determined by the Secretary or designee.

Commenters expressed concerns and made suggestions regarding the rating process. These comments included proposals to use multi-rater approaches such as 360-degree appraisals, require higher-level review of ratings, establish documentation requirements, and tie supervisory ratings to their timely completion of appraisals. Commenters also expressed concerns about supervisors' ability to understand and interpret the regulations. These issues involve the actual operation of the performance management system and will be addressed in DHS implementing directives or operating procedures.

Another commenter suggested that we require a detailed explanation of all formulas used to derive an overall summary rating. This, too, can best be handled by DHS in its implementing directives or operating procedures. We have not changed the regulations in response to this comment.

Commenters expressed concern that ratings of record could be lowered without sufficient justification. During the meet-and-confer process, participating labor organizations requested that we provide additional detail regarding the circumstances in which a new rating of record may be issued. We have complied with their request and have clarified § 9701.409(b) to provide that new ratings of record may be prepared only when there has been a substantial change in an employee's performance since the last rating of record was assigned. We also have revised § 9701.409(f) to prohibit lowering an employee's rating for any approved absence.

Other commenters raised concerns that allowing the grievance of ratings of record would allow arbitrators to change those ratings and/or superimpose their judgment of the employee's performance. We have revised § 9701.409(g) to specify that arbitrators are subject to the standards of review in § 9701.521(g)(2).

Section 9701.410—Rewarding Performance

Section 9701.410 of the proposed regulations has been incorporated into the revised § 9701.409 for clarity and to remove redundancies. In addition, the revised section has been retitled, *Rating and rewarding performance.*

Commenters questioned why the proposed regulations included references to within-grade and quality step increases under title 5, Code of Federal Regulations. This specific reference was included in the event a group of employees is covered by the provisions of the performance management system under subpart D of these regulations while they continue to be covered by the within-grade and quality step increase provisions of 5 CFR part 531. We have revised the regulation to clarify that references to provisions in 5 CFR part 531 are applicable only until an employee is covered by the pay system established under subpart C of these regulations.

Section 9701.411—Performance Review Boards

Section 9701.411 of the proposed regulations authorized the establishment of Performance Review Boards (PRBs) and described their duties and composition. During the meet-and-confer process, the participating labor organizations expressed concern about the operation of PRBs; they felt that PRBs could delay pay decisions based on performance appraisals and give the appearance of unwarranted interference in the performance rating process. We continue to believe that an oversight mechanism is important to the credibility of the Department's pay-for-performance system. To that end, the Homeland Security Compensation Committee established under § 9701.313 will conduct an annual review of performance payout summary data. Therefore, we have removed the

separate section in subpart D dealing with PRBs.

Section 9701.412—DHS Responsibilities

Section 9701.412 of the proposed regulations specified the responsibilities DHS must carry out in order to ensure a fair, credible, and transparent performance management system. This section has been redesignated as § 9701.410. Commenters expressed concern that only startup training would be funded. The purpose section of the regulations (§ 9701.401) has been revised to provide guiding principles for DHS performance management systems based on similar criteria that Congress recently enacted with respect to chapters 47, 54, and 99 of title 5, U.S. Code. These principles require initial and ongoing training for managers, supervisors, and others involved in the performance management process. Finally, to comply with 29 CFR 1614.102(a)(5), we have added a new requirement in § 9701.410 to ensure that managers and supervisors fulfill their equal employment responsibilities.

Subpart E—Labor-Management Relations

General Comments

Commenters expressed concern that the proposed regulations curtailed employees' rights to collectively bargain, with a number suggesting that the limits on collective bargaining are contrary to the provisions of the Homeland Security Act. Commenters also recommended that the design and implementation of every aspect of the proposed DHS human resource system, including the pay, performance, classification and appeals systems, be subject to collective bargaining. As discussed in the Major Issues section, we do not believe that collective bargaining over these matters is appropriate, nor intended by Congress. However, we have provided a number of mechanisms to ensure the substantive involvement of labor organizations in such things as the development of implementing directives, the administration of the Department's new pay system, and the nomination of members to the Homeland Security Labor Relations Board (HSLRB) and the Mandatory Removal Panel (MRP). Other concerns related to the scope of bargaining are addressed in the discussion of the specific related sections of subpart E that follow.

Other Comments on Specific Sections of Subpart E

Section 9701.501—Purpose

The proposed regulation restates the statute's purpose to provide DHS and OPM with flexibility to establish a modern DHS personnel system, permitting waiver of certain statutory provisions while retaining core civil service protections, including the merit system principles. In their comments and during the meet-and-confer process, participating labor organizations recommended that we include in this section a statement that labor organizations and collective bargaining are in the public interest, consistent with the Homeland Security Act's preservation of collective bargaining rights.

We have decided to retain the originally proposed language with minor clarifications. This section of the regulations recognizes and stresses the fundamental purpose underlying the Homeland Security Act and the statutory mandate to build a flexible personnel system that supports the unique mission of DHS. Consistent with the Homeland Security Act, the regulations specifically recognize the right of employees to organize and bargain collectively subject to limitations established by law, including these regulations, applicable Executive orders, and any other legal authority.

Section 9701.502—Rule of Construction

In accordance with the Homeland Security Act's core purpose, these regulations provide the Department with the flexibility necessary to accomplish its vital mission. In so doing, they also provide that interpretations of these regulations by the Secretary and the Director be accorded great deference.

In their comments and during the meet-and-confer process, participating labor organizations suggested that we delete ''great'' and describe the particular circumstances in which DHS and OPM's interpretation of the regulations would not be given deference.

We decided to retain this section as originally proposed. However, in so doing, we do not intend to imply that the rule of construction is limited only to this subpart. In this regard, we have added a new § 9701.106(a), as previously noted, and its express language extends the application of that rule of construction to the entire part. We believe § 9701.106(a), as referenced in this subpart, accurately reflects the Supreme Court's rulings on deference. In this regard, the Court has held that courts and administrative bodies must defer to an agency head's interpretation of a regulation unless an ''alternate reading is compelled by the regulation's plain language or by other indications of [her] intent at the time of the regulation's promulgation.'' *Thomas Jefferson University* v. *Shalala*, 512 U.S. 504, 512 (1994). An agency's interpretation must be given ''controlling weight unless plainly erroneous or inconsistent with the regulation.'' *Id.* The regulation is entirely consistent with Supreme Court decisions. Moreover, the regulation reflects the exceptionally broad grant of regulatory authority that Congress conferred on DHS and OPM to establish and implement a human resources system for the Department.

Section 9701.503—Waivers

The proposed regulations waived sections 7101 through 7135 of title 5 except as otherwise specified in the regulations. During the meet-and-confer process, participating labor organizations requested that the regulations clarify when such waivers will be applied. We have amended § 9701.503 to clarify that the waivers apply to DHS employees when they are covered by the labor-management relations system established under subpart E.

Section 9701.504—Definitions

In their comments and during the meet-and-confer process, participating labor organizations recommended that the current definition of ''conditions of employment'' be expanded to include the classification of any position. In addition, they and other commenters recommended that we include Department-wide regulations as ''conditions of employment.'' We have adopted the second recommendation, and we have adopted the recommendation of participating labor organizations to revert to the definition of ''confidential employee'' contained in 5 U.S.C. 7103. To avoid confusion, we also deleted the definition of ''employee'' and instead, revised § 9701.505 to ensure appropriate coverage. We have also modified the definition of ''exclusive representative'' contained in the proposed regulations by deleting the second paragraph, which dealt with the requirement of the Homeland Security Act that recognition of exclusive representatives would continue as organizations transferred into the Department, because such transfers have already taken place and thus the language was unnecessary and confusing. Further, the provision

remains in force through the Homeland Security Act. In response to labor organization comments, we have revised the definition of ''grievance'' to more closely align with the definition in 5 U.S.C. 7103; however, the revised definition clarifies that grievances must relate to conditions of employment. Finally, we have added a definition of ''professional employee'' by referencing 5 U.S.C. 7103(a)(5) to reflect changes discussed in § 9701.514.

Section 9701.505—Coverage

As noted, we have clarified which employees are covered by this subpart by moving language from the definitions section in the proposed regulations to the coverage section; this parallels the structure of subpart F, Adverse Actions. Labor organizations commented that TSA screeners should be covered by this subpart. We did not accept that recommendation, given that the TSA administrator, exercising his statutory authority, specifically determined that screeners would not be subject to coverage under 5 U.S.C. chapter 71. Similarly, we did not accept the recommendation from other commenters that Customs and Border Patrol officers be excluded from coverage, given that their predecessor occupations have been covered by 5 U.S.C. chapter 71 for some time. We have also clarified two of the exclusions in paragraph (b) by adding a reference to 5 U.S.C. 2101(3) to better define what is meant by the term ''a member of the uniformed services'' and clarified the exclusion for the ''United States Secret Service'' by adding the ''United States Secret Service Uniformed Division,'' as these two exclusions are provided by separate statutory provisions.

Section 9701.506—Impact on Existing Agreements

In their comments and during the meet-and-confer process, participating labor organizations stated that it was unreasonable to void any contract provisions that conflict with the regulations because continuing them would not adversely affect the Department's mission. Instead, they recommended that conflicting contract provisions remain in full force and effect until they expire unless the Department shows that they adversely affect homeland security. In those latter instances only, the parties would be required to engage in bargaining over modifications to existing agreements. There was significant discussion with the participating labor organizations regarding what level of detail would be provided in these regulations and what would be provided in the implementing directives, what the effect of each would be on existing agreements, and what involvement the union would have in the development of the implementing directives. The participating labor organizations recommended that the implementing directives should be subject to the full scope of collective bargaining provided in 5 U.S.C. chapter 71 or, if that were not possible, that they should be afforded the opportunity to participate in the development of the implementing directives.

As a general matter, we have retained this section as originally proposed. We believe that the effect of the alternative posed by participating labor organizations would be to delay implementation of these regulations for years, a result Congress never intended. It would severely hamper the Department's mission by permitting piecemeal, haphazard implementation of these regulations, dictated solely by the happenstance of a local contract's expiration date. This would create a confusing, difficult-to-administer, and Balkanized personnel system. A primary purpose of the Homeland Security Act was to create one Department out of a patchwork quilt of agencies performing similar functions. Accepting the recommendation would impair accomplishment of that goal.

We believe Congress intended the opposite result. Given that these regulations have the full force and effect of law, they have the same effect on collective bargaining agreements as any statutory change. However, in response to the concerns expressed by participating labor organizations, we have modified the regulation to provide for a 60-day period during which the parties to a collective bargaining agreement would bring conflicting and other impacted provisions into conformance. We have also provided that the Secretary may exercise his or her discretion to continue certain contract provisions as appropriate and to cancel such provisions at any time. Note that this process would not delay the effective date of these regulations or their implementing directives. However, in response to discussions with the participating labor organizations, we have adopted a provision for continuing collaboration in § 9701.105 on the development of implementing directives and clarified that all contract provisions must be consistent with implementing directives which, by their very nature, flow directly from the regulations.

Section 9701.508—Homeland Security Labor Relations Board

Commenters, including the labor organizations participating in the meet-and-confer process, objected to the creation of the HSLRB, and recommended that the regulations preserve the authority of FLRA, FMCS, and FSIP. They remarked that these agencies, which are independent and impartial, currently decide many of those matters for which the proposed regulations confer jurisdiction on the HSLRB to adjudicate. In this regard, they challenged the independence and impartiality of any HSLRB member appointed exclusively by the Secretary. Therefore, they objected to any change to the status quo. Other commenters approved of the proposal, indicating that the HSLRB would afford the Department greater regularity and consistency in the processing of cases than that currently provided by FLRA. A commenter noted that the ''one-stop shop'' concept of the HSLRB was preferable to the division of prosecutorial, adjudicatory, and mediation responsibilities provided for in the current system.

We have decided to retain the HSLRB. As we indicated in the Preamble accompanying the proposed regulations, it ensures that those who adjudicate the most critical labor disputes in the Department do so quickly and with an understanding and appreciation of the unique challenges that the Department faces in carrying out its mission. During the meet-and-confer process, participating labor organizations proposed that the HSLRB be required to develop a single, integrated dispute resolution process for matters concerning the scope and duty to bargain. Second, they proposed a new process for nominating HSLRB members. Other commenters made similar recommendations. We have revised the proposed regulations to include a formal opportunity for labor organization participation in the nomination process.

In this regard, the final regulations establish criteria for HSLRB members, requiring that they be known for their integrity and impartiality as well as their expertise in labor relations, law enforcement, or national/homeland or other related security issues (for example, former members of the judiciary). The regulations preserve the Secretary's sole and exclusive discretion to appoint one member who serves as the HSLRB's Chair, with powers and duties enumerated in § 9701.508. However, the regulations provide the Department's labor organizations with an opportunity to participate in the process of nominating the remaining two members of the HSLRB. While the Secretary, like other heads of departments and agencies, retains the

ability to make these senior appointments from any appropriate source (and to remove those appointees), the Secretary and the Director have determined that it is in the Department's interest to include a formal process through which labor organizations can recommend individuals for these positions.

We also received several comments regarding the terms of the HSLRB members. One commenter suggested that the terms of the HSLRB members should be staggered to ensure continuity. We have adopted this suggestion. Another commenter suggested that an HSLRB member should be permitted to serve an additional term beyond his or her initial term because that HSLRB member might have gained valuable experience or expertise that could be of value to the HSLRB. We agree, and have adopted this suggestion as well.

A review of the comments made us realize that estimating the number of cases that the HSLRB might be called upon to handle at any particular time is a difficult, if not impossible, task. To ensure the HSLRB has the resources to process all cases expeditiously, we have given the Secretary the sole and exclusive discretion to appoint additional HSLRB members, subject to the criteria and nomination procedures specified in the regulations. In addition, we have permitted individual HSLRB members to adjudicate disputes. Such changes will provide the HSLRB with more flexibility to manage its workload, but will not significantly prejudice the interests of either the Department or its employees.

The proposed regulations also discussed judicial review of HSLRB decisions and posed two options for consideration by commenters. One option would have the regulations remain silent with regard to judicial review, thus allowing existing governing legal principles to determine the circumstances under which there would be judicial review. The second option would have required FLRA review, under the same procedures and standards for judicial review of FLRA decisions as a condition precedent to appellate court jurisdiction. The labor organizations made no recommendations with regard to the two options. We received other comments that specifically supported allowing judicial review following FLRA review of HSLRB decisions. On the other hand, a commenter argued that the Homeland Security Act gave neither DHS nor OPM the power to confer jurisdiction on FLRA to hear appeals from HSLRB decisions involving the duty to bargain or appropriate unit issues involving DHS employees. We disagree. The Homeland Security Act, within defined parameters, gave DHS and OPM sufficiently wide latitude for designing the Department's labor-management relations program.

Accordingly, after further consultation with FLRA (as well as MSPB with regard to subpart G), we have adopted the second option in § 9701.508(g), which provides that either party may request review of the record of an HSLRB decision by FLRA. In conducting its review, FLRA will defer to findings of fact and interpretations of these regulations made by the HSLRB. The provision also establishes a 30-day time limit for FLRA to render its decision. This 30-day time limit is mandatory, except that FLRA may extend its time for review by a maximum of 15 additional days if it determines that a case is unusually complex, or that an extension is necessary to prevent any prejudice to the parties; however, the regulations do not permit any further extension. In addition, § 9701.508(g) was revised to provide for judicial review under 5 U.S.C. 7123 of any final FLRA order.

Section 9701.509—Powers and Duties of the HSLRB and Section 9701.510—Powers and Duties of the Federal Labor Relations Authority

Commenters, including the labor organizations participating in the meet-and-confer process, recommended that FLRA retain jurisdiction over all labor disputes in DHS. Specifically, they suggested that not all labor relations issues that arise in the Department will have a significant enough impact on homeland security to warrant removing them from the jurisdiction of FLRA. The labor organizations also expressed concern at the HSLRB's authority to assert jurisdiction over any matter submitted to FLRA if the HSLRB determined that homeland security was affected. Following discussion during the meet-and-confer process, we agreed to amend the proposed regulation. In addition to retaining the powers and duties of FLRA that we outlined in our proposed regulations, we also agreed to retain FLRA's current authority to determine the appropriateness of units pursuant to § 9701.514, and to resolve exceptions to arbitration awards which do not involve the exercise of management rights and/or the duty to bargain.

It is imperative that the HSLRB retain jurisdiction over each matter for which an understanding and appreciation of the Department's mission is necessary. As a result, the final regulations give the HSLRB jurisdiction over disputes concerning the duty to bargain, the scope of bargaining, negotiation impasses, and certain exceptions to arbitration awards involving these issues because these disputes typically involve the exercise of management rights under § 9701.511. Similarly, the final regulations continue to give the HSLRB authority to assert jurisdiction over any dispute submitted to FLRA that affects homeland security. Finally, labor organizations suggested that, because the regulations accorded the HSLRB the authority to issue opinions, those opinions should have the force and effect of law and be subject to judicial review. We agree, and have amended the regulations accordingly. Finally, in response to comments from participating labor organizations, we have included procedures for resolving jurisdictional disputes between the HSLRB and the FLRA in § 9701.509(d).

Section 9701.511—Management Rights

In their comments and during the meet-and-confer process, participating labor organizations recommended that we retain the current language in 5 U.S.C. chapter 71 with regard to management rights, arguing that the proposed regulations unduly limited the scope of bargaining. However, they did propose modifications that would allow the Department to take immediate action without bargaining in advance, or without regard to existing collective bargaining agreements, in exceptional circumstances. This issue was discussed extensively during the meet-and-confer process, but no agreement was reached. Even with the modifications recommended by the labor organizations, the current statute does not give the Department the flexibility necessary to carry out its vital mission of protecting homeland security. Title 5, chapter 71, requires bargaining over procedures that govern how employees are assigned or deployed to particular locations, often within the same facility. The resulting procedures often prevent management from quickly assigning the right employee to the right task at the right time. Similarly, the requirement to bargain in advance of the exercise of a management right, over its implementation and impact, also has the potential for impeding or delaying the execution of the Department's mission.

The Department needs greater flexibility to act—for example, in the assignment or deployment of personnel or the introduction of new technology—not just in emergency or exceptional situations, but also on a day-to-day basis to meet operational demands.

Accordingly, we have retained the management right provisions in the proposed regulations. However, this section has been clarified to prohibit bargaining over the exercise of the management rights enumerated in paragraph (a), as well as the procedures associated with the exercise of the management rights enumerated in paragraphs (a)(1) and (2). As noted previously, the Department has found that procedures negotiated under current law have impeded its ability to accomplish its mission, and as a consequence, we have removed these procedures from the scope of bargaining. We have also eliminated the requirement to bargain in advance over implementation and impact of a management action as well as appropriate arrangements when employees are adversely affected by that action.

However, as a result of concerns expressed by participating labor organizations in the meet-and-confer process, we have added a new paragraph (c) establishing a requirement that management ''confer'' with an exclusive representative over operational procedures such as for work assignments and deployments, which are no longer negotiable under § 9701.511(a)(1) and (2) (see § 9701.512). We have also substantially revised the proposed regulations to require that when management exercises a management right and the effect on conditions of employment is foreseeable, substantial, and significant in terms of both duration and impact on the bargaining unit as a whole, or on those employees in that part of the bargaining unit affected by the management action, notice will be provided to the exclusive representative at the time management exercises that right if an obligation to bargain, confer, or consult exists. Such notice also may be provided any time in advance at the discretion of management. Additionally, under certain circumstances and upon request of the exclusive representative, management is obligated to negotiate over impact and appropriate arrangements for employees adversely affected by the action. Each party may exercise sole and exclusive discretion to delegate authority to bargain such matter below the level of recognition. This provision allows either party to exercise unreviewable discretion to decline to bargain below the level of recognition. The regulations continue to provide that such bargaining may occur on a pre-implementation basis at management's discretion.

However, as a result of the September 10 meeting, the regulations have been revised to require bargaining over impact and appropriate arrangements after implementation under certain circumstances specified in § 9701.511 (see the discussion on *Management Rights/Scope and Duty to Bargain* in the Major Issues section of this Supplementary Information). The regulations continue to require bargaining over implementation, impact, procedures, and appropriate arrangements regarding the exercise of nonoperational management rights enumerated in § 9701.511(a)(3), as provided under current law. The proposed regulations have also been modified to provide the exclusive representative with the opportunity to present its views and recommendations regarding the exercise of management rights. We added paragraph (f) to clarify that nothing prevents management from taking action, and that any agreements over impact or appropriate arrangements are neither retroactive nor precedential.

In their comments and during the meet-and-confer process, participating labor organizations raised concerns about out-of-pocket expenses incurred by employees as a result of the exercise of a management right. They argued that employees should not be expected to shoulder unusual or unanticipated expenses incurred as a result of management action. Based on those comments, we have revised the proposed regulation to provide reimbursement of appropriate out-of-pocket expenses incurred by an employee as a direct result of a management action, under certain conditions.

Section 9701.512—Obligation To Confer

In their comments and during the meet-and-confer process, participating labor organizations strongly objected to § 9701.511(b) of the proposed regulations that eliminated mandatory bargaining over the procedures management will follow in the exercise of its rights. As previously discussed, we have clarified that section to prohibit negotiations over these procedures. However, in response to the concerns expressed by participating labor organizations, we have added a new section that requires management to confer with an appropriate exclusive representative to consider its views and recommendations with regard to such procedures. The process established by this section requires that the parties meet for no longer than 30 calendar days to confer over operational procedures governing such matters as work assignments and deployments, unless the parties mutually agree to an extension. Upon mutual agreement, the parties may ask the HSLRB, FMCS, or any other third-party to assist them in reaching resolution. Because these procedures are so critical to accomplishing the Department's mission, the process established under this section is beyond the scope of the unfair labor practice provisions of these regulations, and the Department retains final authority to determine the content of these operational procedures as well as the authority to deviate from them.

Section 9701.513—Exclusive Recognition of Labor Organizations

In their comments and during the meet-and-confer process, the participating labor organizations recommended that the regulations authorize the Secretary to voluntarily recognize a labor organization or two or more labor organizations jointly upon a demonstration that they represent a majority of employees in the unit. However, we believe it is essential that employees have the utmost confidence in the process by which their exclusive representatives are selected and that employees should continue to be afforded the opportunity to vote in representational elections. Therefore, we have not adopted the recommendation and have retained the language of the proposed regulations regarding elections.

Section 9701.514—Determination of Appropriate Units for Labor Organization Representation

We have adopted the recommendation of commenters to retain the current statutory distinction between professional and non-professional bargaining units by incorporating the provision from 5 U.S.C. 7112(b)(5) in § 9701.513(b)(5).

Section 9701.515—Representation Rights and Duties

In connection with this section of the proposed regulations, we received comments pertaining to (1) an employee's right to representation during an investigatory interview; (2) the right of an exclusive representative to attend formal discussions; (3) the standard of conduct applicable to employee representatives; and (4) the scope of the Department's obligation to disclose information to the exclusive representative(s) of its employees.

Commenters strongly objected to the elimination of the right of an employee to request representation when examined by representatives of the Office of the Inspector General, Office of Security, and Office of Internal Affairs, arguing that such representation

protects employees against abusive or illegal interview techniques and provides reassurance and guidance to employees. Accordingly, we modified the regulation to restore the full scope of the ''Weingarten'' right as it currently exists.

In their comments, labor organizations objected to the elimination of formal discussions in the proposed regulations, viewing it as undermining the ability of labor organizations to effectively represent bargaining unit employees. In response to these comments, we revised the proposed regulations to provide the exclusive representative with an opportunity to be present at meetings between Department representatives and bargaining unit employees when the purpose of the meeting is to discuss and/or announce new or substantially changed personnel policies, practices, or working conditions. However, this right was not extended to meetings between Department representatives and bargaining unit employees that involve operational matters when the discussion of working conditions is incidental or peripheral to the announced purpose of the meeting. Additionally, this right does not apply to discussions that merely reiterate or apply existing personnel policies, practices, or working conditions.

We believe this modification provides clearer guidance to a Department representative as to when he or she is required to notify the exclusive representative of a meeting with bargaining unit employees. Moreover, this provision facilitates the Department's accomplishment of its critical mission by enabling managers and supervisors to have meetings with their employees regarding operational matters without any confusion regarding whether the exclusive representative must receive prior notice.

In their comments and during the meet-and-confer process, participating labor organizations objected to precluding their right to be present during the discussion of an EEO complaint. The parties noted that an exclusive representative's presence during a discussion concerning an EEO complaint has been intensely litigated. Given this ongoing debate, we have modified the language in the proposed regulations to provide that an official of a labor organization may attend formal EEO complaint meetings as an employee's personal representative and only at the request of the bargaining unit employee who filed the complaint. The final regulation provides that if the United States Supreme Court determines whether an exclusive representative has a right to be present at such a meeting under 5 U.S.C. 7114, the Department will interpret and apply that decision to this section. We have also clarified § 9701.515(a)(5) regarding an employee's right to a personal representative in grievance or appeal procedures other than those negotiated grievance procedures established under subpart E.

In their comments and during the meet-and-confer process, participating labor organizations objected to the requirement in the proposed regulations that employee representatives be subject to the same standards of conduct as any other employee, stating that this provision would ''chill'' the employee representatives' ability to exercise their protected rights. The participating labor organizations recommended retaining current case law standards that allow discipline of employee representatives only if they engage in ''outrageous conduct.'' We have deleted this provision but have left the development of any standards in this regard to the discretion of the HSLRB.

In their comments and during the meet-and-confer process, participating labor organizations suggested that we maintain the duty to disclose information as it currently exists under 5 U.S.C. 7114(b). They particularly objected to the proposed exemption for disclosure of information if ''adequate alternative means exist'' for obtaining it. Another commenter stated that it was unclear whether the proposed regulation will utilize the existing ''particularized need'' standard, which requires a labor organization to specifically state why it needs the requested information.

We do not believe the current standards for information disclosure in 5 U.S.C. chapter 71 adequately address the Department's need to withhold information that it determines would compromise its mission, security, or employee safety/privacy. Further, those standards have led to considerable confusion and much unnecessary litigation. Accordingly, we have added language to clarify the conditions for disclosure of information, including the requirement that the exclusive representative must demonstrate a particularized need. We expect the HSLRB to interpret and apply this language in a manner that is consistent with the Department's mission and the established particularized need of exclusive representatives in accordance with law.

Finally, we have revised the language in the proposed regulations to make clear that § 9701.515(b)(5)(ii) applies only to information requested in connection with matters covered by subpart E. However, if a labor organization serves as the personal representative of a bargaining unit employee in connection with the appeal of an adverse action to MSPB, the appeal of a mandatory removal offense to the Mandatory Removal Panel, or the pursuit of a complaint of discrimination before the Equal Employment Opportunity Commission, the applicable discovery rules and procedures of those respective bodies apply.

Section 9701.516—Allotments to Representatives

Commenters suggested that the regulations should allow employees to discontinue their allotments at any time, rather than on an annual basis. In their comments, the labor organizations recommended that we revise the proposed regulation to allow the assignment and allotment of other financial assessments of the exclusive representative, and that we adopt language which provides that after one year has passed, an employee may revoke his or her dues allotment assignment on the anniversary date of his or her enrollment or on a date specified in a collective bargaining agreement. We believe the regulations, which track chapter 71, provide the appropriate mechanism for processing dues allotments and have not adopted these suggestions.

Section 9701.517—Unfair Labor Practices

In the proposed regulations, the Department and OPM identified those actions that would constitute unfair labor practices in the Department's labor-management relations system. This list of unfair labor practices is almost identical to that set forth in 5 U.S.C. 7116. The proposal made only slight modifications to this list. Specifically, we clarified that the HSLRB, not FLRA, would be the arbiter of whether a party refused to consult or negotiate in good faith, or failed or refused to cooperate in impasse procedures and impasse decisions required by the Department's regulations. In addition, because these regulations provide that any provision of a collective bargaining agreement that is inconsistent with these regulations or the implementing directives is unenforceable on the effective date of coverage, we did not identify the action set forth in 5 U.S.C. 7116(a)(7) as an unfair labor practice.

The labor organizations suggested that references to the HSLRB be removed from the regulation because of their

objection to the creation of the HSLRB. In addition, they urged that we retain 5 U.S.C. 7116(a)(7) because an agency should not be permitted to enforce a rule or regulation that is in conflict with a collective bargaining agreement if the agreement was in effect prior to the issuance of the rule or regulation.

We decline to adopt the first recommendation in light of the fact that we have retained the HSLRB in the final regulations. In addition, for reasons of homeland security, it is imperative that these regulations and any implementing directives trump provisions of existing collective bargaining agreements if these provisions are inconsistent with the regulations or directives. Therefore, we decline to adopt this second recommendation.

We have made technical corrections in the second sentence of paragraph (e) to reflect the intent of the proposed regulations to mirror the language in 5 U.S.C. 7116(d).

Section 9701.518—Duty To Bargain, Confer, and Consult in Good Faith

Commenters, including those labor organizations participating in the meet-and-confer process, objected to (1) the removal of Departmental implementing directives and other regulations from the scope and duty to bargain; (2) the modification to the *de minimis* standard, which limits the duty to bargain to those matters that ''significantly affect a substantial portion of the bargaining unit''; (3) the establishment of a 60-day time limit for term bargaining; and (4) the absence of a mechanism for resolving mid-term bargaining impasses.

We retained the bar on negotiations over Departmental implementing directives and other regulations. Under current law, Departmental implementing directives and other regulations would be subject to collective bargaining at a subordinate level of recognition, unless the Department could demonstrate a ''compelling need'' for uniformity. We believe that this is inconsistent with the basic purposes of the Homeland Security Act. The Department was created, in part, to bring about greater cohesion and coordination among its formerly separate components, and by definition, we believe there is a compelling need for uniformity among those components. Therefore, we have excepted Departmental implementing directives and other regulations from bargaining. The prospect of subjecting critical Department-wide human resources policies to modification through bargaining in over 70 separate bargaining units is untenable, and the resulting patchwork of human resources policies could have an adverse effect on the Department's mission.

However, we have revised the regulation to provide for labor organization involvement in three ways: (1) With respect to Departmental implementing directives, the Department will provide appropriate labor organizations with an opportunity to participate in the ''continuing collaboration'' process under § 9701.105; (2) with respect to other Departmental regulations dealing with conditions of employment, the Department will confer with labor organizations granted national consultation rights under § 9701.518(d)(2), in accordance with the procedures set forth in § 9701.512; and (3) with respect to all other Department-wide matters that impact bargaining unit members, the Department will consult with national labor organizations.

During the meet-and-confer process, we agreed to revise the proposed *de minimis* standard. Participating labor organizations expressed concern that the proposed standard relieved management from the duty to bargain unless the change impacted a majority of bargaining unit employees. In response to those concerns, we further clarified the standard to reflect current Federal and private sector case law, which requires management to afford an exclusive representative an opportunity to bargain over changes that are ''foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.'' Under this standard, management is not required to negotiate when the impact is on a single employee. We also agreed to extend the time limit for term bargaining from 60 days to 90 days. In addition, we provide that the parties may refer a mid-term bargaining impasse to an independent mediator/arbitrator (by mutual agreement), FMCS, and/or HSLRB for assistance or resolution.

Section 9701.519—Negotiation Impasses

The proposed regulation provided the Homeland Security Labor Relations Board with the authority to resolve negotiation impasses. We have retained this authority, but deleted § 9701.519(b) involving the HSLRB's regulations and reincorporated the concepts into § 9701.508, Homeland Security Labor Relations Board, where it more appropriately flows with the HSLRB's authority to issue regulations concerning its impasse resolution procedures. Commenters recommended that negotiation impasses should be referred through the Federal Mediation and Conciliation Service (FMCS) and then to the Federal Service Impasses Panel (FSIP) for resolution. We have incorporated provisions for parties to use the services of FMCS in § 9701.508, Homeland Security Labor Relations Board. However, we continue to believe that FSIP is not positioned to adequately respond to the unique and critical mission of the Department, and the labor organizations during the meet-and-confer process were not opposed to the creation of a streamlined impasse resolution process.

Section 9701.521—Grievance Procedures

In their comments, labor organizations recommended that we modify paragraph (b)(2) of the proposed regulations to retain an arbitrator's current authority to stay a personnel action in the same manner as MSPB if a prohibited personnel action is involved. We agree and have so modified the regulation.

Paragraph (f) of the proposed regulations provided that employees may no longer challenge adverse actions through the negotiated grievance procedure. Several labor organizations commented that access to the grievance/arbitration process is a fundamental element of the statutory right to organize and bargain collectively. Other commenters also opposed this change. We agree and have modified the regulations to permit employees who are subjected to certain adverse actions to seek redress either through the appeals process or grievance procedure, but not both. We have revised the regulations to provide that 5 U.S.C. 7121(f) is modified so that matters covered by subpart G are deemed to be matters covered by 5 U.S.C. 4303 and 7512 for the purpose of obtaining judicial review. Section 7121(f) also is modified to provide that judicial review under 5 U.S.C. 7703 will apply to an arbitration award under the same manner and under the same conditions as if the matter had been decided by MSPB under § 9701.706, including the requirement that the preponderance of the evidence standard applies to arbitrators as well as to MSPB. The new § 9701.521(f) is consistent with 5 U.S.C. chapter 71 and requires arbitrators hearing adverse action grievances to be bound by these regulations and MSPB case law as it applies to DHS.

For example, section 9701.706(k)(6) clarifies that MSPB may mitigate a penalty only if the penalty is so disproportionate to the offense as to be wholly without justification. Under the

final regulations, this standard applies with equal force to arbitrators who adjudicate adverse actions under the negotiated grievance procedure. Adverse action penalties which do not meet this standard may not be modified by either MSPB or an arbitrator; in other words, they are barred from substituting their judgment as to the penalty for that of the Department. In cases of multiple charges, MSPB or an arbitrator may still mitigate a penalty where not all of the charges are sustained. The third party's judgment is based on the justification for the penalty as it relates to the sustained charge(s). The regulations are intended to ensure that when a penalty is mitigated, the maximum justifiable penalty will be applied.

In order to ensure consistency in the adjudication of adverse actions, the Department's two largest labor organizations recommended the establishment of a mutually acceptable panel of arbitrators who have been trained and qualified to hear adverse action grievances. The Secretary and the Director concurred with this recommendation, and § 9701.521(f) has been revised accordingly.

Consistent with the change to allow grievances regarding certain adverse actions, we have revised § 9701.521 to provide that adverse actions under subpart F are grievable, except for mandatory removal offenses and adverse actions taken in the interest of national security under § 9701.613. This revision also eliminates confusion caused by the language in 5 U.S.C. 7121(c)(5) and accurately reflects the current situation that, although adverse actions are grievable, the exclusive recourse with regard to classification disputes is the OPM classification appeals procedure (5 CFR 511.603). The revision also is consistent with the statutory exclusion of classification matters from the definition of ''conditions of employment'' in 5 U.S.C. 7103(a)(14)(B). (See related clarifications in §§ 9701.222 and 9701.604(b)(15).)

In their comments, labor organizations recommended that we delete paragraph (g), which provided that an employee may grieve a performance rating only if it was not raised in connection with an adverse action appeal. However, during the meet-and-confer process, they withdrew their objections.

Labor organizations also objected to that part of paragraph (g) requiring that an arbitrator must sustain a grieved rating of record unless the grievant proves that it was arbitrary or capricious. The labor organizations argued that a rating should be cancelled upon a showing of a prejudicial violation of applicable law or the provisions of a labor agreement. During the meet-and-confer process, we agreed to revise paragraph (g) to address the authority of an arbitrator to cancel a performance rating. Paragraph (g) now provides that an arbitrator may cancel such a rating upon a finding that management applied the employee's established performance expectations in violation of law, regulation, or collective bargaining agreement if the violation prejudices the grievant. Further, the revision precludes an arbitrator from ordering a change to a rating, except when he or she is able to determine the rating that the manager would have given but for the violation; if the arbitrator cannot do so, the case must be remanded for re-evaluation. Finally, paragraph (g) states that an arbitrator does not have authority to conduct an independent evaluation of an employee's performance or otherwise substitute his or her judgment for that of the manager, unless otherwise provided by law.

Section 9701.522—Exceptions to Arbitration Awards

Commenters, including labor organizations, objected to giving the HSLRB jurisdiction over exceptions to arbitration awards and requested that FLRA retain such jurisdiction. We adopted this suggestion in part, revising the regulations to give FLRA jurisdiction over exceptions that do not involve the exercise of management rights and/or the scope and duty to bargain. Because those matters involving the exercise of management rights and/or the scope and duty to bargain potentially impact Department operations, we believe that they should remain within the purview of the HSLRB. This will also facilitate the HSLRB's development of a single, integrated dispute resolution process for such matters. During the meet-and-confer process, participating labor organizations also suggested that we develop procedures to resolve disputes over whether exceptions to a particular arbitration award involve the exercise of a management right or the duty to bargain. The final regulations include such procedures at § 9701.522(b). (See *Section 9701.509—Powers and Duties of the HSLRB* and *Section 9701.510—Powers and Duties of the Federal Labor Relations Authority.*)

Section 9701.527—Savings Provision

We have revised this section to clarify our intent that any remedy that applies after the date of coverage under any provision of subpart E and that is in conflict with applicable provisions of this part is not enforceable.

Subpart F—Adverse Actions

General Comments

Some commenters felt that the proposed regulations would adversely impact due process rights, equal employment opportunity claims, whistleblowing claims, and recruiting and retention efforts. We disagree. Under the Homeland Security Act of 2002, DHS is prohibited from waiving or modifying any provision relating to prohibited personnel practices or merit system principles, including reprisal against whistleblowing or discrimination. We retained these protections intact. The Homeland Security Act also requires DHS to ensure that employees are afforded the protections of due process, and we have done so, not only for actions that trigger due process protections, but for all covered adverse actions. We have retained these protections as well, assuring an employee a right to notice of a proposed adverse action, a right to reply, a right to a final written decision, and a right to appeal the action. Although we have made changes to the proposed regulations, those changes preserve due process and guarantee other legal protections, and as a result, we do not believe they will have any effect on recruiting and retention efforts.

One commenter expressed concern that the new time limits could lead to longer processing times and more burdensome delays for other Federal agencies attempting to defend their adverse actions before MSPB. We intend to conduct an evaluation of the appellate procedures after they have been in effect for 2 years in order to determine, among other things, whether additional modifications to 5 U.S.C. chapter 77 and/or these regulations should be considered.

Other Comments on Specific Sections of Subpart F

Section 9701.601—Purpose

Section 9701.601 of the proposed regulations revised the number of days for a furlough from 30 days or less to 90 days or less. Commenters noted that this revision conflicts with current Governmentwide rules where a furlough of more than 30 days requires the use of reduction in force procedures. This conflict was not intended. We have revised the final regulations to retain the current number of days for a furlough action as 30 days or less. We have also clarified this section by including a statement that DHS may issue

implementing directives to carry out the provisions of this subpart.

Section 9701.602—Waivers

Section 9701.602 of the proposed regulations specified the provisions of title 5, U.S. Code, that are waived for employees covered by the DHS adverse action system established under subpart F. We have revised this section to be consistent with language used in other waivers sections of the regulations.

Section 9701.603—Definitions

Section 9701.603 of the proposed regulations defined an ''initial service period'' as the 1 to 2 years employees must serve upon appointment to DHS before being covered by subpart F, and counts prior Federal service toward this requirement. We have clarified the initial service period in a new separate section in the final regulations, numbered as § 9701.605.

Labor organizations requested that we retain the current probationary period of one year as sufficient time to evaluate employees. However, we note that the initial service period is not a probationary period. A probationary period is an extension of the examination process. An initial service period focuses on an employee's developmental progress. Accordingly, we have retained the initial service period for those jobs that have an extended (12- to 24-month) developmental cycle, in order to allow the Department sufficient time to determine whether a trainee has the potential to acquire the competencies required at the full performance level of the employee's occupation and should be retained. However, in response to the concerns of labor organizations, we have specified that initial service periods will be standardized for particular occupations via DHS implementing directives, rather than left to individual supervisory discretion. We have also revised the definition to specify that the 1- to 2-year initial service period (ISP) applies only to employees selected for a designated DHS position in the competitive service, and to credit relevant prior Federal service towards satisfactory completion of the ISP.

We use the term ''competencies'' in this subpart, and have added this term to the definitions. It is identical to the definition of that term in § 9701.404 concerning the DHS performance management system. Additionally, we use the identical definition of ''band'' found at § 9701.204, rather than referring the reader to that section for the definition. We have also included the current title 5 definitions for ''probationary period,'' ''current continuous service,'' ''similar positions,'' and ''trial period'' to coincide with the use of these terms in subpart F of the final regulations.

Finally, we have added definitions of adverse action, *mandatory removal offense (MRO), and Mandatory Removal Panel (MRP).*

Section 9701.604—Coverage

Section 9701.604(b)(1) of the proposed regulations indicated that employees in the competitive service who are removed during an initial service period are subject to the limited appeal rights under 5 CFR part 315. Labor organizations observed an inconsistency with this section and § 9701.704(c) which indicates that employees in the competitive service who are removed during the first year of an initial service period are covered by 5 CFR part 315, while employees removed during the second year of an initial service period are not covered by either part 315 or subpart G of these regulations. As a result, the labor organizations noted, those employees could conceivably have fewer rights in their second year of service than their first year of service. We have clarified this drafting error in § 9701.704(c) of the final regulations to reflect that the applicable appeal procedures of 5 CFR part 315 apply during the entire initial service period. We have also moved the reference to 5 CFR part 315 coverage in § 9701.604(b)(1) of the proposed regulations to § 9701.605(c) in the final regulations.

We have added a new paragraph (b)(15) to clarify that classification determinations, including classification determinations under subpart B, are not subject to adverse action procedures under subpart F. Under § 9701.222, classification determinations under subpart B are subject to DHS and/or OPM review and are not subject to further review or appeal.

We revised § 9701.604(d) to add employees appointed and serving under Executive Order 11203, members of the Homeland Security Labor Relations Board, and members of the Mandatory Removal Panel to the list of exclusions. The members of the HSLRB and the Panel may be removed only under the same conditions and according to the same procedures applicable to members of the Federal Labor Relations Authority and the Merit Systems Protection Board, respectively, as specified in the relevant sections of the two subparts.

Section 9701.604(d)(1) of the proposed regulations excluded employees serving a term, temporary, or otherwise time-limited appointment. During the meet-and-confer process, participating labor organizations requested that the regulation exclude employees serving a time-limited appointment, except those employees who have completed a trial period. We have partially adopted this suggestion. Preference eligible employees who are serving a time-limited appointment of any length (including a term appointment) and who have completed a probationary or trial period are covered by subpart F. Non-preference eligible employees who are on a time-limited appointment of longer than 2 years and who have completed a trial period are also covered by subpart F except as otherwise provided by §§ 9701.604 and 9701.605. We have revised this paragraph accordingly and have also redesignated this paragraph as § 9701.604(d)(4).

Section 9701.604(d)(2) of the proposed regulation provided that preference eligible employees would be covered by subpart F adverse action procedures, as well as subpart G appeal procedures, after their first year of an initial service period, regardless of the length of the initial service period. During the meet-and-confer process and in their comments, participating labor organizations suggested that the protections for preference eligible employees apply to all DHS employees. We have not adopted this suggestion. Placing non-preference eligible employees on equal footing with preference eligible employees in this instance would diminish preference status. We have redesignated this paragraph as § 9701.604(d)(1) in the final regulations, and revised it to exclude employees in the competitive service who are serving a probationary, trial, or initial service period. We have also moved the reference to 5 CFR part 315 coverage in § 9701.604(d)(2) of the proposed regulations to § 9701.605(c) in the final regulations.

To further clarify coverage of subpart F, we created parallel provisions to 5 U.S.C. 7511 that retain the adverse action procedures for employees in the excepted service. These provisions are included at § 9701.604(d)(2) and (d)(3) of the final regulations.

Section 9701.605—Standard for Action

We redesignated this section as § 9701.606 due to insertion of the new section on ''Initial service period'' at § 9701.605. (*See* discussion of ISP in *Section 9701.603—Definitions.*)

Section 9701.605 of the proposed regulations provided that DHS may take an adverse action only when it establishes a factual basis for the action and a connection between the action and a legitimate Departmental interest.

During the meet-and-confer process, the participating labor organizations requested that the long-standing ''efficiency of the service standard'' be retained. We agree. We originally deleted the efficiency of the service standard in the proposed regulations to allay any confusion that might arise from case law linking this standard with the authority to review and mitigate penalties, an authority we did not provide in the proposed regulations. However, because we have revised the proposed regulations to provide for a limited authority to mitigate in other than mandatory removal offenses, we have also revised the proposed regulations to retain the current efficiency of the service standard. See the discussion on mitigation in the Major Issues section of the **SUPPLEMENTARY INFORMATION**.

Section 9701.606—Mandatory Removal Offenses

This section has been redesignated as § 9701.607. Section 9701.606 of the proposed regulations provided that the Secretary in his or her sole, exclusive, and unreviewable discretion will identify offenses that have a direct and substantial impact on the ability of the Department to protect homeland security. The Secretary intends to consult with the Department of Justice in preparing the list of offenses. An employee who commits such an offense must be removed from Federal service, and must be provided due process including third-party review by an independent DHS Panel. Commenters suggested that the Secretary would have too much discretion in such cases, that removal may be too harsh, and that due process would be diminished. We disagree and have retained this provision, including the Secretary's sole, exclusive, and unreviewable discretion to mitigate.

During the meet-and-confer process, participating labor organizations initially opposed this provision. However, upon their review of a tentative list of MROs, they agreed in concept. They also agreed that the proposed regulations met due process requirements. In that regard, the participating labor organizations recommended that the final list of MROs be publicized and communicated annually to employees. We agree. We will publish the final list of MROs in the **Federal Register** and will include it in DHS implementing directives; we have also revised § 9701.607(a) to provide for making them known to employees annually. See the discussion on ''Mandatory Removal Offenses'' in the Major Issues section of the Supplementary Information.

Also in response to proposals made by labor organizations during the meet-and-confer process, we added a requirement in § 9701.607(c) that a proposed notice of a MRO be reviewed and approved by the Secretary or designee prior to issuance of the notice to the employee. In addition, we moved the reference to the Secretary's mitigation authority from paragraph (b) to a new paragraph (d). Finally, we have added a new paragraph (f) to clarify that the current authority to remove an employee based on the revocation of a security clearance is not limited by the establishment of MROs.

Section 9701.607—Procedures

We redesignated this section as § 9701.608. Section 9701.607 of the proposed regulations provided shorter advance notice and reply periods. Labor organizations and other commenters requested that we retain the current notice and reply periods (currently 30 and 7 days, respectively) because they believed proposed shorter periods deprive employees of a full and fair defense or would make it extremely difficult for employees to enforce their rights. However, we believe that one of the fundamental objectives of the Homeland Security Act was to streamline the process for taking an adverse action, and as a result, we have retained a minimum notice period of 15 days as originally proposed. However, based on the comments of participating labor organizations, we have extended the reply period from a minimum of 5 days to a minimum of 10 days. Moreover, employees may always request an extension of their reply period.

We have revised the notice period in paragraph (a) for mandatory removal offenses from ''at least 5 days'' to ''at least 15 days'' to be consistent with the notice period for other adverse actions. Should DHS need longer notice periods when taking an adverse action, the regulations provide that flexibility as well in that the notice periods are only minimum required timeframes. Similarly, we have revised the reply periods in paragraph (b) for both mandatory removal offenses and other adverse actions from ''at least 5 days'' to ''at least 10 days''. The net result is a shorter notice period coupled with a longer, but concurrent, reply period than currently provided under 5 U.S.C. 7513. The only situation where a shorter 5-day notice and reply period is permitted is where there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. This ''crime provision'' is patterned after that provided for in the current law at 5 U.S.C. 7513.

Section 9701.607 of the proposed regulations established a single, integrated process for taking adverse action based on unacceptable performance and for disciplinary reasons, and eliminated the requirement for a formal, set period for an employee to improve performance before management can take an adverse action. Some commenters indicated that the requirement for an opportunity to improve should be retained, while another commenter agreed with having the single process. We have not revised the proposed regulations in this regard. However, the final regulations continue to provide for the optional use of performance improvement periods.

Section 9701.607(b)(4) of the proposed regulation provided that the Department may disallow an employee's choice of representative when that choice could compromise security. One commenter expressed concern that employees would not be able to be represented by attorneys who did not have security clearances. Labor organizations participating in the meet-and-confer process raised similar concerns. Generally, we agree and have revised the regulation to reflect 5 CFR 752.404(e). However, we have limited the applicability of this section to mandatory removal offenses because of their very nature. We have also clarified that an employee must designate his or her representative in writing.

Section 9701.607(b)(5) of the proposed regulations provided that the Department must comply with 5 CFR part 339 when addressing an employee's medical condition relevant to a proposed adverse action. A commenter suggested that we include language to clarify the Department's compliance requirement with the Rehabilitation Act found at 29 CFR 1614.203. During the meet-and-confer process, participating labor organizations suggested that we edit § 9701.607(b)(5) and (c) so that it reads as it currently does in 5 CFR part 752. We agree and have revised this section in the final regulations to better clarify the Department's required compliance with the Rehabilitation Act, 29 CFR 1614.203. We have also revised § 9701.607(b)(5)(i) and (c) of the proposed regulations so that they read as they currently do in 5 CFR part 752.

Finally, to aid the reader, we have split the material in this section of the regulations into a total of four sections (§ 9701.608—Procedures, § 9701.609—Proposal notice, § 9701.610—Opportunity to reply, and § 9701.611—

Decision notice), and we have redesignated the subsequent sections accordingly.

Section 9701.608—Departmental Record

We redesignated this section as § 9701.612. Section 9701.608(a) of the proposed regulations provided that the Department must retain a record of the adverse action pursuant to the General Records Schedule and the Guide to Processing Personnel Actions. One commenter asked that we clarify whether an employee's SF–50 and Official Personnel Folder (OPF) will be documented. We have revised this section in the final regulations to correct the citation from the Guide to Processing Personnel Actions to the Guide to Personnel Recordkeeping. The Department will comply with the requirements for documenting an employee's SF–50 and OPF as provided by the General Records Schedule and the Guide to Personnel Recordkeeping.

Section 9701.609—Suspension and Removal

We redesignated this section as § 9701.613. Section 9701.609 of the proposed regulations provided procedures for taking an adverse action based on national security reasons, as provided by 5 U.S.C. 7532. Labor organizations suggested that we delete this section because they believe Congress needs to designate DHS as one of the agencies with the authority to use these special procedures. We have not revised this section in the final regulations. Such a designation is not necessary because Congress already gave the Department the authority to waive and/or modify 5 U.S.C. chapter 75 through the Homeland Security Act.

We revised paragraph (c) to clarify that employees who have completed their initial service period, probationary period, or trial period are covered by this section.

Section 9701.614—Savings Provision

We have added this new section in the final regulations to clarify that this subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

Subpart G—Appeals

Section 9701.701—Purpose

Section 9701.701 of the proposed regulations specified that the purpose of subpart G is to provide regulations implementing the provisions of 5 U.S.C. 9701(a) through (c) and (f) concerning the Department's appeals system for certain adverse actions covered under subpart F. During the meet-and-confer process, the participating labor organizations recommended that we either delete this section or revise it to accurately reflect the text from the Homeland Security Act of 2002. We agree and have deleted it as unnecessary, given that it is a legal requirement.

Section 9701.702—Waivers

Section 9701.702 specifies the provisions of title 5, U.S. Code, that are waived for employees covered by the DHS appeals system established under subpart G. We have revised this section to be consistent with language used in other waivers sections of the regulations.

This section also specifies that the appellate procedures in subpart G replace those of the Merit Systems Protection Board (MSPB) to the extent MSPB's procedures are inconsistent with these regulations, and that MSPB must follow these regulations until it issues conforming regulations. In this regard, commenters questioned how the deadlines for handling DHS cases would impact MSPB's handling of non-DHS cases and suggested that rather than include the streamlined procedures in the final regulation, DHS and MSPB should instead enter into a voluntary memorandum of understanding streamlining the MSPB's procedures. In addition, during the meet-and-confer process, the participating labor organizations questioned the authority of DHS and OPM to waive, modify, or supersede MSPB's appellate procedures or otherwise diminish its authority to take final action on any matter within its jurisdiction. However, they concurred with the substance of the streamlined procedures contained in the regulations. We believe that sufficient legal authority exists to modify MSPB procedures. Moreover, as required by the Homeland Security Act, we have consulted extensively with MSPB on these matters, and MSPB has indicated an intention to issue its own conforming regulations pursuant to this section.

The participating labor organizations also suggested that this section be amended to clarify that appeals of actions not covered by subpart F continue to be covered by 5 U.S.C. 7701. We have not revised this section. We believe that the proposed regulation is clear with respect to the continued applicability of 5 U.S.C. 7701 to actions not covered by subpart F.

We also received numerous comments expressing concern that limiting the discretion of MSPB to mitigate penalties would make MSPB review ''practically meaningless,'' and would decrease the credibility of MSPB. The labor organizations participating in the meet-and-confer process also argued strongly for retaining MSPB authority to mitigate, identifying this as one of their most important priorities. Based on these comments and concerns, we have reconsidered this provision and have attempted to balance the equity issues raised by commenters and participating labor organizations with the Department's critical homeland security mission. In this regard, we have decided to authorize MSPB to mitigate penalties, but only under certain limited circumstances, and have thus included a standard for mitigation that is more stringent than current case law. See the discussion on mitigation in the Major Issues section of the **SUPPLEMENTARY INFORMATION.**

Commenters and participating labor organizations also recommended that we return to the status quo with respect to the criteria for the award of attorney fees. We agree that awards of attorney fees should be based on current requirements and have revised the final regulations accordingly. See §§ 9701.706 and 9701.707.

Section 9701.704—Coverage

Section 9701.704(c) of the proposed regulation provided that the removal of an employee in the competitive service during an initial service period is subject to the provisions of 5 CFR 315.806. During the meet-and-confer process, participating labor organizations requested that we delete the initial service period and replace it with the existing probationary or trial period. As previously discussed with regard to § 9701.604, we have retained the initial service period in the final regulations.

Section 9701.705—Alternative Dispute Resolution

Section 9701.705 of the proposed regulations provided for the development of alternative dispute resolution (ADR) methods to address employee-employer disputes arising in the workplace, including those which may involve disciplinary actions. Commenters endorsed the concept of ADR and we continue to provide for these techniques in the final regulations, as appropriate. Participating labor organizations during the meet-and-confer process requested that the Department negotiate with the labor organization(s) before implementing a new ADR process or making changes to an existing ADR process. We have revised this section to add that ADR will be subject to collective bargaining to the extent permitted by subpart E.

Section 9701.706—MSPB Appellate Procedures

This section established streamlined MSPB appellate procedures and provided for such things as limited discovery, summary judgment, and expedited timeframes. The process for computing number of days allowed for filing under the expedited timeframes, however, will be consistent with current MSPB procedures. For example, if a filing deadline falls on a weekend or Federal holiday, the filing period will include the first workday after that date.

During the meet-and-confer process, participating labor organizations questioned our authority to establish streamlined procedures to replace current MSPB regulations. However, those labor organizations ultimately agreed that these streamlined procedures would serve appellants without compromising fundamental fairness. Accordingly, we have retained all of these provisions, with specific revisions as follows.

Section 9701.706(d)(1) of the proposed regulations provided that the Department's adverse action decision must be sustained if it is supported by substantial evidence. Several commenters, including labor organizations, commented that the reduction in the standard of proof from a preponderance of the evidence to substantial evidence violated the fundamental notions of fairness and due process. During the meet-and-confer process, participating labor organizations also identified this issue as one of major import and proposed that we revert to the current ''preponderance'' standard. Based on those discussions, we have revised this paragraph to retain the current preponderance of the evidence standard. See discussion on burden of proof in the Major Issues section of the **SUPPLEMENTARY INFORMATION**.

Section 9701.706(d)(2) of the proposed regulations also provided that the MSPB may not reverse a Department action based on the way the charge is labeled or the conduct characterized, provided the employee is on notice of the facts sufficient to respond to the factual allegations of the charge. During the meet-and-confer process, participating labor organizations expressed concern that this proposal would violate the right of employees to due process in that the Department would not be required to prove all the specific elements of a charge. Although we do not agree, we have revised this section to delete the provision regarding the framing of charges or charge-labeling.

Section 9701.706(h) of the proposed regulations established a new standard for recovering attorney fees which was intended to simplify the process. Comments received on the proposed regulations and during the meet-and-confer process argued that the new standard was unreasonable, beyond the authority provided under the Homeland Security Act, and would discourage employees from challenging wrongful terminations. As noted previously, we have revised this paragraph to retain the current statutory standard under which such fees may be awarded.

Section 9701.706(i)(1) of the proposed regulations provided that the MSPB may not require settlement discussions in connection with any appealed action. A commenter remarked that settlement can contribute to fast and simple case resolution. We agree that settlement can aid in timely case resolution. However, we have not revised this section because we believe strongly that settlement should be a completely voluntary decision made by the parties on their own, based on their individual interests.

Section 9701.706(k)(3) of the proposed regulations provided for limited discovery. A commenter suggested that the proposed discovery changes were ''one-sided,'' and should be reconsidered. Another commenter thought the proposed changes failed to address the disproportionate impact of current discovery procedures on Federal agencies. The commenter suggested that the regulations provide for motions by DHS to preclude factual assertions or legal arguments made by appellants in their prehearing submissions, or at the hearing, where they have failed to respond to DHS discovery requests seeking complete information on their defenses to the charges against them and their affirmative defenses. We believe we have this authority now and have decided not to revise this section. These rules of discovery are derived from the Federal Rules of Civil Procedure and apply equally to all parties.

Section 9701.706(k)(5) of the proposed regulations provided that the MSPB must render summary judgment on the law without a hearing when there is no dispute of material fact. We received comments from labor organizations and others expressing concern that this change would violate or ''scrap'' employee due process rights. We have not revised this section. Summary judgment will help to significantly expedite and streamline the appeals process. When material facts are in dispute, a hearing will be held and a transcript will be kept (as is the case today, a tape recording is sufficient for this purpose). Thus, the regulations retain due process protections.

Section 9701.706(k)(6) of the proposed regulations also established procedures for appeals in which the MSPB sustains fewer than all of the Department's charges. A commenter observed that the proposal would effectively eliminate MSPB review of the charges. We have revised this section to provide for limited mitigation, and eliminated the special procedures for processing of MSPB decisions that sustain fewer than all of the charges. See discussion on mitigation in the Major Issues section of the **SUPPLEMENTARY INFORMATION**.

We moved the reference to judicial review to a new paragraph on judicial review at § 9701.706(m).

We also received suggestions from commenters to clarify that whistleblower and prohibited personnel practice protections are unchanged. We have not revised the proposed regulations in response to these suggestions because we believe that the waiver sections of this subpart clearly identify the provisions of law that we have waived. Whistleblower and prohibited personnel practice protections are unchanged.

Section 9701.707—Appeals of Mandatory Removal Actions

Section 9701.707 of the proposed regulations established the appellate procedures for a mandatory removal action (MRO), including creation of the DHS independent panel to decide MRO appeals. Commenters and participating labor organizations stated that the MRO panel would not be transparent, accountable, or objective, nor would it protect employee due process rights. A commenter suggested that the judicial review issue could be resolved by providing for MSPB review of mandatory removal offenses. Another commenter suggested that the Department consider having members of the panel removed only by a majority decision of the panel, and that we stagger the terms of the members to ensure a degree of continuity.

During extensive discussions in the meet-and-confer process, participating labor organizations emphasized that the nomination process for that panel should be credible, transparent, and not subject to politicization. We agree and have established a process for appointing Panel members by the Secretary that includes labor organization involvement in the nomination of candidates. (See § 9701.708.) The process for appointing members of the Mandatory Removal Panel (MRP) mirrors those for

appointing members of the Homeland Security Labor Relations Board, as described in § 9701.508 of the final regulations. Specific revisions include—

- § 9701.708(a), which provides that the MRP is a standing panel composed of three members who are appointed by the Secretary for fixed terms. The members must be independent, distinguished citizens of the U.S. who are well known for their integrity, impartiality, and expertise in labor or employee relations and law enforcement/homeland security. Also, members serve for 3-year staggered terms.
- § 9701.708(b), which provides that the Secretary appoints the Chair of the MRP.
- § 9701.708(c), which authorizes labor organizations to submit lists of proposed nominees to serve as non-Chair MRP members.

In addition, § 9701.707(b) provides that all members of the MRP will hear a particular appeal and will decide the appeal based on a majority vote of the members. The MRP must provide a hearing, and may not mitigate the Department's penalty. An employee may petition the Equal Employment Opportunity Commission to review the MRP decision as a ''mixed case'' under procedures established in 5 U.S.C. 7702, except that a Special Panel convened under those procedures will include a member of the MRP and not MSPB.

The proposed regulations also discussed judicial review of MRO Panel decisions and posed two options for consideration by commenters. One option would have the regulations remain silent with regard to judicial review, thus allowing existing governing legal principles to determine the circumstances under which there would be judicial review. The second option would have required MSPB review, under the same procedures and standards for judicial review of MSPB decisions as a condition precedent to Federal Circuit jurisdiction.

One commenter noted that under the first option, judicial review would most likely be available under 5 U.S.C. 704. However, another commenter recommended the second option because, according to the commenter, the first option could permit review in a broad array of Federal courts of competent jurisdiction, resulting in greater second-guessing of DHS management decisions, as well as the creation of fragmented and inconsistent case law in this area. This commenter favored the second option because it has the advantage of keeping interpretation and enforcement of the DHS regulations within the existing MSPB/Federal Circuit review structure and therefore promises much greater uniformity and consistency than the first option. The commenter cautioned, however, that based on its experience with the Federal Circuit, that court would likely subject to very searching and critical scrutiny any Panel claims to special deference under the U.S. Supreme Court's decision in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)). Therefore, this commenter believes the likelihood of the court respecting those claims is somewhat debatable. The labor organizations did not have any recommendations in this regard during the meet-and-confer process. Accordingly, after further consultation with MSPB (as well as FLRA with regard to subpart E), we have adopted the second option in revising § 9701.707(d), which now provides that either party may request review of the record of an MRP decision by MSPB. In conducting its review, MSPB will accept the findings of fact and interpretations of these regulations made by the MRP. The provision also establishes a 30-day time limit for MSPB to render its decision. This 30-day time limit is mandatory, except that MSPB may extend its time for review by a maximum of 15 additional days if it determines that a case is unusually complex, or that an extension is necessary to prevent any prejudice to the parties; however, the regulations do not permit any further extension. In addition, § 9701.707(f) was revised to provide for judicial review under 5 U.S.C. 7703 of any final MSPB order or decision on an MRO. See the discussion on mandatory removal offenses and mandatory removal panel in the Major Issues section of the **SUPPLEMENTARY INFORMATION**.

Section 9701.709—Savings Provision

We have added this new section in the final regulations to clarify that this subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

Next Steps

The mission of homeland security has never been more important. Whether it be the ability to appropriately compensate and reward our top performers, the ability to attract top talent from industry to our key mission areas, the ability to more rapidly respond to workforce and organizational requirements, or the ability to identify and establish career progression opportunities for all of the workforce, the flexibilities contained in the new DHS regulations are a top priority.

These regulations affect people, processes, and technology across the Department and represent a significant change management undertaking. The communications and training requirements to ensure success are enormous. DHS will apply the new labor relations, adverse actions, and appeals provisions no sooner than 30 days, but no later than 180 days, after the publication of these final regulations (unless the Secretary and the Director jointly approve a later date). The Preamble to the proposed regulations also outlined a tentative schedule for implementing classification, pay and performance management system changes, starting with employees of DHS Headquarters, Science and Technology and Intelligence Analysis and Infrastructure Protection, as well as GS employees of the Coast Guard (Phase 1).

The proposed regulations contemplated conversion of these groups of employees to a new performance management system in the fall of 2004, with a subsequent conversion to the new classification and pay system in early 2005. At that time, affected employees would have been converted to the new system with a one-time within-grade increase buy-out and would have received their first performance-based pay increase in the summer/fall of 2005, to coincide with the completion of their FY 2005 performance management cycle. The first annual rate range adjustment for these employees was contemplated for early 2006.

A second phase would convert all remaining GS employees to new performance management provisions in fall 2005, with conversion to new job evaluation and pay systems in early 2006. The first annual rate range adjustment for Phase 2 employees was contemplated for early 2007.

However, many commenters voiced concern over the proposed schedule for conversion to the new pay and performance systems. Specific concerns were noted regarding the ability of the Department to adequately provide DHS leaders with the requisite training and skills that would be required to manage a pay-for-performance system during the Phase 1 proposed schedule. Other concerns included the need for additional time to plan for and conduct a thorough evaluation of Phase 1, making necessary course corrections prior to expanding the scope of the deployment effort to all remaining GS employees. Additionally, during the meet-and-confer process, participating

labor organizations repeatedly stated their case for conducting a pilot test of the systems prior to converting bargaining unit employees.

DHS is committed to the successful implementation of these regulations and to addressing employee concerns. Accordingly, we have revised our implementation schedule with respect to pay, classification, and performance management. The revised implementation plan has been adjusted to provide the majority of employees with at least 2 full years under the new performance management system before the results of performance ratings are used for pay purposes.

The performance management cycle for all employees (except civilian employees of the U.S. Coast Guard) will run concurrently with the fiscal year (October through September). Under the revised schedule, the new DHS performance management system will be applied to as many DHS employees as feasible during calendar year 2005. No later than October 2006, the new DHS performance management system will be applied to all covered employees.

We have also redefined the phases for implementation of the pay-for-performance system. The first phase will include covered employees at DHS Headquarters, Information Analysis and Infrastructure Protection, Science and Technology, Emergency Preparedness and Response, and the Federal Law Enforcement Training Center. The second phase will include covered employees at the U.S. Secret Service and the U.S. Coast Guard. The third will include covered employees at Customs and Border Patrol, Immigration and Customs Enforcement, and Citizenship and Immigration Services. Conversion to the new pay system will occur for employees in the first phase in early calendar year 2006. The first performance-based pay adjustments under the new DHS pay system will occur at the beginning of calendar year 2007. Employees in the second phase will be converted to the new pay system in early calendar year 2007; performance-based pay adjustments for these employees will occur at the beginning of calendar 2008. Employees in the third phase will be converted to the new pay system in early calendar year 2008; performance-based pay adjustments for these employees will occur at the beginning of calendar 2009.

This revised schedule will provide (1) additional time for implementation and evaluation of the pay-for-performance system and (2) adequate lead time to train DHS managers and employees on their pay-for-performance responsibilities under the new system.

Moving Forward

Every day the men and women of DHS work tirelessly to maintain the safety and security of the Nation. They patrol 195,000 miles of coastline and navigable waters and 7,500 miles of borderline with Canada and Mexico. They inspect tons of imported food products and review thousands of visa and green card applications. They work with States, cities, and citizens to help them prepare for and recover from emergencies such as tornados and hurricanes. They review dozens of technology proposals, some 500 cyber security reports, and more than 1,000 pieces of intelligence, maintaining constant daily communication with authorities throughout the country to safeguard our Nation's most critical infrastructure and assets.

With the enactment of the Homeland Security Act of 2002, DHS Secretary Tom Ridge and OPM Director Kay Coles James made a commitment that the Department's new HR system would be the result of a collaborative and inclusive process involving managers, employees, the Department's largest labor organizations, and a broad array of stakeholders and experts from the Federal sector and private industry in order to provide the best system possible for the men and women of Homeland Security. The final regulations governing the new human resources system for DHS are a testament to that commitment to carefully weigh, and include as appropriate, the constructive recommendations of the labor organizations with which DHS and OPM collaborated throughout the entire design and development process, as well as others who provided comments. The Secretary and the Director are confident that these regulations will enable DHS to—

- Act swiftly and decisively in response to mission needs,
- Recognize and reward high performance,
- Adapt readily and rapidly to the changing nature of the Department's work,
- Attract and maintain a highly skilled and motivated workforce, and
- Protect the rights guaranteed by the Homeland Security Act.

Regulatory Requirements

E.O. 12866, Regulatory Review

DHS and OPM have determined that this action is a significant regulatory action within the meaning of Executive Order 12866 because there is a significant public interest in revisions of the Federal employment system. DHS and OPM have analyzed the expected costs and benefits of the HR system to be adopted for DHS, and that analysis is presented here.

Integral to the administration of the new DHS pay system is a commitment to ''manage to budget.'' Accordingly, the new pay system carries with it potential implications relative to the base pay of individual employees, depending upon local labor market conditions and individual, team, and organizational performance. However, actual payroll costs under this system will be constrained by the amount budgeted for overall DHS payroll expenditures, as is the case with the present GS pay system. Moreover, assuming that a normal, static population will exist over time, DHS anticipates that accessions, separations, and promotions will net out and, as with the present system, not add to the overall cost of administering the system.

The creation of a new DHS pay and performance management system will, however, result in some initial implementation costs, including some payroll related conversion costs (*e.g.,* the ''buyout'' of within-grade increases). In addition, DHS will incur costs relating to such matters as training (including the cost of overtime pay required to backfill for front-line DHS employees during periods of training), reprogramming automated payroll and HR information systems, developing and conducting pay surveys to determine future pay adjustments in relation to the labor market, and conducting employee education and communication activities. The extent of these costs will be directly related to the level of comprehensiveness desired by DHS, especially in relation to training in the new system and developing and conducting labor market pay surveys for the wide variety of jobs in DHS.

Programming costs relating to automating the payroll, HR information, and performance management systems and for administering pay in a performance-focused pay system should not be extensive, since such systems already are in use elsewhere in the Federal Government and could be adapted for use by DHS. In some cases, however, DHS could benefit from contracting with outside providers for the development and maintenance of such systems.

DHS estimates the overall costs associated with implementing the new DHS HR system—including the development and implementation of a new pay and performance system, the

conversion of current employees to that system, and the creation of the new Homeland Security Labor Relations Board—will be approximately $130 million through FY 2007 (*i.e.*, over a 4-year period); less than $100 million will be spent in any 12-month period.

The primary benefit to the public of this new system resides in the HR flexibilities that will enable DHS to build a high-performance organization focused on mission accomplishment. The new job evaluation, pay, and performance management system provides DHS with an increased ability to attract and retain a more qualified and proficient workforce. The new labor relations, adverse actions, and appeals system affords DHS greater flexibility to manage its workforce in the face of constantly changing threats to the security of our homeland. Taken as a whole, the changes included in these final regulations will result in a contemporary, merit-based HR system that focuses on performance, generates respect and trust, and above all, supports the primary mission of DHS—protecting our homeland.

Regulatory Flexibility Act

DHS and OPM have determined that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

E.O. 12988, Civil Justice Reform

This regulation is consistent with the requirements of E.O. 12988. The regulation clearly specifies the effects on existing Federal law or regulation; provides clear legal standards; has no retroactive effects; specifies procedures for administrative and court actions; defines key terms; and is drafted clearly.

E.O. 13132, Federalism

DHS and OPM have determined that these regulations will not have Federalism implications because they will apply only to Federal agencies and employees. The regulations will not have financial or other effects on States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

Unfunded Mandates

These regulations will not result in the expenditure by State, local, or tribal governments of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

List of Subjects in 5 CFR Part 9701

Administrative practice and procedure, Government employees, Labor management relations, Labor unions, Reporting and recordkeeping requirements, Wages.

Department of Homeland Security.

Tom Ridge,

Secretary.

Office of Personnel Management.

Kay Coles James,

Director.

■ Accordingly, under the authority of section 9701 of title 5, United States Code, the Department of Homeland Security and the Office of Personnel Management amend title 5, Code of Federal Regulations, by establishing chapter XCVII consisting of part 9701 as follows:

CHAPTER XCVII—DEPARTMENT OF HOMELAND SECURITY HUMAN RESOURCES MANAGEMENT SYSTEM (DEPARTMENT OF HOMELAND SECURITY—OFFICE OF PERSONNEL MANAGEMENT)

PART 9701—DEPARTMENT OF HOMELAND SECURITY HUMAN RESOURCES MANAGEMENT SYSTEM

Subpart A—General Provisions

Sec.

9701.101 Purpose.
9701.102 Eligibility and coverage.
9701.103 Definitions.
9701.104 Scope of authority.
9701.105 Continuing collaboration.
9701.106 Relationship to other provisions.
9701.107 Program evaluation.

Subpart B—Classification

General

9701.201 Purpose.
9701.202 Coverage.
9701.203 Waivers.
9701.204 Definitions.
9701.205 Bar on collective bargaining.

Classification Structure

9701.211 Occupational clusters.
9701.212 Bands.

Classification Process

9701.221 Classification requirements.
9701.222 Reconsideration of classification decisions.

Transitional Provisions

9701.231 Conversion of positions and employees to the DHS classification system.
9701.232 Special transition rules for Federal Air Marshal Service.

Subpart C—Pay and Pay Administration

General

9701.301 Purpose.
9701.302 Coverage.
9701.303 Waivers.
9701.304 Definitions.
9701.305 Bar on collective bargaining.

Overview of Pay System

9701.311 Major features.
9701.312 Maximum rates.
9701.313 Homeland Security Compensation Committee.
9701.314 DHS responsibilities.

Setting and Adjusting Rate Ranges

9701.321 Structure of bands.
9701.322 Setting and adjusting rate ranges.
9701.323 Eligibility for pay increase associated with a rate range adjustment.
9701.324 Treatment of employees whose rate of basic pay does not fall below the minimum rate of their band.
9701.325 Treatment of employees whose rate of basic pay falls below the minimum rate of their band.

Locality and Special Rate Supplements

9701.331 General.
9701.332 Locality rate supplements.
9701.333 Special rate supplements.
9701.334 Setting and adjusting locality and special rate supplements.
9701.335 Eligibility for pay increase associated with a supplement adjustment.
9701.336 Treatment of employees whose pay does not fall below the minimum adjusted rate of their band.
9701.337 Treatment of employees whose pay falls below the minimum adjusted rate of their band.

Performance-Based Pay

9701.341 General.
9701.342 Performance pay increases.
9701.343 Within-band reductions.
9701.344 Special within-band increases.
9701.345 Developmental pay adjustments.
9701.346 Pay progression for new supervisors.

Pay Administration

9701.351 Setting an employee's starting pay.
9701.352 Use of highest previous rate.
9701.353 Setting pay upon promotion.
9701.354 Setting pay upon demotion.
9701.355 Setting pay upon movement to a different occupational cluster.
9701.356 Pay retention.
9701.357 Miscellaneous.

Special Payments

9701.361 Special skills payments.
9701.362 Special assignment payments.
9701.363 Special staffing payments.

Transitional Provisions

9701.371 General.
9701.372 Creating initial pay ranges.
9701.373 Conversion of employees to the DHS pay system.
9701.374 Special transition rules for Federal Air Marshal Service.

Subpart D—Performance Management

9701.401 Purpose.
9701.402 Coverage.
9701.403 Waivers.
9701.404 Definitions.
9701.405 Performance management system requirements.

9701.406 Setting and communicating performance expectations.
9701.407 Monitoring performance and providing feedback.
9701.408 Developing performance and addressing poor performance.
9701.409 Rating and rewarding performance.
9701.410 DHS responsibilities.

Subpart E—Labor-Management Relations

9701.501 Purpose.
9701.502 Rule of construction.
9701.503 Waivers.
9701.504 Definitions.
9701.505 Coverage.
9701.506 Impact on existing agreements.
9701.507 Employee rights.
9701.508 Homeland Security Labor Relations Board.
9701.509 Powers and duties of the HSLRB.
9701.510 Powers and duties of the Federal Labor Relations Authority.
9701.511 Management rights.
9701.512 Conferring on procedures for the exercise of management rights.
9701.513 Exclusive recognition of labor organizations.
9701.514 Determination of appropriate units for labor organization representation.
9701.515 Representation rights and duties.
9701.516 Allotments to representatives.
9701.517 Unfair labor practices.
9701.518 Duty to bargain, confer, and consult.
9701.519 Negotiation impasses.
9701.520 Standards of conduct for labor organizations.
9701.521 Grievance procedures.
9701.522 Exceptions to arbitration awards.
9701.523 Official time.
9701.524 Compilation and publication of data.
9701.525 Regulations of the HSLRB.
9701.526 Continuation of existing laws, recognitions, agreements, and procedures.
9701.527 Savings provision.

Subpart F—Adverse Actions

General

9701.601 Purpose.
9701.602 Waivers.
9701.603 Definitions.
9701.604 Coverage.
9701.605 Initial service period.

Requirements for Furlough of 30 Days or Less, Suspension, Demotion, Reduction in Pay, or Removal

9701.606 Standard for action.
9701.607 Mandatory removal offenses.
9701.608 Procedures.
9701.609 Proposal notice.
9701.610 Opportunity to reply.
9701.611 Decision notice.
9701.612 Departmental record.

National Security

9701.613 Suspension and removal.

Savings Provision

9701.614 Savings provision.

Subpart G—Appeals

9701.701 Purpose.
9701.702 Waivers.
9701.703 Definitions.
9701.704 Coverage.
9701.705 Alternative dispute resolution.
9701.706 MSPB appellate procedures.
9701.707 Appeals of mandatory removal actions.
9701.708 Mandatory Removal Panel.
9701.709 Actions involving discrimination.
9701.710 Savings provision.

Authority: 5 U.S.C. 9701.

Subpart A—General Provisions

§ 9701.101 Purpose.

(a) This part contains regulations governing the establishment of a new human resources management system within the Department of Homeland Security (DHS), as authorized by 5 U.S.C. 9701. As permitted by section 9701, these regulations waive and replace various statutory provisions that would otherwise be applicable to affected DHS employees. These regulations are issued jointly by the Secretary of Homeland Security and the Director of the Office of Personnel Management (OPM).

(b) The system established under this part is designed to be mission-centered, performance-focused, flexible, contemporary, and excellent; to generate respect and trust through employee involvement; to be based on the principles of merit and fairness embodied in the statutory merit system principles; and to comply with all other applicable provisions of law.

§ 9701.102 Eligibility and coverage.

(a) All civilian employees of the Department are eligible for coverage under one or more subparts of this part except those covered by a provision of law outside the waivable chapters of title 5, U.S. Code, identified in § 9701.104. For example, Transportation Security Administration employees, employees appointed under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Secret Service Uniformed Division members, Coast Guard Academy faculty members, and Coast Guard military members are not eligible for coverage under any classification or pay system established under subpart B or C of this part. Refer to subparts B through G of this part for specific information regarding the coverage of each subpart.

(b)(1) Subpart A of this part becomes applicable to all eligible employees on March 3, 2005.

(2) The Secretary or designee may, at his or her sole and exclusive discretion and after coordination with OPM, establish the effective date for applying subparts E, F, and G of this part to all eligible employees. Unless otherwise determined by the Secretary and the Director, subparts E, F, and G of this part will become applicable to all eligible employees no later than August 1, 2005.

(3) With respect to subparts B, C, and D of this part, the Secretary or designee may, at his or her sole and exclusive discretion and after coordination with OPM, apply one or more of these subparts to a specific category or categories of eligible civilian employees at any time. With respect to any given category of civilian employees, the Secretary or designee may apply some of these subparts, but not others, and such coverage determinations may be made effective on different dates (e.g., in order to phase in coverage under a new classification, pay, and performance management system).

(4) DHS will notify affected employees and labor organizations in advance of the application of one or more subparts of this part to them.

(c) Until the Secretary or designee makes a determination under paragraph (b) of this section to apply the provisions of one or more subparts of this part to a particular category or categories of eligible DHS employees, those DHS employees will continue to be covered by the applicable Federal laws and regulations that would apply to them in the absence of this part. All personnel actions affecting DHS employees must be based on the Federal laws and regulations applicable to them on the effective date of the action.

(d) Any new DHS classification, pay, or performance management system covering Senior Executive Service (SES) members must be consistent with the policies and procedures established by the Governmentwide SES pay-for-performance system authorized by 5 U.S.C. chapter 53, subchapter VIII, and applicable implementing regulations issued by OPM. If the Secretary determines that SES members employed by DHS should be covered by classification, pay, or performance management provisions that differ substantially from the Governmentwide SES pay-for-performance system, the Secretary and the Director must issue joint regulations consistent with all of the requirements of 5 U.S.C. 9701.

(e) At his or her sole and exclusive discretion, the Secretary or designee may, after coordination with OPM, rescind the application under paragraph (b) of this section of one or more subparts of this part to a particular category of employees and prescribe implementing directives for converting that category of employees to coverage under applicable title 5 provisions. DHS will notify affected employees and labor

organizations in advance of a decision to rescind the application of one or more subparts of this part to them.

(f) The Secretary or other authorized DHS official may exercise an independent legal authority to establish a parallel system that follows some or all of the requirements in this part for a category of employees who are not eligible for coverage under this part.

§ 9701.103 Definitions.

In this part:

Authorized agency official means the Secretary or an official who is authorized to act for the Secretary in the matter concerned.

Coordination means the process by which DHS, after appropriate staff-level consultation, officially provides OPM with notice of a proposed action and intended effective date. If OPM concurs, or does not respond to that notice within 30 calendar days, DHS may proceed with the proposed action. However, if OPM indicates the matter has Governmentwide implications or consequences, DHS will not proceed until the matter is resolved. The coordination process is intended to give due deference to the flexibilities afforded DHS by the Homeland Security Act and the regulations in this part, without compromising OPM's institutional responsibility, as codified in 5 U.S.C. chapter 11 and Executive Order 13197 of January 18, 2001, to provide Governmentwide oversight in human resources management programs and practices.

Department or *DHS* means the Department of Homeland Security.

Director means the Director of the Office of Personnel Management.

Employee means an employee within the meaning of that term in 5 U.S.C. 2105.

General Schedule or *GS* means the General Schedule classification and pay system established under chapter 51 and subchapter III of chapter 53 of title 5, U.S. Code.

Implementing directives means directives issued at the Departmental level by the Secretary or designee to carry out any policy or procedure established in accordance with this part. These directives may apply Departmentwide or to any part of the Department as determined by the Secretary at his or her sole and exclusive discretion.

OPM means the Office of Personnel Management.

Secretary means the Secretary of Homeland Security or, as authorized, the Deputy Secretary of Homeland Security.

Secretary or *designee* means the Secretary or a DHS official authorized to act for the Secretary in the matter concerned who serves as—

(1) The Undersecretary for Management; or

(2) The Chief Human Capital Officer for DHS.

§ 9701.104 Scope of authority.

Subject to the requirements and limitations in 5 U.S.C. 9701, the provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified in exercising the authority in 5 U.S.C. 9701:

(a) Chapter 43, dealing with performance appraisal systems;

(b) Chapter 51, dealing with General Schedule job classification;

(c) Chapter 53, dealing with pay for General Schedule employees, pay and job grading for Federal Wage System employees, and pay for certain other employees;

(d) Chapter 71, dealing with labor relations;

(e) Chapter 75, dealing with adverse actions and certain other actions; and

(f) Chapter 77, dealing with the appeal of adverse actions and certain other actions.

§ 9701.105 Continuing collaboration.

(a) In accordance with 5 U.S.C. 9701(e)(1)(D), this section provides employee representatives with an opportunity to participate in the development of implementing directives. This process is not subject to the requirements established by subpart E of this part, including but not limited to §§ 9701.512 (regarding conferring on procedures for the exercise of management rights), 9701.517(a)(5) (regarding enforcement of the duty to consult or negotiate), 9701.518 (regarding the duty to bargain, confer, and consult), or 9701.519 (regarding impasse procedures).

(b)(1) For the purpose of this section, the term ''employee representatives'' includes representatives of labor organizations with exclusive recognition rights for units of DHS employees, as well as representatives of employees who are not within a unit for which a labor organization has exclusive recognition.

(2) Consistent with 5 U.S.C. 9701(e)(2)(A), (B), and (D), DHS will determine the number of employee representatives to be engaged in the continuing collaboration process.

(3) Each national labor organization with multiple collective bargaining units accorded exclusive recognition will determine how its units will be represented within the limitations imposed by DHS.

(c)(1) Within timeframes specified by DHS, employee representatives will be provided with an opportunity to submit written comments and/or to discuss their views with DHS officials on proposed final draft implementing directives.

(2) As the Department determines necessary, employee representatives will be provided with an opportunity to discuss their views with DHS officials and/or to submit written comments at initial identification of implementation issues and conceptual design and/or at review of draft recommendations or alternatives.

(d) Employee representatives will be provided with access to information, including research, to make their participation in the continuing collaboration process productive.

(e) Any written comments submitted by employee representatives regarding proposed final draft implementing directives will become part of the record and will be forwarded to the Secretary or designee for consideration in making a final decision.

(f) Nothing in the continuing collaboration process affects the right of the Secretary to determine the content of implementing directives and to make them effective at any time.

(g) In accordance with 5 U.S.C. 9701(e)(2), any procedures necessary to carry out this section will be established by the Secretary and the Director jointly as internal rules of Departmental procedure which will not be subject to review.

§ 9701.106 Relationship to other provisions.

(a)(1) The provisions of title 5, U.S. Code, are waived or modified to the extent authorized by 5 U.S.C. 9701 to conform to the provisions of this part.

(2) This part must be interpreted in a way that recognizes the critical mission of the Department. Each provision of this part must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission, as defined by the Secretary or designee. The interpretation of the regulations in this part by DHS and OPM must be accorded great deference.

(b) For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code, the referenced provisions are not waived but are modified consistent with the corresponding regulations in this part, except as otherwise provided in this part (including paragraph (c) of this

section) or in DHS implementing directives. Applications of this rule include, but are not limited to, the following:

(1) If another provision of law or Governmentwide regulations requires coverage under one of the chapters modified or waived under this part (*i.e.*, chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code), DHS employees are deemed to be covered by the applicable chapter notwithstanding coverage under a system established under this part. Selected examples of provisions that continue to apply to any DHS employees (notwithstanding coverage under subparts B through G of this part) include, but are not limited to, the following:

(i) Foreign language awards for law enforcement officers under 5 U.S.C. 4521–4523;

(ii) Pay for firefighters under 5 U.S.C. 5545b;

(iii) Differentials for duty involving physical hardship or hazard under 5 U.S.C. 5545(d);

(iv) Recruitment, relocation, and retention payments under 5 U.S.C. 5753–5754;

(v) Physicians' comparability allowances under 5 U.S.C. 5948; and

(vi) The higher cap on relocation bonuses for law enforcement officers established by section 407 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101–509).

(2) In applying the back pay law in 5 U.S.C. 5596 to DHS employees covered by subpart G of this part (dealing with appeals), the reference in section 5596(b)(1)(A)(ii) to 5 U.S.C. 7701(g) (dealing with attorney fees) is considered to be a reference to a modified section 7701(g) that is consistent with § 9701.706(h).

(3) In applying the back pay law in 5 U.S.C. 5596 to DHS employees covered by subpart E of this part (dealing with labor relations), the reference in section 5596(b)(5) to section 7116 (dealing with unfair labor practices) is considered to be a reference to a modified section 7116 that is consistent with § 9701.517.

(c) When a specified category of employees is covered by a classification and pay system established under subparts B and C of this part, the following provisions do not apply:

(1) Time-in-grade restrictions that apply to competitive service GS positions under 5 CFR part 300, subpart F;

(2) Supervisory differentials under 5 U.S.C. 5755; and

(3) Law enforcement officer special rates and geographic adjustments under sections 403 and 404 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101–509).

(d) Nothing in this part waives, modifies or otherwise affects the employment discrimination laws that the Equal Employment Opportunity Commission (EEOC) enforces under 42 U.S.C. 2000e *et seq.*, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and 29 U.S.C. 206(d). Employees and applicants for employment in DHS will continue to be covered by EEOC's Federal sector regulations found at 29 CFR part 1614.

§ 9701.107 Program evaluation.

(a) DHS will establish procedures for evaluating the regulations in this part and their implementation. DHS will provide designated employee representatives with an opportunity to be briefed and a specified timeframe to provide comments on the design and results of program evaluations.

(b) Involvement of employee representatives under this section will occur at the following stages:

(1) Identification of the scope, objectives, and methodology to be used in program evaluation; and

(2) Review of draft findings and recommendations.

(c) Involvement in the evaluation process does not waive the rights of any party under applicable law or regulations.

Subpart B—Classification

General

§ 9701.201 Purpose.

(a) This subpart contains regulations establishing a classification structure and rules for covered DHS employees and positions to replace the classification structure and rules in 5 U.S.C. chapter 51 and the job grading system in 5 U.S.C. chapter 53, subchapter IV, in accordance with the merit principle of equal pay for work of equal value.

(b) Any classification system prescribed under this subpart must be established in conjunction with the pay system described in subpart C of this part.

§ 9701.202 Coverage.

(a) This subpart applies to eligible DHS employees and positions listed in paragraph (b) of this section, subject to a determination by the Secretary or designee under § 9701.102(b).

(b) The following employees and positions are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by the General Schedule classification system established under 5 U.S.C. chapter 51;

(2) Employees and positions that would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376; and

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9701.102(d).

§ 9701.203 Waivers.

(a) When a specified category of employees is covered by a classification system established under this subpart, the provisions of 5 U.S.C. chapter 51 and 5 U.S.C. 5346, and related regulations, are waived with respect to that category of employees, except as provided in paragraph (b) of this section, § 9701.106, and § 9701.222(d) (with respect to OPM's authority under 5 U.S.C. 5112(b) and 5346(c) to act on requests for review of classification decisions).

(b) Section 5108 of title 5, U.S. Code, dealing with the classification of positions above GS–15, is not waived.

§ 9701.204 Definitions.

In this subpart:

Band means a work level or pay range within an occupational cluster.

Basic pay means an employee's rate of pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by law or regulation. For the specific purposes prescribed in §§ 9701.332(c) and 9701.333, respectively, basic pay includes locality and special rate supplements.

Classification, also referred to as job evaluation, means the process of analyzing and assigning a job or position to an occupational series, cluster, and band for pay and other related purposes.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics required by a position.

Occupational cluster means a grouping of one or more associated or related occupations or positions. An occupational cluster may include one or more occupational series.

Occupational series means the number OPM or DHS assigns to a group or family of similar positions for identification purposes (for example: 0110, Economist Series; 1410, Librarian Series).

Position or *Job* means the duties, responsibilities, and related competency requirements that are assigned to an

employee whom the Secretary or designee approves for coverage under § 9701.202(a).

§ 9701.205 Bar on collective bargaining.

As provided in the definition of *conditions of employment* in § 9701.504, any classification system established under this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the classification system, including but not limited to coverage determinations, the design of the classification structure, and classification methods, criteria, and administrative procedures and arrangements.

Classification Structure

§ 9701.211 Occupational clusters.

For the purpose of classifying positions, DHS may, after coordination with OPM, establish occupational clusters based on factors such as mission or function; nature of work; qualifications or competencies; career or pay progression patterns; relevant labor-market features; and other characteristics of those occupations or positions. DHS must document in implementing directives the criteria and rationale for grouping occupations or positions into occupational clusters.

§ 9701.212 Bands.

(a) For purposes of identifying relative levels of work and corresponding pay ranges, DHS may, after coordination with OPM, establish one or more bands within each occupational cluster.

(b) Each occupational cluster may include, but is not limited to, the following bands:

(1) Entry/Developmental—work that involves gaining the competencies needed to perform successfully in a Full Performance band through appropriate formal training and/or on-the-job experience.

(2) Full Performance—work that involves the successful completion of any required entry-level training and/or developmental activities necessary to independently perform the full range of non-supervisory duties of a position in an occupational cluster.

(3) Senior Expert—work that involves an extraordinary level of specialized knowledge or expertise upon which DHS relies for the accomplishment of critical mission goals and objectives; reserved for a limited number of non-supervisory employees.

(4) Supervisory—work that may involve hiring or selecting employees, assigning work, managing performance, recognizing and rewarding employees, and other associated duties.

(c) DHS must document in implementing directives the definitions for each band which specify the type and range of difficulty and responsibility, qualifications, competencies, or other characteristics of the work encompassed by the band.

(d) DHS must, after coordination with OPM, establish qualification standards and requirements for each occupational cluster, occupational series, and/or band. DHS may use the qualification standards established by OPM or, after coordination with OPM, may establish different qualification standards. This paragraph does not waive or modify any DHS authority to establish qualification standards or requirements under 5 U.S.C. chapters 31 and 33 and OPM implementing regulations.

Classification Process

§ 9701.221 Classification requirements.

(a) DHS must develop a methodology for describing and documenting the duties, qualifications, and other requirements of categories of jobs, and DHS must make such descriptions and documentation available to affected employees.

(b) An authorized agency official must—

(1) Assign occupational series to jobs consistent with occupational series definitions established by OPM under 5 U.S.C. 5105 and 5346 or by DHS, after coordination with OPM; and

(2) Apply the criteria and definitions required by § 9701.211 and § 9701.212 to assign jobs to an appropriate occupational cluster and band.

(c) DHS must establish procedures for classifying jobs and may make such inquiries or investigations of the duties, responsibilities, and qualification requirements of jobs as it considers necessary for the purpose of this section.

(d) Classification decisions become effective on the date designated by the authorized agency official who makes the decision.

(e) DHS must establish a plan to periodically review the accuracy of classification decisions.

§ 9701.222 Reconsideration of classification decisions.

(a) An individual employee may request that DHS or OPM reconsider the pay system, occupational cluster, occupational series, or band assigned to his or her current official position of record at any time.

(b) DHS will, after coordination with OPM, establish implementing directives for reviewing requests for reconsideration, including nonreviewable issues, rights of representation, and the effective date of any corrective actions. OPM will, after consulting with DHS, establish separate policies and procedures for reviewing reconsideration requests.

(c) An employee may request OPM to review a DHS determination made under paragraph (a) of this section. If an employee does not request an OPM reconsideration decision, DHS's classification determination is final and not subject to further review or appeal.

(d) OPM's final determination on a request made under this section is not subject to further review or appeal.

Transitional Provisions

§ 9701.231 Conversion of positions and employees to the DHS classification system.

(a) This section describes the transitional provisions that apply when DHS positions and employees are converted to a classification system established under this subpart. Affected positions and employees may convert from the GS system, a prevailing rate system, the SL/ST system, or the SES system, as provided in § 9701.202. For the purpose of this section, the terms ''convert,'' ''converted,'' ''converting,'' and ''conversion'' refer to positions and employees that become covered by the classification system as a result of a coverage determination made under § 9701.102(b) and exclude employees who are reassigned or transferred from a noncovered position to a position already covered by the DHS system.

(b) DHS will issue implementing directives prescribing policies and procedures for converting the GS or prevailing rate grade of a position to a band and for converting SL/ST and SES positions to a band upon initial implementation of the DHS classification system. Such procedures must include provisions for converting an employee who is retaining a grade under 5 U.S.C. chapter 53, subchapter VI, immediately prior to conversion. As provided in § 9701.373, DHS must convert employees to the system without a reduction in their rate of pay (including basic pay and any applicable locality payment under 5 U.S.C. 5304, special rate under 5 U.S.C. 5305, locality rate supplement under § 9701.332, or special rate supplement under § 9701.333).

§ 9701.232 Special transition rules for Federal Air Marshal Service.

Notwithstanding any other provision in this subpart, if DHS transfers Federal Air Marshal Service positions from the Transportation Security Administration (TSA) to another organization within DHS, DHS may cover those positions

under a classification system that is parallel to the classification system that was applicable to the Federal Air Marshal Service within TSA. DHS may, after coordination with OPM, modify that system. DHS will issue implementing directives on converting Federal Air Marshal Service employees to any new classification system that may subsequently be established under this subpart, consistent with the conversion rules in § 9701.231.

Subpart C—Pay and Pay Administration

General

§ 9701.301 Purpose.

(a) This subpart contains regulations establishing pay structures and pay administration rules for covered DHS employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53, as authorized by 5 U.S.C. 9701. These regulations are designed to provide DHS with the flexibility to allocate available funds strategically in support of DHS mission priorities and objectives. Various features that link pay to employees' performance ratings are designed to promote a high-performance culture within DHS.

(b) Any pay system prescribed under this subpart must be established in conjunction with the classification system described in subpart B of this part.

(c) The pay system established under this subpart, working in conjunction with the performance management system established under subpart D of this part, is designed to incorporate the following features:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between elements of the pay system established in this subpart, the employee performance appraisal system, and the Department's strategic plan;

(4) Employee involvement in the design and implementation of the system (as specified in § 9701.105);

(5) Adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the pay system established in this subpart;

(6) Periodic performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;

(7) Effective safeguards so that the management of the system is fair and equitable and based on employee performance; and

(8) A means for ensuring that adequate resources are allocated for the design, implementation, and administration of the performance management system that supports the pay system established under this subpart.

§ 9701.302 Coverage.

(a) This subpart applies to eligible DHS employees in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary or designee under § 9701.102(b).

(b) The following employees are eligible for coverage under this subpart:

(1) Employees who would otherwise be covered by the General Schedule pay system established under 5 U.S.C. chapter 53, subchapter III;

(2) Employees who would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376; and

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9701.102(d).

§ 9701.303 Waivers.

(a) When a specified category of employees is covered by the pay system established under this subpart, the provisions of 5 U.S.C. chapter 53, and related regulations, are waived with respect to that category of employees, except as provided in § 9701.106 and paragraphs (b) through (f) of this section.

(b) The following provisions of 5 U.S.C. chapter 53 are not waived:

(1) Section 5307, dealing with the aggregate limitation on pay;

(2) Sections 5311 through 5318, dealing with Executive Schedule positions;

(3) Section 5371, insofar as it authorizes OPM to apply the provisions of 38 U.S.C. chapter 74 to DHS employees in health care positions covered by section 5371 in lieu of any DHS pay system established under this subpart or the following provisions of title 5, U.S. Code: Chapters 51, 53, and 61, and subchapter V of chapter 55. The reference to ''chapter 51'' in section 5371 is deemed to include a classification system established under subpart B of this part; and

(4) Section 5377, dealing with the critical pay authority.

(c) Section 5373 is modified. The limit on rates of basic pay, including any applicable locality payment or supplement, for DHS employees who are not covered by this subpart and whose pay is set by administrative action (e.g., Coast Guard Academy faculty) is increased to the rate for level III of the Executive Schedule.

(d) Section 5379 is modified. DHS may, after coordination with OPM, establish and administer a student loan repayment program for DHS employees, except that DHS may not make loan payments for any noncareer appointees to the SES (as defined in 5 U.S.C. 3132(a)(7)) or for any employee occupying a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character. Notwithstanding § 9701.302(a), any DHS employee otherwise covered by section 5379 is eligible for coverage under the provisions established under this paragraph, subject to a determination by the Secretary or designee under § 9701.102(b).

(e) In approving the coverage of employees who would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV, DHS may limit the waiver so that affected employees remain entitled to environmental or other differentials established under 5 U.S.C. 5343(c)(4) and night shift differentials established under 5 U.S.C. 5343(f) if such employees are grouped in separate occupational clusters (established under subpart B of this part) that are limited to employees who would otherwise be covered by a prevailing rate system.

(f) Employees in SL/ST positions and SES members who are covered by a basic pay system established under this subpart are considered to be paid under 5 U.S.C. 5376 and 5382, respectively, for the purpose of applying 5 U.S.C. 5307(d).

§ 9701.304 Definitions.

In this part:

48 contiguous States means the States of the United States, excluding Alaska and Hawaii, but including the District of Columbia.

Band means a work level or pay range within an occupational cluster.

Band rate range means the range of rates of basic pay (excluding any locality or special rate supplements) applicable to employees in a particular band, as described in § 9701.321. Each band rate range is defined by a minimum and maximum rate.

Basic pay means an employee's rate of pay before any deductions and exclusive of additional pay of any kind,

except as expressly provided by law or regulation. For the specific purposes prescribed in §§ 9701.332(c) and 9701.333, respectively, basic pay includes locality and special rate supplements.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics required by a position.

Day means a calendar day.

Demotion means a reduction to a lower band within the same occupational cluster or a reduction to a lower band in a different occupational cluster under implementing directives issued by DHS pursuant to § 9701.355.

Locality rate supplement means a geographic-based addition to basic pay, as described in § 9701.332.

Modal rating means the rating of record that occurs most frequently in a particular pay pool.

Occupational cluster means a grouping of one or more associated or related occupations or positions. An occupational cluster may include one or more occupational series.

Promotion means an increase to a higher band within the same occupational cluster or an increase to a higher band in a different occupational cluster under implementing directives issued by DHS pursuant to § 9701.355.

Rating of record means a performance appraisal prepared—

(1) At the end of an appraisal period covering an employee's performance of assigned duties against performance expectations (as defined in § 9701.404) over the applicable period; or

(2) To support a pay determination, including one granted in accordance with subpart C of this part, a within-grade increase granted under 5 CFR 531.404, or a pay determination granted under other applicable rules.

SES means the Senior Executive Service established under 5 U.S.C. chapter 31, subchapter II.

SL/ST refers to an employee serving in a senior-level position paid under 5 U.S.C. 5376. The term ''SL'' identifies a senior-level employee covered by 5 U.S.C. 3324 and 5108. The term ''ST'' identifies an employee who is appointed under the special authority in 5 U.S.C. 3325 to a scientific or professional position established under 5 U.S.C. 3104.

Special rate supplement means an addition to basic pay for a particular category of employees to address staffing problems, as described in § 9701.333. A special rate supplement is paid in place of any lesser locality rate supplement that would otherwise apply.

Unacceptable performance means the failure to meet one or more performance expectations, as described in § 9701.406.

§ 9701.305 Bar on collective bargaining.

As provided in the definition of *conditions of employment* in § 9701.504, any pay program established under authority of this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the pay program, including but not limited to coverage decisions, the design of pay structures, the setting and adjustment of pay levels, pay administration rules and policies, and administrative procedures and arrangements.

Overview of Pay System

§ 9701.311 Major features.

Through the issuance of implementing directives, DHS will establish a pay system that governs the setting and adjusting of covered employees' rates of pay. The DHS pay system will include the following features:

(a) A structure of rate ranges linked to various bands for each occupational cluster, in alignment with the classification structure described in subpart B of this part;

(b) Policies regarding the setting and adjusting of basic pay rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9701.321 and 9701.322;

(c) Policies regarding the setting and adjusting of supplements to basic pay based on local labor market conditions and other factors, as described in §§ 9701.331 through 9701.334;

(d) Policies regarding employees' eligibility for pay increases based on adjustments in rate ranges and supplements, as described in §§ 9701.323 through 9701.325 and 9701.335 through 9701.337;

(e) Policies regarding performance-based pay adjustments, as described in §§ 9701.341 through 9701.346;

(f) Policies on basic pay administration, including movement between occupational clusters, as described in §§ 9701.351 through 9701.356;

(g) Policies regarding special payments that are not basic pay, as described in §§ 9701.361 through 9701.363; and

(h) Linkages to employees' performance ratings of records, as described in subpart D of this part.

§ 9701.312 Maximum rates.

(a) DHS may not pay any employee an annual rate of basic pay in excess of the rate for level III of the Executive Schedule, except as provided in paragraph (b) of this section.

(b) DHS may establish the maximum annual rate of basic pay for members of the SES at the rate for level II of the Executive Schedule if DHS obtains the certification specified in 5 U.S.C. 5307(d).

§ 9701.313 Homeland Security Compensation Committee.

(a) DHS will establish a Homeland Security Compensation Committee to provide options and/or recommendations for consideration by the Secretary or designee on strategic compensation matters such as Departmental compensation policies and principles, the annual allocation of funds between market and performance pay adjustments, and the annual adjustment of rate ranges and locality and special rate supplements. The Compensation Committee will consider factors such as turnover, recruitment, and local labor market conditions in providing options and recommendations for consideration by the Secretary. The Secretary's or designee's determination with regard to those options and/or recommendations is final and not subject to further review.

(b) The Compensation Committee will be chaired by the DHS Undersecretary for Management. The Compensation Committee has 14 members, including 4 officials of labor organizations granted national consultation rights (NCR) in accordance with § 9701.518(d)(2). An OPM official will serve as an *ex officio* member of the Compensation Committee. DHS will provide technical staff to support the Compensation Committee.

(c) DHS will establish procedures governing the membership and operation of the Compensation Committee.

(d) An individual will be selected by the Chair to facilitate Compensation Committee meetings. The facilitator will be selected from a list of nominees developed jointly by representatives of the Department and NCR labor organizations, the latter acting as a single party, according to procedures and time limits established by implementing directives. Nominees must be known for their integrity, impartiality, and expertise in facilitation and compensation. If the Department and the labor organizations are unable to reach agreement on a joint list of nominees, they will enlist the services of the Federal Mediation and Conciliation Service (FMCS) to assist them. If the parties are unable to reach agreement with FMCS assistance, each

party will prepare a list of up to three nominees and provide those separate lists to FMCS; FMCS may add up to three additional nominees. From that combined list of nominees, the Department and the labor organizations, the latter acting as a single party, will alternately strike names from the list until five names remain; those five nominees will be submitted to the Chair for consideration. The Chair may request that the parties develop an additional list of nominees. If the representatives of the Department's NCR labor organizations, acting as a single party, do not participate in developing the list of nominees in accordance with this section, the Chair will select the facilitator.

(e) After considering the views of all Compensation Committee members, the Chair prepares and provides options and/or recommendations to the Secretary or designee. Members may present their views on the final recommendations in writing as part of the final recommendation package. The Secretary or designee will make the final decision and notify the Compensation Committee. This process is not subject to the requirements established by §§ 9701.512 (regarding conferring on procedures for the exercise of management rights), 9701.517(a)(5) (regarding enforcement of the duty to consult or negotiate), 9701.518 (regarding the duty to bargain, confer, and consult), or 9701.519 (regarding impasse procedures).

(f) The Secretary retains the right to make determinations regarding the annual allocation of funds between market and performance pay adjustments, the annual adjustment of rate ranges and locality and special rate supplements, or any other matter recommended by the Compensation Committee, and to make such determinations effective at any time.

§ 9701.314 DHS responsibilities.

DHS responsibilities in implementing this subpart include the following:

(a) Providing OPM with information regarding the implementation of the programs authorized under this subpart at OPM's request;

(b) Participating in any interagency pay coordination council or group established by OPM to ensure that DHS pay policies and plans are coordinated with other agencies; and

(c) Fulfilling all other responsibilities prescribed in this subpart.

Setting and Adjusting Rate Ranges

§ 9701.321 Structure of bands.

(a) DHS may, after coordination with OPM, establish ranges of basic pay for bands, with minimum and maximum rates set and adjusted as provided in § 9701.322. Rates must be expressed as annual rates.

(b) For each band within an occupational cluster, DHS will establish a common rate range that applies in all locations.

§ 9701.322 Setting and adjusting rate ranges.

(a) Within its sole and exclusive discretion, DHS may, after coordination with OPM, set and adjust the rate ranges established under § 9701.321 on an annual basis. In determining the rate ranges, DHS and OPM may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) DHS may, after coordination with OPM, determine the effective date of newly set or adjusted band rate ranges. Unless DHS determines that a different effective date is needed for operational reasons, these adjustments will become effective on or about the date of the annual General Schedule pay adjustment authorized by 5 U.S.C. 5303.

(c) DHS may establish different rate ranges and provide different rate range adjustments for different bands.

(d) DHS may adjust the minimum and maximum rates of a band by different percentages.

§ 9701.323 Eligibility for pay increase associated with a rate range adjustment.

(a) When a band rate range is adjusted under § 9701.322, employees covered by that band are eligible for an individual pay increase. An employee who meets or exceeds performance expectations (*i.e.,* has a rating of record above the unacceptable performance level for the most recently completed appraisal period) must receive an increase in basic pay equal to the percentage value of any increase in the minimum rate of the employee's band resulting from a rate range adjustment under § 9701.322. The pay increase takes effect at the same time as the corresponding rate range adjustment, except as provided in §§ 9701.324 and 9701.325. For an employee receiving a retained rate, the amount of the increase under this paragraph is determined under § 9701.356.

(b) If an employee does not have a rating of record for the most recently completed appraisal period, he or she must be treated in the same manner as an employee who meets or exceeds performance expectations and is entitled to receive an increase based on the rate range adjustment, as provided in paragraph (a) of this section.

(c) An employee whose rating of record is unacceptable is prohibited from receiving a pay increase as a result of a rate range adjustment, except as provided by §§ 9701.324 and 9701.325. Because the employee's pay remains unchanged, failure to receive a pay increase is not considered an adverse action under subpart F of this part.

§ 9701.324 Treatment of employees whose rate of basic pay does not fall below the minimum rate of their band.

An employee who does not receive a pay increase under § 9701.323 because of an unacceptable rating of record and whose rate of basic pay does not fall below the minimum rate of his or her band as a result of that rating will receive such an increase if he or she demonstrates performance that meets or exceeds performance expectations, as reflected by a new rating of record issued under § 9701.409(b). Such an increase will be made effective on the first day of the first pay period beginning on or after the date the new rating of record is issued.

§ 9701.325 Treatment of employees whose rate of basic pay falls below the minimum rate of their band.

(a) In the case of an employee who does not receive a pay increase under § 9701.323 because of an unacceptable rating of record and whose rate of basic pay falls below the minimum rate of his or her band as a result of that rating, DHS must—

(1) If the employee demonstrates performance that meets or exceeds performance expectations within 90 days after the date of the rate range adjustment, issue a new rating of record under § 9701.409(b) and adjust the employee's pay prospectively by making the increase effective on the first day of the first pay period beginning on or after the date the new rating of record is issued; or

(2) Initiate action within 90 days after the date of the rate range adjustment to demote or remove the employee in accordance with the adverse action procedures established in subpart F of this part.

(b) If DHS fails to initiate a removal or demotion action under paragraph (a)(2) of this section within 90 days after the date of a rate range adjustment, the employee becomes entitled to the minimum rate of his or her band rate range on the first day of the first pay period beginning on or after the 90th day following the date of the rate range adjustment.

Locality and Special Rate Supplements

§ 9701.331 General.

The basic pay ranges established under §§ 9701.321 through 9701.323 may be supplemented in appropriate circumstances by locality or special rate supplements, as described in §§ 9701.332 through 9701.335. These supplements are expressed as a percentage of basic pay and are set and adjusted as described in § 9701.334. As authorized by § 9701.356, DHS implementing directives will determine the extent to which §§ 9701.331 through 9701.337 apply to employees receiving a retained rate.

§ 9701.332 Locality rate supplements.

(a) For each band rate range, DHS may, after coordination with OPM, establish locality rate supplements that apply in specified locality pay areas. Locality rate supplements apply to employees whose official duty station is located in the given area. DHS may provide different locality rate supplements for different occupational clusters or for different bands within the same occupational cluster in the same locality pay area.

(b) For the purpose of establishing and modifying locality pay areas, 5 U.S.C. 5304 is not waived. A DHS decision to use the locality pay area boundaries established under 5 U.S.C. 5304 does not require separate DHS regulations. DHS may, after coordination with OPM and in accordance with the public notice and comment provisions of 5 U.S.C. 553, publish Departmental regulations (6 CFR Chapter I) in the **Federal Register** that establish and adjust different locality pay areas within the 48 contiguous States or establish and adjust new locality pay areas outside the 48 contiguous States. These regulations are subject to the continuing collaboration process described in § 9701.105. As provided by 5 U.S.C. 5304(f)(2)(B), judicial review of any DHS regulation regarding the establishment or adjustment of locality pay areas is limited to whether or not the regulation was promulgated in accordance with 5 U.S.C. 553.

(c) Locality rate supplements are considered basic pay for only the following purposes:

(1) Retirement under 5 U.S.C. chapter 83 or 84;

(2) Life insurance under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, or similar payments under other legal authority;

(4) Severance pay under 5 U.S.C. 5595;

(5) Application of the maximum rate limitation set forth in § 9701.312;

(6) Determining the rate of basic pay upon conversion to the DHS pay system established under this subpart, consistent with § 9701.373(b);

(7) Other payments and adjustments authorized under this subpart as specified by DHS implementing directives;

(8) Other payments and adjustments under other statutory or regulatory authority that are basic pay for the purpose of locality-based comparability payments under 5 U.S.C. 5304; and

(9) Any provisions for which DHS locality rate supplements must be treated as basic pay by law.

§ 9701.333 Special rate supplements.

DHS will, after coordination with OPM, establish special rate supplements that provide higher pay levels for subcategories of employees within an occupational cluster if DHS determines that such supplements are warranted by current or anticipated recruitment and/or retention needs. In exercising this authority, DHS will issue necessary implementing directives. Any special rate supplement must be treated as basic pay for the same purposes as locality rate supplements, as described in § 9701.332(c), and for the purpose of computing cost-of-living allowances and post differentials in nonforeign areas under 5 U.S.C. 5941.

§ 9701.334 Setting and adjusting locality and special rate supplements.

(a) Within its sole and exclusive discretion, DHS may, after coordination with OPM, set and adjust locality and special rate supplements. In determining the amounts of the supplements, DHS and OPM may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) DHS may, after coordination with OPM, determine the effective date of newly set or adjusted locality and special rate supplements. Established supplements will be reviewed for possible adjustment on an annual basis in conjunction with rate range adjustments under § 9701.322.

§ 9701.335 Eligibility for pay increase associated with a supplement adjustment.

(a) When a locality or special rate supplement is adjusted under § 9701.334, an employee to whom the supplement applies is entitled to the pay increase resulting from that adjustment if the employee meets or exceeds performance expectations (i.e., has a rating of record above the unacceptable performance level for the most recently completed appraisal period). This includes an increase resulting from the initial establishment and setting of a special rate supplement. The pay increase takes effect at the same time as the applicable supplement is set or adjusted, except as provided in §§ 9701.336 and 9701.337.

(b) If an employee does not have a rating of record for the most recently completed appraisal period, he or she must be treated in the same manner as an employee who meets or exceeds performance expectations and is entitled to any pay increase associated with a supplement adjustment, as provided in paragraph (a) of this section.

(c) An employee who has an unacceptable rating of record is prohibited from receiving a pay increase as a result of an increase in an applicable locality or special rate supplement, except as provided by §§ 9701.336 and 9701.337. Because the employee's pay remains unchanged, failure to receive a pay increase is not considered an adverse action under subpart F of this part.

§ 9701.336 Treatment of employees whose pay does not fall below the minimum adjusted rate of their band.

An employee who does not receive a pay increase under § 9701.335 because of an unacceptable rating of record and whose rate of basic pay (including a locality or special rate supplement) does not fall below the minimum adjusted rate of his or her band as a result of that rating will receive such an increase if he or she demonstrates performance that meets or exceeds performance expectations, as reflected by a new rating of record issued under § 9701.409(b). Such an increase will be made effective on the first day of the first pay period beginning on or after the date the new rating of record is issued.

§ 9701.337 Treatment of employees whose rate of pay falls below the minimum adjusted rate of their band.

(a) In the case of an employee who does not receive a pay increase under § 9701.335 because of an unacceptable rating of record and whose rate of basic pay (including a locality or special rate supplement) falls below the minimum adjusted rate of his or her band as a result of that rating, DHS must—

(1) If the employee demonstrates performance that meets or exceeds performance expectations within 90 days after the date of the locality or special rate supplement adjustment, issue a new rating of record under

§ 9701.409(b) and adjust the employee's pay prospectively by making the increase effective on the first day of the first pay period beginning on or after the date the new rating of record is issued; or

(2) Initiate action within 90 days after the date of the locality or special rate supplement adjustment to demote or remove the employee in accordance with the adverse action procedures established in subpart F of this part.

(b) If DHS fails to initiate a removal or demotion action under paragraph (a)(2) of this section within 90 days after the date of a locality or special rate supplement adjustment, the employee becomes entitled to the minimum adjusted rate of his or her band rate range on the first day of the first pay period beginning on or after the 90th day following the date of the locality or special rate supplement adjustment.

Performance-Based Pay

§ 9701.341 General.

Sections 9701.342 through 9701.346 describe various types of performance-based pay adjustments that are part of the pay system established under this subpart. Generally, these within-band pay increases are directly linked to an employee's rating of record (as assigned under the performance management system described in subpart D of this part). These provisions are designed to provide DHS with the flexibility to allocate available funds based on performance as a means of fostering a high-performance culture that supports mission accomplishment. While performance measures primarily focus on an employee's contributions (as an individual or as part of a team) in accomplishing work assignments and achieving mission results, performance also may be reflected in the acquisition and demonstration of required competencies.

§ 9701.342 Performance pay increases.

(a) *Overview.* (1) The DHS pay system provides employees in a Full Performance or higher band with increases in basic pay based on individual performance ratings of record as assigned under a performance management system established under subpart D of this part. The DHS pay system uses pay pool controls to allocate pay increases based on performance points that are directly linked to the employee's rating of record, as described in this section. Performance pay increases are a function of the amount of money in the performance pay pool, the relative point value placed on ratings, and the distribution of ratings within that performance pay pool.

(2) The rating of record used as the basis for a performance pay increase is the one assigned for the most recently completed appraisal period (subject to the requirements of subpart D of this part), except that if the supervisor or other rating official determines that an employee's current performance is inconsistent with that rating, the supervisor or other rating official may prepare a more current rating of record, consistent with § 9701.409(b). If an employee does not have a rating of record, DHS will use the modal rating received by other employees covered by the same pay pool during the most recent rating cycle for the purpose of determining the employee's performance pay increase.

(b) *Performance pay pools.* (1) DHS will establish pay pools for performance pay increases.

(2) Each pay pool covers a defined group of DHS employees, as determined by DHS.

(3) An authorized agency official(s) may determine the distribution of funds among pay pools and may adjust those amounts based on overall levels of organizational performance or contribution to the Department's mission.

(4) In allocating the monies to be budgeted for performance pay increases, the Secretary or designee must take into account the average value of within-grade and quality step increases under the General Schedule, as well as amounts that otherwise would have been spent on promotions among positions placed in the same band.

(c) *Performance point values.* (1) DHS will establish point values that correspond to the performance rating levels established under subpart D of this part, so that a point value is attached to each rating level. For example, in a four-level rating program, the point value pattern could be 4–2–1–0, where 4 points are assigned to the highest (outstanding) rating and 0 points to an unacceptable rating. Performance point values will determine performance pay increases.

(2) DHS will establish a point value pattern for each pay pool. Different pay pools may have different point value patterns.

(3) DHS must assign zero performance points to an unacceptable rating of record.

(d) *Performance payout.* (1) DHS will determine the value of a performance point, expressed as a percentage of an employee's rate of basic pay (exclusive of locality or special rate supplements under §§ 9701.332 and 9701.333) or as a fixed dollar amount.

(2) To determine an individual employee's performance payout, DHS will multiply the point value determined under paragraph (d)(1) of this section by the number of performance points assigned to the rating.

(3) To the extent that the adjustment does not cause the employee's rate of basic pay to exceed the maximum rate of the employee's band rate range, DHS will pay the performance payout as an adjustment in the employee's annual rate of basic pay. Any excess amount may be granted as a lump-sum payment, which may not be considered basic pay for any purpose.

(4) DHS may, after coordination with OPM, determine the effective date of adjustments in basic pay made under paragraph (d)(3) of this section.

(5) For an employee receiving a retained rate under § 9701.356, DHS will issue implementing directives to provide for granting a lump-sum performance payout that may not exceed the amount that may be received by an employee in the same pay pool with the same rating of record whose rate of pay is at the maximum rate of the same band.

(e) *Proration of performance payouts.* DHS will issue implementing directives regarding the proration of performance payouts for employees who, during the period between performance pay adjustments, are—

(1) Hired or promoted;

(2) In a leave-without-pay status (except as provided in paragraphs (f) and (g) of this section); or

(3) In other circumstances where proration is considered appropriate.

(f) *Adjustments for employees returning after performing honorable service in the uniformed services.* DHS will issue implementing directives regarding how it sets the rate of basic pay prospectively for an employee who leaves a DHS position to perform service in the uniformed services (as defined in 38 U.S.C. 4303 and 5 CFR 353.102) and returns through the exercise of a reemployment right provided by law, Executive order, or regulation under which accrual of service for seniority-related benefits is protected (*e.g.,* 38 U.S.C. 4316). DHS will credit the employee with intervening rate range adjustments under § 9701.323(a), as well as developmental pay adjustments under § 9701.345 (as determined by DHS in accordance with its implementing directives), and performance pay adjustments under this section based on the employee's last DHS rating of record. For employees

who have no such rating of record, DHS will use the modal rating received by other employees covered by the same pay pool during the most recent rating cycle. An employee returning from qualifying service in the uniformed services will receive the full amount of the performance pay increase associated with his or her rating of record.

(g) *Adjustments for employees returning to duty after being in workers' compensation status.* DHS will issue implementing directives regarding how it sets the rate of basic pay prospectively for an employee who returns to duty after a period of receiving injury compensation under 5 U.S.C. chapter 81, subchapter I (in a leave-without-pay status or as a separated employee). DHS will credit the employee with intervening rate range adjustments under § 9701.323(a), as well as developmental pay adjustments under § 9701.345 (as determined by DHS in accordance with its implementing directives), and performance pay adjustments under this section based on the employee's last DHS rating of record. For employees who have no such rating of record, DHS will use the modal rating received by other employees covered by the same pay pool during the most recent rating cycle. An employee returning to duty after receiving injury compensation will receive the full amount of the performance pay increase associated with his or her rating of record.

§ 9701.343 Within-band reductions.

Subject to the adverse action procedures set forth in subpart F of this part, DHS may reduce an employee's rate of basic pay within a band for unacceptable performance or conduct. A reduction under this section may not be more than 10 percent or cause an employee's rate of basic pay to fall below the minimum rate of the employee's band rate range. Such a reduction may be made effective at any time.

§ 9701.344 Special within-band increases.

DHS may issue implementing directives regarding special within-band basic pay increases for employees within a Full Performance or higher band established under § 9701.212 who possess exceptional skills in critical areas or who make exceptional contributions to mission accomplishment or in other circumstances determined by DHS. Increases under this section are in addition to any performance pay increases made under § 9701.342 and may be made effective at any time. Special within-band increases may not be based on length of service.

§ 9701.345 Developmental pay adjustments.

DHS will issue implementing directives regarding pay adjustments within the Entry/Developmental band. These directives may require employees to meet certain standardized assessment or certification points as part of a formal training/developmental program. In administering Entry/Developmental band pay progression plans, DHS may link pay progression to the demonstration of required knowledge, skills, and abilities (KSAs)/competencies. DHS may set standard timeframes for progression through an Entry/Developmental band while allowing an employee to progress at a slower or faster rate based on his or her performance, demonstration of required competencies, and/or other factors.

§ 9701.346 Pay progression for new supervisors.

DHS will issue implementing directives requiring an employee newly appointed to or selected for a supervisory position to meet certain assessment or certification points as part of a formal training/developmental program. In administering performance pay increases for these employees under § 9701.342, DHS may take into account the employee's success in completing a formal training/developmental program, as well as his or her performance.

Pay Administration

§ 9701.351 Setting an employee's starting pay.

DHS will, after coordination with OPM, issue implementing directives regarding the starting rate of pay for an employee, including—

(a) An individual who is newly appointed or reappointed to the Federal service;

(b) An employee transferring to DHS from another Federal agency; and

(c) A DHS employee who moves from a noncovered position to a position already covered by this subpart.

§ 9701.352 Use of highest previous rate.

DHS will issue implementing directives regarding the discretionary use of an individual's highest previous rate of basic pay received as a Federal employee or as an employee of a Coast Guard nonappropriated fund instrumentality (NAFI) in setting pay upon reemployment, transfer, reassignment, promotion, demotion, placement in a different occupational cluster, or change in type of appointment. For this purpose, basic pay may include a locality-based payment or supplement under circumstances approved by DHS. If an employee in a Coast Guard NAFI position is converted to an appropriated fund position under the pay system established under this subpart, DHS must use the existing NAFI rate to set pay upon conversion.

§ 9701.353 Setting pay upon promotion.

(a) Except as otherwise provided in this section, upon an employee's promotion, DHS must provide an increase in the employee's rate of basic pay equal to at least 8 percent. The rate of basic pay after promotion may not be less than the minimum rate of the higher band.

(b) DHS will issue implementing directives providing for an increase other than the amount specified in paragraph (a) of this section in the case of—

(1) An employee promoted from an Entry/Developmental band to a Full Performance band (consistent with the pay progression plan established for the Entry/Developmental band);

(2) An employee who was demoted and is then repromoted back to the higher band; or

(3) Employees in other circumstances specified by DHS implementing directives.

(c) An employee receiving a retained rate (*i.e.,* a rate above the maximum of the band) before promotion is entitled to a rate of basic pay after promotion that is at least 8 percent higher than the maximum rate of the employee's current band (except in circumstances specified by DHS implementing directives). The rate of basic pay after promotion may not be less than the minimum rate of the employee's new band rate range or the employee's existing retained rate of basic pay. If the maximum rate of the employee's new band rate range is less than the employee's existing rate of basic pay, the employee will continue to be entitled to the existing rate as a retained rate.

(d) DHS may determine the circumstances under which and the extent to which any locality or special rate supplements are treated as basic pay in applying the promotion increase rules in this section.

§ 9701.354 Setting pay upon demotion.

DHS will issue implementing directives regarding how to set an employee's pay when he or she is demoted. The directives must distinguish between demotions under adverse action procedures (as defined in subpart F of this part) and other demotions (*e.g.*, due to expiration of a

temporary promotion or canceling of a promotion during a new supervisor's probationary period). A reduction in basic pay upon demotion under adverse action procedures may not exceed 10 percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band.

§ 9701.355 Setting pay upon movement to a different occupational cluster.

DHS will issue implementing directives regarding how to set an employee's pay when he or she moves voluntarily or involuntarily to a position in a different occupational cluster, including rules for determining whether such a movement is to a higher or lower band for the purpose of setting pay upon promotion or demotion under §§ 9701.353 and 9701.354, respectively.

§ 9701.356 Pay retention.

(a) Subject to the requirements of this section, DHS will, after coordination with OPM, issue implementing directives regarding the application of pay retention. Pay retention prevents a reduction in basic pay that would otherwise occur by preserving the former rate of basic pay within the employee's new band or by establishing a retained rate that exceeds the maximum rate of the new band.

(b) Pay retention must be based on the employee's rate of basic pay in effect immediately before the action that would otherwise reduce the employee's rate. A retained rate must be compared to the range of rates of basic pay applicable to the employee's position.

(c) In applying § 9701.323 (regarding pay increases provided at the time of a rate range adjustment under § 9701.322), any increase in the rate of basic pay for an employee receiving a retained rate is equal to one-half of the percentage value of any increase in the minimum rate of the employee's band.

§ 9701.357 Miscellaneous.

(a) Except in the case of an employee who does not receive a pay increase under §§ 9701.323 or 9701.335 because of an unacceptable rating of record, an employee's rate of basic pay may not be less than the minimum rate of the employee's band (or the adjusted minimum rate of that band).

(b) Except as provided in § 9701.356, an employee's rate of basic pay may not exceed the maximum rate of the employee's band rate range.

(c) DHS must follow the rules for establishing pay periods and computing rates of pay in 5 U.S.C. 5504 and 5505, as applicable. For employees covered by 5 U.S.C. 5504, annual rates of pay must be converted to hourly rates of pay in computing payments received by covered employees.

(d) DHS will issue implementing directives regarding the movement of employees to or from a band with a rate range that is increased by a special rate supplement.

(e) For the purpose of applying the reduction-in-force provisions of 5 CFR part 351, DHS must establish representative rates for all band rate ranges.

(f) If a DHS employee moves from the pay system established under this subpart to a GS position within DHS having a higher level of duties and responsibilities, DHS may issue implementing directives that provide for a special increase prior to the employee's movement in recognition of the fact that the employee will not be eligible for a promotion increase under the GS system.

Special Payments

§ 9701.361 Special skills payments.

DHS will issue implementing directives regarding additional payments for specializations for which the incumbent is trained and ready to perform at all times. DHS may determine the amount of the payments and the conditions for eligibility, including any performance or service agreement requirements. Payments may be made at the same time as basic pay or in periodic lump-sum payments. Special skills payments are not basic pay for any purpose and may be terminated or reduced at any time without triggering pay retention or adverse action procedures.

§ 9701.362 Special assignment payments.

DHS will issue implementing directives regarding additional payments for employees serving on special assignments in positions placing significantly greater demands on the employee than other assignments within the employee's band. DHS may determine the amount of the payments and the conditions for eligibility, including any performance or service agreement requirements. Payments may be made at the same time as basic pay or in periodic lump-sum payments. Special assignment payments are not basic pay for any purpose and may be terminated or reduced at any time without triggering pay retention provisions or adverse action procedures.

§ 9701.363 Special staffing payments.

DHS will issue implementing directives regarding additional payments for employees serving in positions for which DHS is experiencing or anticipates significant recruitment and/or retention problems. DHS may determine the amount of the payments and the conditions for eligibility, including any performance or service agreement requirements. Payments may be made at the same time as basic pay or in periodic lump-sum payments. Special staffing payments are not basic pay for any purpose and may be terminated or reduced at any time without triggering pay retention or adverse action procedures.

Transitional Provisions

§ 9701.371 General.

(a) Sections 9701.371 through 9701.374 describe the transitional provisions that apply when DHS employees are converted to a pay system established under this subpart. An affected employee may convert from the GS system, a prevailing rate system, the SL/ST system, or the SES system, as provided in § 9701.302. For the purpose of this section and §§ 9701.372 through 9701.374, the terms ''convert,'' ''converted,'' ''converting,'' and ''conversion'' refer to employees who become covered by the pay system without a change in position (as a result of a coverage determination made under § 9701.102(b)) and exclude employees who are reassigned or transferred from a noncovered position to a position already covered by the DHS system.

(b) DHS will issue implementing directives prescribing the policies and procedures necessary to implement these transitional provisions.

§ 9701.372 Creating initial pay ranges.

(a) DHS must, after coordination with OPM, set the initial band rate ranges for the DHS pay system established under this subpart. The initial ranges will link to the ranges that apply to converted employees in their previously applicable pay system (taking into account any applicable special rates and locality payments or supplements).

(b) For employees who are law enforcement officers as defined in 5 U.S.C. 5541(3) and who were covered by the GS system immediately before conversion, the initial ranges must provide rates of basic pay that equal or exceed the rates of basic pay these officers received under the GS system (taking into account any applicable special rates and locality payments or supplements).

§ 9701.373 Conversion of employees to the DHS pay system.

(a) When a pay system is established under this subpart and applied to a category of employees, DHS must convert employees to the system without a reduction in their rate of pay

(including basic pay and any applicable locality payment under 5 U.S.C. 5304, special rate under 5 U.S.C. 5305, locality rate supplement under § 9701.332, or special rate supplement under § 9701.333).

(b) When an employee receiving a special rate under 5 U.S.C. 5305 before conversion is converted to an equal rate of pay under the DHS pay system that consists of a basic rate and a locality or special rate supplement, the conversion will not be considered as resulting in a reduction in basic pay for the purpose of applying subpart F of this part.

(c) If another personnel action (*e.g.*, promotion, geographic movement) takes effect on the same day as the effective date of an employee's conversion to the new pay system, DHS must process the other action under the rules pertaining to the employee's former system before processing the conversion action.

(d) An employee on a temporary promotion at the time of conversion must be returned to his or her official position of record prior to processing the conversion. If the employee is temporarily promoted immediately after the conversion, pay must be set under the rules for promotion increases under the DHS system.

(e) The Secretary has discretion to make one-time pay adjustments for GS and prevailing rate employees when they are converted to the DHS pay system. DHS will issue implementing directives governing any such pay adjustment, including rules governing employee eligibility, pay computations, and the timing of any such pay adjustment.

(f) The Secretary has discretion to convert entry/developmental employees in noncompetitive career ladder paths to the pay progression plan established for the Entry/Developmental band to which the employee is assigned under the DHS pay system. DHS will issue implementing directives governing any such conversion, including rules governing employee eligibility, pay computations, and the timing of any such conversion. As provided in paragraph (a) of this section, DHS must convert employees without a reduction in their rate of pay.

§ 9701.374 Special transition rules for Federal Air Marshal Service.

Notwithstanding any other provision in this subpart, if DHS transfers Federal Air Marshal Service positions from the Transportation Security Administration (TSA) to another organization within DHS, DHS may cover those positions under a pay system that is parallel to the pay system that was applicable to the Federal Air Marshal Service within TSA. DHS may, after coordination with OPM, modify that system. DHS will issue implementing directives on converting Federal Air Marshal Service employees to any new pay system that may subsequently be established under this subpart, consistent with the conversion rules in § 9701.373.

Subpart D—Performance Management

§ 9701.401 Purpose.

(a) This subpart provides for the establishment in the Department of Homeland Security of at least one performance management system as authorized by 5 U.S.C. chapter 97.

(b) The performance management system established under this subpart, working in conjunction with the pay system established under subpart C of this part, is designed to promote and sustain a high-performance culture by incorporating the following features:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between elements of the pay system established in subpart C of this part, the employee performance appraisal system, and the Department's strategic plan;

(4) Employee involvement in the design and implementation of the system (as provided in § 9701.105);

(5) Adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system;

(6) Periodic performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, with specific timetables for review;

(7) Effective safeguards so that the management of the system is fair and equitable and based on employee performance; and

(8) A means for ensuring that adequate resources are allocated for the design, implementation, and administration of the performance management system that supports the pay system established under subpart C of this part.

§ 9701.402 Coverage.

(a) This subpart applies to eligible DHS employees in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary or designee under § 9701.102(b), except as provided in paragraph (c) of this section.

(b) The following employees are eligible for coverage under this subpart:

(1) Employees who would otherwise be covered by 5 U.S.C. chapter 43; and

(2) Employees who were excluded from chapter 43 by OPM under 5 CFR 430.202(d) prior to the date of coverage of this subpart, as determined under § 9701.102(b).

(c) This subpart does not apply to employees who are not expected to be employed longer than a minimum period (as defined in § 9701.404) during a single 12-month period.

§ 9701.403 Waivers.

When a specified category of employees is covered by the performance management system(s) established under this subpart, 5 U.S.C. chapter 43 is waived with respect to that category of employees.

§ 9701.404 Definitions.

In this subpart—

Appraisal means the review and evaluation of an employee's performance.

Appraisal period means the period of time established under a performance management system for reviewing employee performance.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics required by a position.

Contribution means a work product, service, output, or result provided or produced by an employee that supports the Departmental or organizational mission, goals, or objectives.

Minimum period means the period of time established by DHS during which an employee must perform before receiving a rating of record.

Performance means accomplishment of work assignments or responsibilities.

Performance expectations means that which an employee is required to do, as described in § 9701.406, and may include observable or verifiable descriptions of quality, quantity, timeliness, and cost effectiveness.

Performance management means applying the integrated processes of setting and communicating performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance in support of the organization's goals and objectives.

Performance management system means the policies and requirements established under this subpart, as supplemented by DHS implementing directives, for setting and communicating employee performance expectations, monitoring performance and providing feedback, developing performance and addressing poor

performance, and rating and rewarding performance.

Rating of record means a performance appraisal prepared—

(1) At the end of an appraisal period covering an employee's performance of assigned duties against performance expectations over the applicable period; or

(2) To support a pay determination, including one granted in accordance with subpart C of this part, a within-grade increase granted under 5 CFR 531.404, or a pay determination granted under other applicable rules.

Unacceptable performance means the failure to meet one or more performance expectations.

§ 9701.405 Performance management system requirements.

(a) DHS will issue implementing directives that establish one or more performance management systems for DHS employees, subject to the requirements set forth in this subpart.

(b) Each DHS performance management system must—

(1) Specify the employees covered by the system(s);

(2) Provide for the periodic appraisal of the performance of each employee, generally once a year, based on performance expectations.

(3) Specify the minimum period during which an employee must perform before receiving a rating of record;

(4) Hold supervisors and managers accountable for effectively managing the performance of employees under their supervision as set forth in paragraph (c) of this section;

(5) Include procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance; and

(6) Specify the criteria and procedures to address the performance of employees who are detailed or transferred and for employees in other special circumstances.

(c) In fulfilling the requirements of paragraph (b) of this section, supervisors and managers are responsible for—

(1) Clearly communicating performance expectations and holding employees responsible for accomplishing them;

(2) Making meaningful distinctions among employees based on performance;

(3) Fostering and rewarding excellent performance; and

(4) Addressing poor performance.

§ 9701.406 Setting and communicating performance expectations.

(a) Performance expectations must align with and support the DHS mission and its strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance. Such expectations include those general performance expectations that apply to all employees, such as standard operating procedures, handbooks, or other operating instructions and requirements associated with the employee's job, unit, or function.

(b) Supervisors and managers must communicate performance expectations, including those that may affect an employee's retention in the job. Performance expectations need not be in writing, but must be communicated to the employee prior to holding the employee accountable for them. However, notwithstanding this requirement, employees are always accountable for demonstrating appropriate standards of conduct, behavior, and professionalism, such as civility and respect for others.

(c) Performance expectations may take the form of—

(1) Goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level;

(2) Organizational, occupational, or other work requirements, such as standard operating procedures, operating instructions, administrative manuals, internal rules and directives, and/or other instructions that are generally applicable and available to the employee;

(3) A particular work assignment, including expectations regarding the quality, quantity, accuracy, timeliness, and/or other expected characteristics of the completed assignment;

(4) Competencies an employee is expected to demonstrate on the job, and/or the contributions an employee is expected to make; or

(5) Any other means, as long as it is reasonable to assume that the employee will understand the performance that is expected.

(d) Supervisors must involve employees, insofar as practicable, in the development of their performance expectations. However, final decisions regarding performance expectations are within the sole and exclusive discretion of management.

§ 9701.407 Monitoring performance and providing feedback.

In applying the requirements of the performance management system and its implementing directives and policies, supervisors must—

(a) Monitor the performance of their employees and the organization; and

(b) Provide timely periodic feedback to employees on their actual performance with respect to their performance expectations, including one or more interim performance reviews during each appraisal period.

§ 9701.408 Developing performance and addressing poor performance.

(a) Subject to budgetary and other organizational constraints, a supervisor must—

(1) Provide employees with the proper tools and technology to do the job; and

(2) Develop employees to enhance their ability to perform.

(b) If during the appraisal period a supervisor determines that an employee's performance is unacceptable, the supervisor must—

(1) Consider the range of options available to address the performance deficiency, which include but are not limited to remedial training, an improvement period, a reassignment, an oral warning, a letter of counseling, a written reprimand, and/or an adverse action (as defined in subpart F of this part); and

(2) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences.

(c) As specified in subpart G of this part, employees may appeal adverse actions based on unacceptable performance.

§ 9701.409 Rating and rewarding performance.

(a)(1) Except as provided in paragraphs (a)(2) and (3) of this section, each DHS performance management system must establish a single summary rating level of unacceptable performance, a summary rating level of fully successful performance (or equivalent), and at least one summary rating level above fully successful performance.

(2) For employees in an Entry/Developmental band, the DHS performance management system(s) may establish two summary rating levels, i.e., an unacceptable rating level and a rating level of fully successful (or equivalent).

(3) At his or her sole and exclusive discretion, the Secretary or designee may under extraordinary circumstances establish a performance management system with two summary rating levels, i.e., an unacceptable level and a higher rating level, for employees not in an Entry/Developmental band.

(b) A supervisor or other rating official must prepare and issue a rating of record after the completion of the appraisal period. An additional rating of record may be issued to reflect a substantial change in the employee's performance when appropriate. A rating of record will be used as a basis for determining—

(1) An increase in basic pay under § 9701.324;

(2) A locality or special rate supplement increase under § 9701.336;

(3) A performance pay increase determination under § 9701.342(a);

(4) A within-grade increase determination under 5 CFR 531.404, prior to conversion to the pay system established under subpart C of this part;

(5) A pay determination under any other applicable pay rules;

(6) Awards under any legal authority, including 5 U.S.C. chapter 45, 5 CFR part 451, and a Departmental or organizational awards program;

(7) Eligibility for promotion; or

(8) Such other action that DHS considers appropriate, as specified in the implementing directives.

(c) A rating of record must assess an employee's performance with respect to his or her performance expectations and/or relative contributions and is considered final when issued to the employee with all appropriate reviews and signatures.

(d) DHS may not impose a forced distribution or quota on any rating level or levels.

(e) A rating of record issued under this subpart is an official rating of record for the purpose of any provision of title 5, Code of Federal Regulations, for which an official rating of record is required.

(f) DHS may not lower the rating of record of an employee on an approved absence from work, including the absence of a disabled veteran to seek medical treatment, as provided in Executive Order 5396.

(g) A rating of record may be grieved by a non-bargaining unit employee (or a bargaining unit employee when no negotiated procedure exists) through an administrative grievance procedure established by DHS. A bargaining unit employee may grieve a rating of record through a negotiated grievance procedure, as provided in subpart E of this part. An arbitrator hearing a grievance is subject to the standards of review set forth in § 9701.521(g)(2). Except as otherwise provided by law, an arbitrator may not conduct an independent evaluation of the employee's performance or otherwise substitute his or her judgment for that of the supervisor.

(h) A supervisor or other rating official may prepare an additional performance appraisal for the purposes specified in the applicable performance management system (e.g., transfers and details) at any time after the completion of the minimum period. Such an appraisal is not a rating of record.

(i) DHS implementing directives will establish policies and procedures for crediting performance in a reduction in force, including policies for assigning additional retention credit based on performance. Such policies must comply with 5 U.S.C. chapter 35 and 5 CFR 351.504.

§ 9701.410 DHS responsibilities.

In carrying out its performance management system(s), DHS must—

(a) Transfer ratings between subordinate organizations and to other Federal departments or agencies;

(b) Evaluate its performance management system(s) for effectiveness and compliance with this subpart, DHS implementing directives and policies, and the provisions of 5 U.S.C. chapter 23 that set forth the merit system principles and prohibited personnel practices;

(c) Provide OPM with a copy of the implementing directives, policies, and procedures that implement this subpart; and

(d) Comply with 29 CFR 1614.102(a)(5), which requires agencies to review, evaluate, and control managerial and supervisory performance to ensure enforcement of the policy of equal opportunity.

Subpart E—Labor-Management Relations

§ 9701.501 Purpose.

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9701(b) relating to the Department's labor-management relations system. The Department was created in recognition of the paramount interest in safeguarding the American people, without compromising statutorily protected employee rights. For this reason Congress stressed that personnel systems established by the Department and OPM must be flexible and contemporary, enabling the Department to rapidly respond to threats to our Nation. The labor-management relations regulations in this subpart are designed to meet these compelling concerns and must be interpreted with the Department's mission foremost in mind. The regulations also recognize the rights of DHS employees to organize and bargain collectively, subject to any exclusion from coverage or limitation on negotiability established by law, including these regulations, applicable Executive orders, and any other legal authority.

§ 9701.502 Rule of construction.

In interpreting this subpart, the rule of construction in § 9701.106(a)(2) must be applied.

§ 9701.503 Waivers.

When a specified category of employees is covered by the labor-management relations system established under this subpart, the provisions of 5 U.S.C. 7101 through 7135 are waived with respect to that category of employees, except as otherwise specified in this part (including § 9701.106).

§ 9701.504 Definitions.

In this subpart:

Authority means the Federal Labor Relations Authority described in 5 U.S.C. 7104(a).

Collective bargaining means the performance of the mutual obligation of a management representative of the Department and an exclusive representative of employees in an appropriate unit in the Department to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

Collective bargaining agreement means an agreement entered into as a result of collective bargaining pursuant to the provisions of this subpart.

Component means any organizational subdivision of the Department.

Conditions of employment means personnel policies, practices, and matters affecting working conditions-whether established by rule, regulation, or otherwise—except that such term does not include policies, practices, and matters relating to—

(1) Political activities prohibited under 5 U.S.C. chapter 73, subchapter III;

(2) The classification of any position, including any classification determinations under subpart B of this part;

(3) The pay of any position, including any determinations regarding pay or adjustments thereto under subpart C of this part; or

(4) Any matters specifically provided for by Federal statute.

Confidential employee means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.

Day means a calendar day.

Dues means dues, fees, and assessments.

Exclusive representative means any labor organization which is recognized as the exclusive representative of employees in an appropriate unit consistent with the Department's organizational structure, pursuant to 5 U.S.C. 7111 or as otherwise provided by § 9701.514.

Grievance means any complaint—

(1) By any employee concerning any matter relating to the conditions of employment of the employee;

(2) By any labor organization concerning any matter relating to the conditions of employment of any employee; or

(3) By any employee, labor organization, or the Department concerning—

(i) The effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation issued for the purpose of affecting conditions of employment.

HSLRB means the Homeland Security Labor Relations Board.

Labor organization means an organization composed in whole or in part of Federal employees, in which employees participate and pay dues, and which has as a purpose the dealing with the Department concerning grievances and conditions of employment, but does not include—

(1) An organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(2) An organization which advocates the overthrow of the constitutional form of government of the United States;

(3) An organization sponsored by the Department; or

(4) An organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

Management official means an individual employed by the Department in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the Department or who has the authority to recommend such action, if the exercise of the authority is not merely routine or clerical in nature, but requires the consistent exercise of independent judgment.

Professional employee has the meaning given that term in 5 U.S.C. 7103(a)(15).

Supervisor means an individual employed by the Department having authority in the interest of the Department to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment.

§ 9701.505 Coverage.

(a) *Employees covered.* This subpart applies to eligible DHS employees, subject to a determination by the Secretary or designee under § 9701.102(b), except as provided in paragraph (b) of this section. DHS employees who would otherwise be covered by 5 U.S.C. chapter 71 are eligible for coverage under this subpart. In addition, this subpart applies to an employee whose employment has ceased because of an unfair labor practice under § 9701.517 of this subpart and who has not obtained any other regular and substantially equivalent employment.

(b) *Employees excluded.* This subpart does not apply to—

(1) An alien or noncitizen of the United States who occupies a position outside the United States;

(2) A member of the uniformed services as defined in 5 U.S.C. 2101(3);

(3) A supervisor or a management official;

(4) Any person who participates in a strike in violation of 5 U.S.C. 7311;

(5) Employees of the United States Secret Service, including the United States Secret Service Uniformed Division;

(6) Employees of the Transportation Security Administration; or

(7) Any employee excluded pursuant to § 9701.514 or any other legal authority.

§ 9701.506 Impact on existing agreements.

(a) Any provision of a collective bargaining agreement that is inconsistent with this part and/or its implementing directives is unenforceable on the effective date of coverage under the applicable subpart or directive. In accordance with procedures and time limits established by the HSLRB under § 9701.509, an exclusive representative may appeal to the HSLRB the Department's determination that a provision is unenforceable. Provisions that are identified by the Department as unenforceable remain unenforceable unless held otherwise by the HSLRB on appeal. The Secretary or designee, in his or her sole and exclusive discretion, may continue all or part of a particular provision(s) with respect to a specific category or categories of employees and may cancel such continued provisions at any time; such determinations are not precedential.

(b) Upon request by an exclusive representative, the parties will have 60 days after the effective date of coverage under the applicable subpart and/or implementing directive to bring into conformance those remaining negotiable terms directly affected by the terms rendered unenforceable by the applicable subpart and/or implementing directive. If the parties fail to reach agreement by that date, they may utilize the negotiation impasse provisions of § 9701.519 to resolve the matter. Agreements reached under this section are subject to approval under § 9701.515(d). Nothing in this paragraph will delay the effective date of an implementing directive.

§ 9701.507 Employee rights.

Each employee has the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee must be protected in the exercise of such right. Except as otherwise provided under this subpart, such right includes the right—

(a) To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities; and

(b) To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this subpart.

§ 9701.508 Homeland Security Labor Relations Board.

(a) *Composition.* (1) The Homeland Security Labor Relations Board is composed of at least three members who will be appointed by the Secretary for terms of 3 years, except that the

appointments of the initial HSLRB members will be for terms of 2, 3, and 4 years, respectively. The Secretary may extend the term of any member beyond 3 years when necessary to provide for an orderly transition and/or appoint the member for an additional term. The Secretary, in his or her sole and exclusive discretion, may appoint additional members to the HSLRB; in so doing, he or she will make such appointments to ensure that the HSLRB consists of an odd number of members.

(2) Members of the HSLRB must be independent, distinguished citizens of the United States who are well known for their integrity and impartiality. Members must have expertise in labor relations, law enforcement, or national/homeland or other related security matters. At least one member of the Board must have experience in labor relations. Members must be able to acquire and maintain an appropriate security clearance. Members may be removed by the Secretary on the same grounds as an FLRA member.

(3) An individual chosen to fill a vacancy on the HSLRB will be appointed for the unexpired term of the member who is replaced.

(b) *Appointment of the Chair.* The Secretary, at his or her sole and exclusive discretion, will appoint one member to serve as Chair of the HSLRB.

(c) *Appointment procedures for non-Chair HSLRB members.* (1) The appointments of the two non-Chair HSLRB members will be made by the Secretary after he or she considers any lists of nominees submitted by labor organizations that represent employees in the Department of Homeland Security.

(2) The submission of lists of recommended nominees by labor organizations must be in accordance with timelines and requirements set forth by the Secretary, who may provide for additional consultation in order to obtain further information about a recommended nominee. The ability of the Secretary to appoint HSLRB members may not be delayed or otherwise affected by the failure of any labor organization to provide a list of nominees that meets the timeframe and requirements established by the Secretary.

(d) *Appointment of additional non-Chair HSLRB members.* If the Secretary determines that additional members are needed, he or she may, subject to the criteria set forth in paragraph (a)(2) of this section, appoint the additional members according to the procedures established by paragraph (c) of this section.

(e) *Filling a HSLRB vacancy.* A HSLRB vacancy will be filled according to the procedure in effect at the time of the appointment.

(f) *Procedures of the HSLRB.* (1) The HSLRB will establish procedures for the fair, impartial, and expeditious assignment and disposition of cases. To the extent practicable, the HSLRB will use a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and bargaining impasses. The HSLRB may, pursuant to its regulations, use a combination of mediation, factfinding, and any other appropriate dispute resolution method to resolve all such disputes at the earliest practicable time and with a minimum of process. Such proceedings will be conducted by the HSLRB, a HSLRB member, or employee of the HSLRB. Individual HSLRB members may decide a particular dispute. However, at the motion of a party upon its initial request for HSLRB assistance or upon the HSLRB's own motion at any time, the full HSLRB (or, where the Secretary appoints more than three members, a three-person panel of the HSLRB) may decide a particular dispute involving a matter of first impression or a major policy.

(2) In cases where the full HSLRB acts, a vote of the majority of the HSLRB (or a three-person panel of the HSLRB) will be dispositive. A vacancy on the HSLRB does not impair the right of the remaining members to exercise all of the powers of the HSLRB. The vote of the Chair will be dispositive in the event of a tie.

(g) *Finality of HSLRB decisions.* Decisions of the HSLRB are final and binding. However, in cases involving unfair labor practices and/or negotiability disputes decided by a single member, a party may seek review of that decision with the full HSLRB, according to rules prescribed by the HSLRB. In such cases the initial decision is stayed pending the final decision by the full HSLRB.

(h) *Review of a HSLRB decision.* (1) In order to obtain judicial review of a HSLRB decision, a party must request a review of the record of a HSLRB decision by the Authority by filing such a request in writing within 15 days after the issuance of the decision. Within 15 days after the Authority's receipt of the request for a review of the record, any response must be filed. A party may each submit, and the Authority may grant for good cause shown, a request for a single extension of time not to exceed a maximum of 15 additional days. The Authority will establish, in conjunction with the HSLRB, standards for the sufficiency of the record and other procedures, including notice to the parties. The Authority must defer to findings of fact and interpretations of this part made by the HSLRB and sustain the HSLRB's decision unless the requesting party shows that the HSLRB's decision was—

(i) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) Based on error in applying the HSLRB's procedures that resulted in substantial prejudice to a party affecting the outcome; or

(iii) Unsupported by substantial evidence.

(2) The Authority must complete its review of the record and issue a final decision within 30 days after receiving the party's timely response to such request for review. This 30-day time limit is mandatory, except that the Authority may extend its time for review by a maximum of 15 additional days if it determines that—

(i) The case is unusually complex; or

(ii) An extension is necessary to prevent any prejudice to the parties that would otherwise result.

(3) No extension beyond that provided by paragraph (h)(2) of this section is permitted.

(4) If the Authority does not issue a final decision within the mandatory time limit established by paragraph (h) of this section, the Authority will be considered to have denied the request for review of the HSLRB's decision, which will constitute a final decision of the Authority and is subject to judicial review in accordance with 5 U.S.C. 7123.

§ 9701.509 Powers and duties of the HSLRB.

(a) The HSLRB may, to the extent provided in this subpart and in accordance with regulations prescribed by the HSLRB—

(1) Resolve issues relating to the scope of bargaining and the duty to bargain in good faith under § 9701.518 and conduct hearings and resolve complaints of unfair labor practices concerning—

(i) The duty to bargain in good faith; and

(ii) Strikes, work stoppages, slowdowns, and picketing, or condoning such activity by failing to take action to prevent or stop such activity;

(2) Resolve disputes concerning requests for information under § 9701.515(b)(5) and (c);

(3) Resolve exceptions to arbitration awards involving the exercise of management rights, as defined in

§ 9701.511, and the duty to bargain, as defined in § 9701.518. The HSLRB must conduct any review of an arbitral award in accordance with the same standards set forth in 5 U.S.C. 7122(a), which is not waived for the purpose of this subpart but which is modified to apply to this section and to read ''HSLRB'' wherever the term ''Authority'' appears;

(4) Resolve negotiation impasses in accordance with § 9701.519;

(5) Conduct *de novo* review of legal conclusions involving all matters within the HSLRB's jurisdiction;

(6) Have discretion to evaluate the evidence presented in the record and reach its own independent conclusions with respect to the matters at issue; and

(7) Assume jurisdiction over any matter concerning Department employees that has been submitted to FLRA pursuant to § 9701.510, if the HSLRB determines that the matter affects homeland security.

(b) The HSLRB may issue binding Department-wide opinions, which may be appealed as if they were decisions of the HSLRB in accordance with § 9701.508(h).

(c) In issuing opinions under paragraph (b) of this section, the HSLRB may elect to consult with the Authority.

(d)(1) In any matter filed with the HSLRB, if the responding party believes that the HSLRB lacks jurisdiction, that party must timely raise the issue with the HSLRB and simultaneously file a copy of its response with the Authority in accordance with regulations established by the HSLRB. The HSLRB's determination with regard to its jurisdiction in a particular matter is final and not subject to review by the Authority.

(2) If a matter involves one or more issues that are appropriately before the HSLRB and one or more issues that are appropriately before the Authority, the matter must be filed with the HSLRB in accordance with its procedures. The HSLRB will have primary jurisdiction over the matter. The HSLRB will decide those issues within its jurisdiction and will promptly transfer the matter to the Authority for resolution of any remaining issues.

§ 9701.510 Powers and duties of the Federal Labor Relations Authority.

(a) The Federal Labor Relations Authority may, to the extent provided in this subpart and in accordance with regulations prescribed by the Authority, make the following determinations with respect to the Department:

(1) Determine the appropriateness of units pursuant to the provisions of § 9701.514;

(2) Supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of 5 U.S.C. 7111 relating to the according of exclusive recognition to labor organizations, which are not waived for the purpose of this subpart but which are modified to apply to this section;

(3) Conduct hearings and resolve complaints of unfair labor practices under § 9701.517(a)(1) through (4) and (b)(1) through (4), and in accordance with the provisions of 5 U.S.C. 7118, which is not waived for this purpose but which is modified to apply to this section;

(4) Resolve exceptions to arbitrators' awards otherwise in its jurisdiction and not involving the exercise of management rights under § 9701.511, the duty to bargain, as defined in § 9701.518, and matters under § 9701.521(f); and

(5) Review HSLRB decisions and issue final decisions pursuant to § 9701.508(h).

(b) In any matter filed with the Authority, if the responding party believes that the Authority lacks jurisdiction, that party must timely raise the issue with the Authority and simultaneously file a copy of its response with the HSLRB in accordance with regulations established by the Authority. The Authority must promptly transfer the case to the HSLRB, which will determine whether the matter is within the HSLRB's jurisdiction. If the HSLRB determines that the matter is not within its jurisdiction, the HSLRB will return the matter to the Authority for appropriate action. The HSLRB's determination with regard to its jurisdiction in a particular matter is final and not subject to review by the Authority.

(c) Judicial review of any Authority decision is as prescribed in 5 U.S.C. 7123, which is not waived.

§ 9701.511 Management rights.

(a) Subject to paragraphs (b), (c), and (d) of this section, nothing in this subpart may affect the authority of any management official or supervisor of the Department—

(1) To determine the mission, budget, organization, number of employees, and internal security practices of the Department;

(2) To hire, assign, and direct employees in the Department; to assign work, make determinations with respect to contracting out, and to determine the personnel by which Departmental operations may be conducted; to determine the numbers, types, grades, or occupational clusters and bands of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work; to assign and deploy employees to meet any operational demand; and to take whatever other actions may be necessary to carry out the Department's mission; and

(3) To lay off and retain employees, or to suspend, remove, reduce in grade, band, or pay, or take other disciplinary action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source.

(b) Management is prohibited from bargaining over the exercise of any authority under paragraph (a) of this section or the procedures that it will observe in exercising the authorities set forth in paragraphs (a)(1) and (2) of this section.

(c) Notwithstanding paragraph (b) of this section, management will confer with an exclusive representative over the procedures it will observe in exercising the authorities set forth in paragraphs (a)(1) and (2) of this section, in accordance with the process set forth in § 9701.512.

(d) If an obligation exists under § 9701.518 to bargain, confer, or consult regarding the exercise of any authority under paragraph (a) of this section, management must provide notice to the exclusive representative concurrently with the exercise of that authority and an opportunity to present its views and recommendations regarding the exercise of such authority under paragraph (a) of this section. However, nothing in this section prevents management from exercising its discretion to provide notice as far in advance of the exercise of that authority as appropriate. Further, nothing in paragraph (d) of this section establishes an independent right to bargain, confer, or consult.

(e) To the extent otherwise required by § 9701.518 and at the request of an exclusive representative, the parties will bargain at the level of recognition (unless otherwise delegated below that level, at their sole and exclusive discretion) over—

(1) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(3) of this section and procedures which management officials and supervisors will observe in exercising any authority under paragraph (a)(3) of this section; and

(2)(i) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(1) or (2) of this section, provided that the effects of such exercise have a significant and substantial impact on the bargaining unit, or on those employees in that part of the bargaining unit affected by the action or event, and are expected to exceed or have exceeded 60 days. Appropriate arrangements within the duty to bargain include proposals on matters such as—

(A) Personal hardships and safety measures; and

(B) Reimbursement of out-of-pocket expenses incurred by employees as the direct result of the exercise of authorities under this section, to the extent such reimbursement is in accordance with applicable law and governing regulations.

(ii) Appropriate arrangements within the duty to bargain do not include proposals on matters such as—

(A) The routine assignment to specific duties, shifts, or work on a regular or overtime basis; and

(B) Compensation for expenses not actually incurred, or pay or credit for work not actually performed.

(f) Nothing in this section will delay or prevent the Department from exercising its authority. Any agreements reached with respect to paragraph (e)(2) of this section will not be precedential or binding on subsequent acts, or retroactively applied, except at the Department's sole, exclusive, and unreviewable discretion.

§ 9701.512 Conferring on procedures for the exercise of management rights.

(a) As provided by § 9701.511(c), management, at the level of recognition, will confer with an appropriate exclusive representative to consider its views and recommendations with regard to procedures that management will observe in exercising its rights under § 9701.511(a)(1) and (2). This process is not subject to the requirements established by §§ 9701.517(a)(5) (regarding enforcement of the duty to consult or negotiate), 9701.518 (regarding the duty to bargain and consult), and 9701.519 (regarding impasse procedures). Nothing in this section requires that the parties reach agreement on any covered matter. The parties may, upon mutual agreement, provide for the Federal Mediation and Conciliation Service or another third party to assist in this process. Neither the HSLRB nor the Authority may intervene in this process.

(b) The parties will meet at reasonable times and places but for no longer than 30 days, including any voluntary third party assistance, unless the parties mutually agree to extend this period.

(c) Nothing in the process established under this section will delay the exercise of a management right under § 9701.511(a)(1) and (2).

(d) Management retains the sole, exclusive, and unreviewable discretion to determine the procedures that it will observe in exercising the authorities set forth in § 9701.511(a)(1) and (2) and to deviate from such procedures, as necessary.

§ 9701.513 Exclusive recognition of labor organizations.

The Department must accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit as determined by the Authority, who cast valid ballots in the election.

§ 9701.514 Determination of appropriate units for labor organization representation.

(a) The Authority will determine the appropriateness of any unit. The Authority must determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this subpart, the appropriate unit should be established on a Department, plant, installation, functional, or other basis and will determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the Department, consistent with the Department's mission and organizational structure.

(b) A unit may not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor may a unit be determined to be appropriate if it includes—

(1) Except as provided under 5 U.S.C. 7135(a)(2), which is not waived for the purpose of this subpart, any management official or supervisor;

(2) A confidential employee;

(3) An employee engaged in personnel work in other than a purely clerical capacity;

(4) An employee engaged in administering the provisions of this subpart;

(5) Both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) Any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by the Department whose duties directly affect the internal security of the Department, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Pursuant to 6 U.S.C. 412(b)(2), a unit to which continued recognition was provided upon transfer to DHS may not include an employee whose primary duty has materially changed to consist of intelligence, counterintelligence, or investigative work directly related to terrorism investigation.

(d) Any employee who is engaged in administering any provision of law or this subpart relating to labor-management relations may not be represented by a labor organization—

(1) Which represents other individuals to whom such provision applies; or

(2) Which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(e) Two or more units in the Department for which a labor organization is the exclusive representative may, upon petition by the Department or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority will certify the labor organization as the exclusive representative of the new larger unit.

§ 9701.515 Representation rights and duties.

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit must be given the opportunity to be represented at—

(i) Any formal discussion between Department representative(s) and bargaining unit employees, the purpose of which is to discuss and/or announce new or substantially changed personnel policies, practices, or working conditions. This right does not apply to meetings between Department

representative(s) and bargaining unit employees for the purpose of discussing operational matters where any discussion of personnel policies, practices or working conditions—

(A) Constitutes a reiteration or application of existing personnel policies, practices, or working conditions;

(B) Is incidental or otherwise peripheral to the announced purpose of the meeting; or

(C) Does not result in an announcement of a change to, or a promise to change, an existing personnel policy(s), practice(s), or working condition(s);

(ii) Any discussion between one or more Department representatives and one or more bargaining unit employees concerning any grievance;

(iii) Any examination of a bargaining unit employee by a representative of the Department in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and the employee requests such representation; or

(iv) Any discussion between a representative of the Department and a bargaining unit employee in connection with a formal complaint of discrimination only if the employee, at his or her sole discretion, requests such representation.

(3) Notwithstanding any other provision of this paragraph, if the Supreme Court determines that the definition of ''grievance'' in 5 U.S.C. 7103(a)(9) includes a formal complaint of discrimination filed by a bargaining unit employee, the definition of *grievance* in § 9701.504, and its application to this section, will be interpreted and applied consistent with that decision.

(4) The Department must annually inform its employees of their rights under paragraph (a)(2)(iii) of this section.

(5) Except in the case of grievance procedures negotiated under this subpart, the rights of an exclusive representative under this section may not be construed to preclude an employee from—

(i) Being represented by an attorney or other representative of the employee's own choosing, other than the exclusive representative, in any other grievance or appeal action; or

(ii) Exercising other grievance or appellate rights established by law, rule, or regulation.

(b) The duty of the Department or appropriate component(s) of the Department and an exclusive representative to negotiate in good faith under paragraph (a) of this section includes the obligation—

(1) To approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) To be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on conditions of employment;

(3) To meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) If agreement is reached, to execute on the request of any party to the negotiation, a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement; and

(5) In the case of the Department or appropriate component(s) of the Department, to furnish information to an exclusive representative, or its authorized representative, when—

(i) Such information exists, is normally maintained, and is reasonably available;

(ii) The exclusive representative has requested such information and demonstrated a particularized need for the information in order to perform its representational functions in grievance proceedings or in negotiations; and

(iii) Disclosure is not prohibited by law.

(c) Disclosure of information in paragraph (b)(5) of this section does not include the following:

(1) Disclosure prohibited by law or regulations, including, but not limited to, the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives and other policies and regulations, and Executive orders;

(2) Disclosure of information if adequate alternative means exist for obtaining the requested information, or if proper discussion, understanding, or negotiation of a particular subject within the scope of collective bargaining is possible without recourse to the information;

(3) Internal Departmental guidance, counsel, advice, or training for managers and supervisors relating to collective bargaining;

(4) Any disclosure that would compromise the Department's mission, security, or employee safety; and

(5) Home addresses, telephone numbers, email addresses, or any other information not related to an employee's work.

(d)(1) An agreement between the Department or appropriate component(s) of the Department and the exclusive representative is subject to approval by the Secretary or designee.

(2) The Secretary or designee must approve the agreement within 30 days after the date the agreement is executed if the agreement is in accordance with the provisions of these regulations and any other applicable law, rule, or regulation.

(3) If the Secretary or designee does not approve or disapprove the agreement within the 30-day period specified in paragraph (d)(2) of this section, the agreement must take effect and is binding on the Department or component(s), as appropriate, and the exclusive representative, but only if consistent with law, the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives and other policies and regulations, and Executive orders.

(4) A local agreement subject to a national or other controlling agreement at a higher level may be approved under the procedures of the controlling agreement or, if none, under Departmental regulations. Bargaining will be at the level of recognition except where delegated.

(5) Provisions in existing collective bargaining agreements are unenforceable if an authorized agency official determines that they are contrary to law, the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives (as provided by § 9701.506) and other policies and regulations, or Executive orders.

§ 9701.516 Allotments to representatives.

(a) If the Department has received from an employee in an appropriate unit a written assignment which authorizes the Department to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the Department must honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment must be made at no cost to the exclusive representative or the employee. Except as provided under paragraph (b) of this section, any such assignment may not be revoked for a period of 1 year.

(b) An allotment under paragraph (a) of this section for the deduction of dues with respect to any employee terminates when—

(1) The agreement between the Department or Department component and the exclusive representative involved ceases to be applicable to the employee; or

(2) The employee is suspended or expelled from membership in the exclusive representative.

(c)(1) Subject to paragraph (c)(2) of this section, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in the Department have membership in the labor organization, the Authority must investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the Department has a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(i) The provisions of paragraph (c)(1) of this section do not apply in the case of any appropriate unit for which there is an exclusive representative.

(ii) Any agreement under paragraph (c)(1) of this section between a labor organization and the Department or Department component with respect to an appropriate unit becomes null and void upon the certification of an exclusive representative of the unit.

§ 9701.517 Unfair labor practices.

(a) For the purpose of this subpart, it is an unfair labor practice for the Department—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) To sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities on an impartial basis to other labor organizations having equivalent status;

(4) To discipline or otherwise discriminate against an employee because the employee has filed a complaint or petition, or has given any information or testimony under this subpart;

(5) To refuse, as determined by the HSLRB, to consult or negotiate in good faith with a labor organization, as required by this subpart;

(6) To fail or refuse, as determined by the HSLRB, to cooperate in impasse procedures and impasse decisions, as required by this subpart; or

(7) To fail or refuse otherwise to comply with any provision of this subpart.

(b) For the purpose of this subpart, it is an unfair labor practice for a labor organization—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To cause or attempt to cause the Department to discriminate against any employee in the exercise by the employee of any right under this subpart;

(3) To coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) To discriminate against an employee with regard to the terms and conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) To refuse, as determined by the HSLRB, to consult or negotiate in good faith with the Department as required by this subpart;

(6) To fail or refuse, as determined by the HSLRB, to cooperate in impasse procedures and impasse decisions as required by this subpart;

(7)(i) To call, or participate in, a strike, work stoppage, or slowdown, or picketing of the Department in a labor-management dispute if such picketing interferes with an agency's operations; or

(ii) To condone any activity described in paragraph (b)(7)(i) of this section by failing to take action to prevent or stop such activity; or

(8) To otherwise fail or refuse to comply with any provision of this subpart.

(c) Notwithstanding paragraph (b)(7) of this section, informational picketing which does not interfere with the Department's operations will not be considered an unfair labor practice.

(d) For the purpose of this subpart, it is an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by the labor organization, except for failure to meet reasonable occupational standards uniformly required for admission or to tender dues uniformly required as a condition of acquiring and retaining membership. This does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this subpart.

(e) The HSLRB will not consider any unfair labor practice allegation filed more than 6 months after the alleged unfair labor practice occurred, unless the HSLRB determines, pursuant to its regulations, that there is good cause for the late filing.

(f) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except where an employee has an option of using the negotiated grievance procedure or an appeals procedure in connection with an adverse action under subpart F of this part, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(g) The expression of any personal view, argument, opinion, or the making of any statement which publicizes the fact of a representational election and encourages employees to exercise their right to vote in such an election, corrects the record with respect to any false or misleading statement made by any person, or informs employees of the Government's policy relating to labor-management relations and representation, may not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions—

(1) Constitute an unfair labor practice under any provision of this subpart; or

(2) Constitute grounds for the setting aside of any election conducted under any provision of this subpart.

§ 9701.518 Duty to bargain, confer, and consult.

(a) The Department or appropriate component(s) of the Department and any exclusive representative in any appropriate unit in the Department, through appropriate representatives, must meet and negotiate in good faith as provided by this subpart for the purpose of arriving at a collective bargaining agreement. In addition, the Department or appropriate component(s) of the Department and the exclusive representative may determine appropriate techniques, consistent with the operational rules of the HSLRB, to assist in any negotiation.

(b) If bargaining over an initial collective bargaining agreement or any successor agreement is not completed within 90 days after such bargaining begins, the parties may mutually agree to continue bargaining or mutually agree to refer the matter to an independent mediator/arbitrator for resolution. Alternatively, either party may refer the

matter to the HSLRB for resolution in accordance with procedures established by the HSLRB. Either party may refer the matter to the Federal Mediation Conciliation Service (FMCS) for assistance at any time.

(c) If the parties bargain during the term of an existing collective bargaining agreement over a proposed change that is otherwise negotiable, and no agreement is reached within 30 days after such bargaining begins, the parties may mutually agree to continue bargaining or mutually agree to refer the matter to an independent mediator/arbitrator for resolution. Alternatively, either party may refer the matter to the HSLRB for resolution in accordance with procedures established by the HSLRB. Either party may refer the matter to the Federal Mediation Conciliation Service (FMCS) for assistance at any time.

(d)(1) Management may not bargain over any matters that are inconsistent with law or the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives and other policies and regulations, or Executive orders.

(2) In promulgating Departmental policies and regulations that deal with otherwise negotiable subjects, the Department will utilize the process set forth in § 9701.512, except that the Department will confer with those labor organizations that request and have been accorded national consultation rights (NCR) established pursuant to 5 U.S.C. 7113, which is not waived for these purposes, and consult with those organizations on other appropriate matters.

(3) Management has no obligation to bargain over a change to a condition of employment unless the change is otherwise negotiable pursuant to these regulations and is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.

(4) Management has no obligation to confer or consult as required by this section unless the change is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.

(5) Nothing in paragraphs (b) or (c) of this section prevents or delays management from exercising the rights enumerated in § 9701.511.

(e) If a management official involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the HSLRB in accordance with procedures established by the HSLRB.

§ 9701.519 Negotiation impasses.

(a) If the Department and exclusive representative are unable to reach an agreement under §§ 9701.515 or 9701.518, either party may submit the disputed issues to the HSLRB for resolution.

(b) If the parties do not arrive at a settlement after assistance by the HSLRB, the HSLRB may take whatever action is necessary and not inconsistent with this subpart to resolve the impasse.

(c) Pursuant to §§ 9701.508 and 9701.525, the HSLRB's regulations will provide for a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and bargaining impasses.

(d) Notice of any final action of the HSLRB under this section must be promptly served upon the parties. The action will be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 9701.520 Standards of conduct for labor organizations.

Standards of conduct for labor organizations are those prescribed under 5 U.S.C. 7120, which is not waived.

§ 9701.521 Grievance procedures.

(a)(1) Except as provided in paragraph (a)(2) of this section, any collective bargaining agreement must provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in paragraphs (d), (f), and (g) of this section, the procedures must be the exclusive administrative procedures for grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in paragraph (a) of this section must be fair and simple, provide for expeditious processing, and include procedures that—

(i) Assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) Assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) Provide that any grievance not satisfactorily settled under the negotiated grievance procedure is subject to binding arbitration, which may be invoked by either the exclusive representative or the Department.

(2) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (b)(1)(iii) of this section must, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order a stay of any personnel action in a manner similar to the manner described in 5 U.S.C. 1221(c) with respect to the Merit Systems Protection Board and order the Department to take any disciplinary action identified under 5 U.S.C. 1215(a)(3) that is otherwise within the authority of the Department to take.

(3) Any employee who is the subject of any disciplinary action ordered under paragraph (b)(2) of this section may appeal such action to the same extent and in the same manner as if the Department had taken the disciplinary action absent arbitration.

(c) The preceding paragraphs of this section do not apply with respect to any matter concerning—

(1) Any claimed violation of 5 U.S.C. chapter 73, subchapter III (relating to prohibited political activities);

(2) Retirement, life insurance, or health insurance;

(3) A suspension or removal under § 9701.613;

(4) A mandatory removal under § 9701.607;

(5) Any examination, certification, or appointment; and

(6) Any subject not within the definition of *grievance* in § 9701.504 (*e.g.*, the classification or pay of any position), except for any other adverse action under subpart F of this part which is not otherwise excluded by paragraph (c) of this section.

(d) To the extent not already excluded by existing collective bargaining agreements, the exclusions contained in paragraph (c) of this section apply upon the effective date of this subpart, as determined under § 9701.102(b).

(e)(1) An aggrieved employee affected by a prohibited personnel practice under 5 U.S.C. 2302(b)(1) which also falls under the coverage of the negotiated grievance procedure may raise the matter under the applicable statutory procedures, or the negotiated procedure, but not both.

(2) An employee is deemed to have exercised his or her option under paragraph (e)(1) of this section to raise the matter under the applicable statutory procedures, or the negotiated procedure, at such time as the employee

timely initiates an action under the applicable statutory or regulatory procedure or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(f)(1) For matters covered by subpart G of this part (except for mandatory removal offenses under § 9701.707), an aggrieved employee may raise the matter under the appeals procedure of § 9701.706 or under the negotiated grievance procedure, but not both. An employee will be deemed to have exercised his or her option under this section when the employee timely files an appeal under the applicable appellate procedures or a grievance in accordance with the provisions of the parties' negotiated grievance procedure, whichever occurs first.

(2) An arbitrator hearing a matter appealable under subpart G of this part is bound by the applicable provisions of this part.

(3) Section 7121(f) of title 5, United States Code, is not waived, but is modified to provide that—

(i) Matters covered by subpart G are deemed to be matters covered by 5 U.S.C. 4303 and 7512 for the purpose of obtaining judicial review; and

(ii) Judicial review under 5 U.S.C. 7703 will apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by MSPB under § 9701.706, including the preponderance of the evidence standard.

(4) In order to ensure consistency, the Department and representatives of those labor organizations granted national consultation rights may establish a mutually acceptable panel of arbitrators who have been trained and qualified to hear adverse action grievances under this part.

(g)(1) An employee may grieve a performance rating of record that has not been appealed in connection with an action under subpart G of this part. Once an employee raises a performance rating issue in an appeal under subpart G of this part, any pending grievance or arbitration will be dismissed with prejudice.

(2) An arbitrator may cancel a performance rating upon a finding that management applied the employee's established performance expectations in violation of applicable law, Department rule or regulation, or provision of collective bargaining agreement in a manner prejudicial to the grievant. An arbitrator who has properly canceled an employee's appraisal may order management to change the grievant's rating only when the arbitrator is able to determine the rating that management would have given but for the violation. When an arbitrator is unable to determine what the employee's rating would have been but for the violation, the arbitrator must remand the case to management for re-evaluation. Except as otherwise provided by law, an arbitrator may not conduct an independent evaluation of the employee's performance or otherwise substitute his or her judgment for that of the supervisor.

(h)(1) This paragraph applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which paragraph (e) of this section applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (h)(1) of this section may elect not more than one of the procedures described in paragraph (h)(3) of this section with respect thereto. A determination as to whether a particular procedure for seeking a remedy has been elected must be made as set forth under paragraph (h)(4) of this section.

(3) The procedures for seeking remedies described in this paragraph are as follows:

(i) An appeal under subpart G of this part;

(ii) A negotiated grievance under this section; and

(iii) Corrective action under 5 U.S.C. chapter 12, subchapters II and III.

(4) For the purpose of this paragraph, an employee is considered to have elected one of the following, whichever election occurs first:

(i) The procedure described in paragraph (h)(3)(i) of this section if such employee has timely filed a notice of appeal under the applicable appellate procedures;

(ii) The procedure described in paragraph (h)(3)(ii) of this section if such employee has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(iii) The procedure described in paragraph (h)(3)(iii) of this section if such employee has sought corrective action from the Office of Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1).

§ 9701.522 Exceptions to arbitration awards.

(a)(1) In the case of awards involving the exercise of management rights or the duty to bargain under §§ 9701.511 and 9701.518, either party to arbitration under this subpart may file with the HSLRB an exception to any arbitrator's award. The HSLRB may take such action and make such recommendations concerning the award as is consistent with this subpart.

(2) In the case of awards not involving the exercise of management rights or the duty to bargain under §§ 9701.511 and 9701.518, either party may file exceptions to an arbitration award with the Authority pursuant to 5 U.S.C. 7122 (which is not waived for the purpose of this subpart but which is modified to apply to arbitration awards under this section) and the Authority's regulations.

(3) Notwithstanding paragraph (a)(2) of this section, exceptions to awards relating to a matter described in § 9701.521(f) may not be filed with the Authority.

(b) If no exception to an arbitrator's award is filed under paragraph (a) of this section during the 30-day period beginning on the date of such award, the award is final and binding. Either party must take the actions required by an arbitrator's final award. The award may include the payment of back pay (as provided under 5 U.S.C. 5596 and 5 CFR part 550, subpart H).

(c) Nothing in this section prevents the HSLRB from determining its own jurisdiction without regard to whether any party has raised a jurisdictional issue.

§ 9701.523 Official time.

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this subpart must be authorized official time for such purposes, including attendance at impasse proceedings, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this section may not exceed the number of individuals designated as representing the Department for such purposes.

(b) Any activities performed by any employee relating to the internal business of the labor organization, including but not limited to the solicitation of membership, elections of labor organization officials, and collection of dues, must be performed during the time the employee is in a nonduty status.

(c) Except as provided in paragraph (a) of this section, the Authority or the HSLRB, as appropriate, will determine whether an employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority or the HSLRB will be authorized official time for such purpose during the time the employee would otherwise be in a duty status.

(d) Except as provided in the preceding paragraphs of this section, any employee representing an exclusive representative or, in connection with any other matter covered by this subpart, any employee in an appropriate unit represented by an exclusive representative, must be granted official time in any amount the Department and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

§ 9701.524 Compilation and publication of data.

(a) The HSLRB must maintain a file of its proceedings and copies of all available agreements and arbitration decisions and publish the texts of its impasse resolution decisions and the actions taken under § 9701.519.

(b) All files maintained under paragraph (a) of this section must be open to inspection and reproduction in accordance with 5 U.S.C. 552 and 552a. The HSLRB will establish rules in consultation with the Department for maintaining and making available for inspection sensitive information.

§ 9701.525 Regulations of the HSLRB.

The Department may issue initial interim rules for the operation of the HSLRB and will consult with labor organizations granted national consultation rights on the rules. The HSLRB will prescribe and publish rules for its operation in the **Federal Register**.

§ 9701.526 Continuation of existing laws, recognitions, agreements, and procedures.

(a) Except as otherwise provided by § 9701.506, nothing contained in this subpart precludes the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or an agreement that is otherwise consistent with law and the regulations in this part between the Department or a component thereof and an exclusive representative of its employees, which is entered into before the effective date of this subpart, as determined under § 9701.102(b).

(b) Policies, regulations, and procedures established under, and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838 or any other Executive order, as in effect on the effective date of this subpart (as determined under § 9701.102(b)), will remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this subpart or by implementing directives or decisions issued pursuant to this subpart.

§ 9701.527 Savings provision.

This subpart does not apply to grievances or other administrative proceedings already pending on the date of coverage of this subpart, as determined under § 9701.102(b). Any remedy that applies after the date of coverage under any provision of this part and that is in conflict with applicable provisions of this part is not enforceable.

Subpart F—Adverse Actions

General

§ 9701.601 Purpose.

This subpart contains regulations prescribing the requirements when employees are furloughed for 30 days or less, suspended, demoted, reduced in pay, or removed. DHS may issue implementing directives to carry out the provisions of this subpart.

§ 9701.602 Waivers.

When a specified category of employees is covered by the adverse action provisions established under this subpart, 5 U.S.C. 7501 through 7514 and 7531 through 7533 are waived with respect to that category of employees. The provisions in 5 U.S.C. 7521 and 7541 through 7543 are not waived.

§ 9701.603 Definitions.

In this subpart:

Adverse action means a furlough for 30 days or less, a suspension, a demotion, a reduction in pay, or a removal.

Band means a work level or pay range within an occupational cluster.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics required by a position.

Current continuous service means a period of service immediately preceding an adverse action in the same or similar positions without any break in Federal civilian employment.

Day means a calendar day.

Demotion means a reduction in grade, a reduction to a lower band within the same occupational cluster, or a reduction to a lower band in a different occupational cluster under rules prescribed by DHS pursuant to § 9701.355.

Furlough means the placement of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons.

Grade means a level of work under a position classification or job grading system.

Indefinite suspension means the placement of an employee in a temporary status without duties and pay pending investigation, inquiry, or further Department action. An indefinite suspension continues for an indeterminate period of time and usually ends with either the employee returning to duty or the completion of any subsequent administrative action.

Initial service period (ISP) means the 1 to 2 years employees must serve after selection (on or after the date this subpart becomes applicable, as determined under § 9701.102(b)) for a designated DHS position in the competitive service for the purpose of providing an employee the opportunity to demonstrate competencies in a specific occupation.

Mandatory removal offense (MRO) means an offense that the Secretary determines, in his or her sole, exclusive, and unreviewable discretion, has a direct and substantial adverse impact on the Department's homeland security mission.

Mandatory Removal Panel (MRP) means the three-person panel composed of officials appointed by the Secretary for fixed terms to decide appeals of removals based on a mandatory removal offense.

Pay means the rate of basic pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind. For the purpose of this subpart, pay does not include locality-based comparability payments under 5 U.S.C. 5304, locality or special rate supplements under subpart C of this part, or other similar payments.

Probationary period has the meaning given that term in 5 CFR 315.801.

Removal means the involuntary separation of an employee from the Department.

Similar positions means positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be moved from one position to another without significant training or undue interruption to the work.

Suspension means the temporary placement of an employee, for disciplinary reasons, in a nonduty/nonpay status.

Trial period has the meaning given that term in 5 CFR 316.304.

§ 9701.604 Coverage.

(a) *Actions covered.* This subpart covers furloughs of 30 days or less, suspensions, demotions, reductions in pay (including reductions in pay within a band), and removals.

(b) *Actions excluded.* This subpart does not cover—

(1) Any adverse action taken against an employee during a probationary, trial, or initial service period, except for an adverse action taken against a preference eligible employee in the competitive service who has completed the first year of an initial service period;

(2) The demotion of a supervisor or manager under 5 U.S.C. 3321;

(3) An action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position of equivalent band and pay, if the employee was informed that the promotion was to be of limited duration;

(4) A reduction-in-force action under 5 U.S.C. 3502;

(5) An action under 5 U.S.C. 1215;

(6) An action against an administrative law judge under 5 U.S.C. 7521;

(7) A voluntary action by an employee;

(8) An action taken or directed by OPM based on suitability under 5 CFR part 731;

(9) Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made;

(10) Cancellation of a promotion to a position not classified prior to the promotion;

(11) Placement of an employee serving on an intermittent or seasonal basis in a temporary non-duty, non-pay status in accordance with conditions established at the time of appointment;

(12) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation;

(13) An action taken under a provision of statute, other than one codified in title 5, U.S. Code, which excludes the action from 5 U.S.C. chapter 75 or this subpart;

(14) A classification determination, including a classification determination under subpart B of this part; and

(15) An action that entitles an employee to grade retention under 5 CFR part 536 and an action to terminate this entitlement.

(c) *Employees covered.* Subject to a determination by the Secretary or designee under § 9701.102(b), this subpart applies to DHS employees, except as excluded by paragraph (d) of this section.

(d) *Employees excluded.* This subpart does not apply to—

(1) An employee in the competitive service who is serving a probationary, trial, or initial service period, except for a preference eligible employee in the competitive service who has completed the first year of an initial service period;

(2) A preference eligible employee in the excepted service who has not completed 1 year of current continuous service in the same or similar positions in an Executive agency or in the United States Postal Service or Postal Rate Commission;

(3) An employee in the excepted service (other than a preference eligible) who has not completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment of 2 years or less;

(4) A non-preference eligible employee who is serving a time-limited appointment (including a term appointment) of 2 years or less;

(5) Members of the Senior Executive Service;

(6) Administrative law judges;

(7) Employees who are terminated in accordance with terms specified as conditions of employment at the time the appointment was made;

(8) Employees whose appointments are made by and with the advice and consent of the Senate;

(9) Employees whose positions have been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by—

(i) The President, for a position that the President has excepted from the competitive service;

(ii) OPM, for a position that OPM has excepted from the competitive service; or

(iii) The President or the Secretary for a position excepted from the competitive service by statute;

(10) An employee whose appointment is made by the President;

(11) An employee who is receiving an annuity from the Civil Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund based on the service of such employee;

(12) An employee who is an alien or non-citizen occupying a position outside the United States, as described in 5 U.S.C. 5102(c)(11);

(13) Members of the Homeland Security Labor Relations Board or the Mandatory Removal Panel;

(14) Employees against whom an adverse personnel action is taken or imposed under any statute or regulation other than this subpart (e.g., Transportation Security Administration employees); and

(15) Employees appointed and serving under a Schedule B excepted service appointment subject to conversion to career status pursuant to Executive Order 11203.

§ 9701.605 Initial service period.

(a) DHS may establish an initial service period of 1 to 2 years for certain designated occupations in order for employees in such occupations to demonstrate appropriate competencies. DHS will establish standard policies for determining the applicability and the length of the ISP for specific occupations.

(b) Employees must complete an ISP after selection for a designated DHS position in the competitive service before obtaining coverage under this subpart. All relevant prior Federal civilian service (including non-appropriated fund service), as determined by appropriate standards established by DHS, counts toward completion of this requirement.

(c) An employee who is removed during a probationary, trial, or initial service period must be removed in accordance with 5 CFR 315.804 or 315.805, except for a preference eligible employee in the competitive service who has completed the first year of an ISP.

Requirements for Furlough of 30 Days or Less, Suspension, Demotion, Reduction in Pay, or Removal

§ 9701.606 Standard for action.

The Department may take an adverse action under this subpart only for such cause as will promote the efficiency of the service. The standards for mandatory removal offenses and actions taken under the national security provisions are set forth in §§ 9701.607 and 9701.613, respectively.

§ 9701.607 Mandatory removal offenses.

(a) The Secretary has the sole, exclusive, and unreviewable discretion to identify offenses that have a direct and substantial adverse impact on the Department's homeland security mission. Such offenses will be identified in advance as part of the Department's implementing directives, publicized via notice in the **Federal Register,** and made known to all employees on an annual basis.

(b) When a mandatory removal action is proposed under this section, employees will have the right to advance notice, an opportunity to respond, a written decision, and a review by the Mandatory Removal Panel as set forth in subpart G of this part.

(c) Prior to the issuance of a notice to the employee in question, the Secretary or designee will review and approve a proposed notice of removal on the grounds that the employee has committed a mandatory removal offense.

(d) The Secretary has the sole, exclusive, and unreviewable discretion to mitigate the removal penalty.

(e) Nothing in this section limits the discretion of the Department or any component thereof to remove employees for offenses other than those identified by the Secretary as mandatory removal offenses.

(f) Nothing in this subpart limits the discretion of the Department or any component thereof to remove an employee based on the revocation of that employee's security clearance.

§ 9701.608 Procedures.

An employee against whom an adverse action is proposed is entitled to the following:

(a) A proposal notice under § 9701.609;

(b) An opportunity to reply under § 9701.610; and

(c) A decision notice under § 9701.611.

§ 9701.609 Proposal notice.

(a) *Notice period.* The Department must provide at least 15 days advance written notice of a proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the Department must provide at least 5 days advance written notice.

(b) *Contents of notice.* (1) The proposal notice must inform the employee of the factual basis for the proposed action in sufficient detail to permit the employee to reply to the notice, and inform the employee of his or her right to review the Department's evidence supporting the proposed action. The Department may not use evidence that cannot be disclosed to the employee, his or her representative, or designated physician pursuant to 5 CFR 297.204.

(2) When some but not all employees in a given competitive level are being furloughed, the proposal notice must state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough. The notice is not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(c) *Duty status during notice period.* An employee will remain in a duty status in his or her regular position during the notice period. However, when the Department determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the Department may elect one or a combination of the following alternatives:

(1) Assign the employee to duties where the Department determines the employee is no longer a threat to safety, the Department's mission, or Government property;

(2) Allow the employee to take leave, or place him or her in an appropriate leave status (annual leave, sick leave, or leave without pay) or absence without leave if the employee has absented himself or herself from the worksite without approved leave; or

(3) Place the employee in a paid, non-duty status for such time as is necessary to effect the action.

§ 9701.610 Opportunity to reply.

(a) The Department must give employees at least 10 days, which must run concurrently with the notice period, to reply orally and/or in writing to a notice of proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the Department must give the employee at least 5 days, which must run concurrently with the notice period, to reply orally and/or in writing.

(b) The opportunity to reply orally does not include the right to a formal hearing with examination of witnesses.

(c) During the opportunity to reply, the Department must give the employee a reasonable amount of official time to review the Department's supporting evidence, and to furnish affidavits and other documentary evidence, if the employee is otherwise in an active duty status.

(d) The Department must designate an official to receive the employee's written and/or oral response. The official must have authority to make or recommend a final decision on the proposed adverse action.

(e) The employee may be represented by an attorney or other representative of the employee's choice and at the employee's expense, subject to paragraph (f) of this section. The employee must provide the Department with a written designation of his or her representative.

(f) The Department may disallow as an employee's representative—

(1) An individual whose activities as representative would cause a conflict between the interest or position of the representative and that of the Department,

(2) An employee of the Department whose release from his or her official position would give rise to unreasonable costs or whose work assignments preclude his or her release; or

(3) An individual whose activities as representative could compromise security.

(g)(1) An employee who wishes the Department to consider any medical condition that may be relevant to the proposed adverse action must provide medical documentation, as that term is defined at 5 CFR 339.104, during the opportunity to reply, whenever possible.

(2) When considering an employee's medical documentation, the Department may require or offer a medical examination pursuant to 5 CFR part 339, subpart C.

(3) When considering an employee's medical condition, the Department is not required to withdraw or delay a proposed adverse action. However, the Department must—

(i) Allow the employee to provide medical documentation during the opportunity to reply;

(ii) Comply with 29 CFR 1614.203 and relevant Equal Employment Opportunity Commission rules; and

(iii) Comply with 5 CFR 831.1205 when issuing a decision to remove.

§ 9701.611 Decision notice.

(a) In arriving at its decision on a proposed adverse action, the Department may not consider any reasons for the action other than those specified in the proposal notice.

(b) The Department must consider any response from the employee and the employee's representative, if the response is provided to the official designated under § 9701.610(d) during the opportunity to reply, and any medical documentation furnished under § 9701.610(g).

(c) The decision notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under subparts E or G of this part.

(d) The Department must deliver the notice to the employee on or before the effective date of the action.

§ 9701.612 Departmental record.

(a) *Document retention.* The Department must keep a record of all relevant documentation concerning the action for a period of time pursuant to the General Records Schedule and the Guide to Personnel Recordkeeping. The record must include the following:

(1) A copy of the proposal notice;

(2) The employee's written response, if any, to the proposal;

(3) A summary of the employee's oral response, if any;

(4) A copy of the decision notice; and

(5) Any supporting material that is directly relevant and on which the action was substantially based.

(b) *Access to the record.* The Department must make the record available for review by the employee and furnish a copy of the record upon the employee's request or the request of the Merit Systems Protection Board or the MRP.

National Security

§ 9701.613 Suspension and removal.

(a) Notwithstanding other provisions of law or regulation, the Secretary may suspend an employee without pay when she or he considers suspension in the interests of national security. To the extent that the Secretary determines that the interests of national security permit, the suspended employee must be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the Secretary statements or affidavits to show why he or she should be restored to duty.

(b) Subject to paragraph (c) of this section, the Secretary may remove an employee suspended under this section when, after investigation and review as the Secretary considers necessary, the Secretary determines that removal is necessary or advisable in the interests of national security. The determination of the Secretary is final.

(c) An employee suspended under this section who has a permanent or indefinite appointment, has completed his or her initial service period, probationary period, or trial period, and is a citizen of the United States is entitled, after suspension and before removal, to—

(1) A written statement of the charges against the employee within 30 days after suspension, which may be amended within 30 days thereafter, and which must be stated as specifically as security considerations permit;

(2) An opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(3) A hearing, at the request of the employee, by a Department authority duly constituted for this purpose;

(4) A review of his or her case by the Secretary or designee, before a decision adverse to the employee is made final; and

(5) A written decision from the Secretary.

Savings Provision

§ 9701.614 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

Subpart G—Appeals

§ 9701.701 Purpose.

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9701(a) through (c) and (f) concerning the Department's appeals system for certain adverse actions covered under subpart F of this part. These provisions require that the new appeals regulations provide Department employees fair treatment, are consistent with the protections of due process and, to the maximum extent practicable, provide for the expeditious handling of appeals.

§ 9701.702 Waivers.

When a specified category of employees is covered by an appeals system established under this subpart, the provisions of 5 U.S.C. 7701 are waived with respect to that category of employees to the extent they are inconsistent with the provisions of this subpart. The provisions of 5 U.S.C. 7702 are modified as provided in § 9701.709 to use ''MSPB or MRP'' wherever the terms ''Merit Systems Protection Board'' or ''Board'' occur. The appellate procedures specified herein supersede those of MSPB to the extent MSPB regulations are inconsistent with this subpart. MSPB must follow the provisions in this subpart until conforming regulations are issued by MSPB.

§ 9701.703 Definitions.

In this subpart:

Adjudicating official means an administrative law judge, administrative judge, or other employee designated by MSPB to decide an appeal.

Day means calendar day.

Harmful error means error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.

Mandatory removal offense (MRO) means an offense that the Secretary determines in his or her sole, exclusive, and unreviewable discretion has a direct and substantial adverse impact on the Department's homeland security mission.

Mandatory Removal Panel (MRP) means the three-person panel composed of officials appointed by the Secretary for fixed terms to decide appeals of removals based on a mandatory removal offense.

MSPB means the Merit Systems Protection Board.

Petition for review means a request for review of an initial decision of an adjudicating official.

Preponderance of the evidence means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

§ 9701.704 Coverage.

(a) Subject to a determination by the Secretary or designee under § 9701.102(b), this subpart applies to employees who appeal furloughs of 30 days or less, demotions, reductions in pay, suspensions of 15 days or more, or removals, provided such employees are covered by § 9701.604.

(b) Appeals of suspensions shorter than 15 days and other lesser disciplinary measures are not covered under this subpart but may be grieved through a negotiated grievance procedure or an administrative grievance procedure, whichever is applicable.

(c) The appeal rights in 5 CFR 315.806 apply to the removal of an employee while serving a probationary, trial, or initial service period, except for a preference eligible employee in the competitive service who has completed the first year of an initial service period.

(d) Actions taken under § 9701.613 are not appealable to MSPB.

§ 9701.705 Alternative dispute resolution.

The Department and OPM recognize the value of using alternative dispute resolution methods such as mediation, an ombudsman, or interest-based negotiation to address employee-employer disputes arising in the workplace, including those which may involve disciplinary actions. Such methods can result in more efficient and more effective outcomes than traditional, adversarial methods of dispute resolution. The Department will use alternative dispute resolution methods where appropriate. Such methods will be subject to collective bargaining to the extent permitted by subpart E of this part.

§ 9701.706 MSPB appellate procedures.

(a) A covered Department employee may appeal an adverse action identified under § 9701.704(a) to MSPB. Such an employee has a right to be represented

by an attorney or other representative, and to a hearing if material facts are in dispute. However, separate procedures apply when the action is taken because of a mandatory removal offense or is in the interest of national security. (*See* §§ 9701.707 and 9701.613, respectively.)

(b) MSPB may decide any case appealed to it or may refer the case to an administrative law judge appointed under 5 U.S.C. 3105 or other employee of MSPB designated by MSPB to decide such cases. MSPB or an adjudicating official must make a decision at the close of the review and provide a copy of the decision to each party to the appeal and to OPM.

(c)(1) If an employee is the prevailing party in an appeal under this section, the employee must be granted the relief provided in the decision upon issuance of the decision, subject to paragraph (c)(3) of this section, and such relief remains in effect pending the outcome of any petition for review unless—

(i) An adjudicating official determines that the granting of such relief is not appropriate; or

(ii) The relief granted in the decision provides that the employee will return or be present at the place of employment pending the outcome of any petition for review, and the Department, subject to paragraph (c)(2) of this section, determines in its sole, exclusive, and unreviewable discretion, that the return or presence of the employee is unduly disruptive to the work environment.

(2) If the Department makes a determination under paragraph (c)(1)(ii) of this section that prevents the return or presence of an employee at the place of employment, such employee must receive pay, compensation, and all other benefits as terms and conditions of employment pending the outcome of any petition for review.

(3) Nothing in the provisions of this section may be construed to require that any award of back pay or attorney fees be paid before the decision is final.

(d) The decision of the Department must be sustained under paragraph (b) of this section if it is supported by a preponderance of the evidence, unless the employee shows by a preponderance of the evidence—

(1) Harmful error in the application of Department procedures in arriving at the decision;

(2) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) That the decision was not in accordance with law.

(e) The Director of OPM may, as a matter of right at any time in the proceeding, intervene or otherwise participate in any proceeding under this section in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(f) Except as provided in § 9701.709, any decision under paragraph (b) of this section is final unless a party to the appeal or the Director of OPM petitions MSPB for review within 30 days after receipt of the decision or MSPB reopens and reconsiders a case on its own motion. The Director may petition MSPB for review only if he or she believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. MSPB, for good cause shown, may extend the filing period.

(g) If MSPB or an adjudicating official is of the opinion that consolidation or joinder could result in more expeditious processing of appeals and would not adversely affect any party, MSPB or an adjudicating official may—

(1) Consolidate appeals filed by two or more appellants; or

(2) Join two or more appeals filed by the same appellant and hear and decide them concurrently.

(h)(1) Except as provided in paragraph (h)(2) of this section or as otherwise provided by law, MSPB or an adjudicating official may require payment by the Department of reasonable attorney fees incurred by an employee if the employee is the prevailing party and MSPB or an adjudicating official determines that payment by the Department is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the Department or any case in which the Department's action was clearly without merit.

(2) If the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable attorney fees must be in accordance with the standards prescribed in section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(i)(1) MSPB or an adjudicating official may not require settlement discussions in connection with any appealed action under this section. If either party decides that settlement is not desirable, the matter will proceed to adjudication.

(2) Where the parties agree to engage in settlement discussions before MSPB or an adjudicating official, these discussions will be conducted by an official specifically designated by MSPB for that sole purpose. Nothing prohibits the parties from engaging in settlement discussions on their own.

(j) If an employee has been removed under subpart F of this part, neither the employee's status under any retirement system established by Federal statute nor any election made by the employee under any such system will affect the employee's appeal rights.

(k) The following provisions modify MSPB's appellate procedures applicable to appeals under this subpart:

(1) All appeals, including class appeals, will be filed no later than 20 days after the effective date of the action being appealed, or no later than 20 days after the date of service of the Department's decision, whichever is later.

(2) Either party may file a motion for representative disqualification at any time during the proceedings.

(3) The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion, either party may seek to limit such discovery because the burden or expense of providing the material outweighs its benefit, or because the material sought is privileged, not relevant, unreasonably cumulative or duplicative, or can be secured from some other source that is more convenient, less burdensome, or less expensive.

(i) Prior to filing a motion to limit discovery, the parties must confer and attempt to resolve any pending objection(s).

(ii) Neither party may submit more than one set of interrogatories, one set of requests for production of documents, and one set of requests for admissions. The number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts; in addition, neither party may conduct/compel more than 2 depositions.

(iii) Either party may file a motion requesting additional discovery. Such motion may be granted only if the party has shown necessity and good cause to warrant such additional discovery.

(4) Requests for case suspensions must be submitted jointly.

(5) When there are no material facts in dispute, the adjudicating official must render summary judgment on the law without a hearing. However, when material facts are in dispute and a hearing is held, a transcript must be kept.

(6) Given the Department's need to maintain an exceptionally high degree of order and discipline in the workplace, an arbitrator, adjudicating official, or MSPB may not modify the penalty imposed by the Department

unless such penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, the third party's determination in this regard is based on the justification for the penalty as it relates to the sustained charge(s). When a penalty is mitigated, the maximum justifiable penalty must be applied.

(7) An initial decision must be made no later than 90 days after the date on which the appeal is filed. If that initial decision is appealed to MSPB, MSPB must render its decision no later than 90 days after the close of the record before MSPB on petition for review.

(8) If the Director seeks reconsideration of a final MSPB order, MSPB must render its decision no later than 60 days after receipt of the opposition to OPM's petition in support of such reconsideration. MSPB must state the reasons for its decision so that the Director can determine whether to seek judicial review and to facilitate expeditious judicial review.

(9) MSPB, in conjunction with the Department and OPM, will develop and issue voluntary expedited appeals procedures for Department cases.

(l) Failure of MSPB to meet the deadlines imposed by paragraphs (k)(7) and (k)(8) of this section in a case will not prejudice any party to the case and will not form the basis for any legal action by any party.

(m) Except as otherwise provided by 5 U.S.C. 7702 with respect to cases involving allegations of discrimination, judicial review of any final MSPB order or decision is as prescribed under 5 U.S.C. 7703.

§ 9701.707 Appeals of mandatory removal actions.

(a) *General.* Appeals of mandatory removal actions are governed by procedures set forth in this section. An employee may appeal such actions to the Mandatory Removal Panel (MRP) established under § 9701.708.

(b) *Procedures.* (1) The MRP will establish procedures for the fair, impartial, and expeditious assignment and disposition of cases, consistent with the requirements set forth in § 9701.706(k), as applicable, and for such other matters as may be necessary to ensure the operation of the MRP.

(2) The MRP will conduct a hearing, for which a transcript will be kept, to resolve any factual disputes and other relevant matters. All members will hear a particular appeal and will decide it based on a majority vote of the members. If only two members are serving, the vote of the Chair will be dispositive in the event of a tie.

(3) The appellant has the right to be represented by an attorney or other representative.

(4) The only action available to the MRP is to sustain or overturn a mandatory removal. The MRP does not have authority to mitigate the penalty. Only the Secretary may mitigate the penalty in these cases after the MRP has rendered its decision.

(5) The decision of the Department must be sustained if it is supported by a preponderance of the evidence, unless the employee shows by a preponderance of the evidence—

(i) Harmful error in the application of Department procedures in arriving at the decision;

(ii) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(iii) That the decision was not in accordance with law.

(6)(i) Except as provided in paragraph (b)(6)(ii) of this section or as otherwise provided by law, the MRP may require payment by the Department of reasonable attorney fees incurred by an employee if the employee is the prevailing party and the Panel reviewing the initial appeal determines that payment by the Department is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the Department or any case in which the Department's action was clearly without merit.

(ii) If the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable attorney fees must be in accordance with the standards prescribed in § 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(7) The MRP must issue a written decision (including dissenting opinions, where appropriate) in each case and serve each party and OPM with a copy. These decisions are final and binding.

(8) Failure of the MRP to meet applicable deadlines imposed under § 9701.706(k) in a case will not prejudice any party to the case and will not form the basis for any legal action by any party.

(c) *MSPB review.* (1) In order to obtain judicial review of an MRP decision, an employee, the Department, or OPM must request a review of the record of an MRP decision by MSPB by filing such a request in writing within 15 days after the issuance of the decision. Within 15 days after MSPB's receipt of the request for a review of the record, any response or OPM intervention must be filed. A party, or OPM, may each submit, and MSPB may grant for good cause shown, a request for a single extension of time not to exceed a maximum of 15 additional days. MSPB will establish, in conjunction with the MRP, standards for the sufficiency of the record and other procedures, including notice to the parties and OPM. MSPB must accept the findings of fact and interpretations of this part made by the MRP and sustain the MRP's decision unless the employee shows that the MRP's decision was—

(i) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) Caused by harmful error in the application of the MRP's procedures in arriving at such decision; or

(iii) Unsupported by substantial evidence.

(2) MSPB must complete its review of the record and issue a final decision within 30 days after receiving the party's timely response to such request for review or OPM's intervention brief, whichever is filed later. This 30-day time limit is mandatory, except that MSPB may extend its time for review by a maximum of 15 additional days if it determines that—

(i) The case is unusually complex; or

(ii) An extension is necessary to prevent any prejudice to the parties that would otherwise result.

(3) No extension beyond that provided by paragraph (c)(2) of this section is permitted.

(4) If MSPB does not issue a final decision within the mandatory time limit established by paragraph (c) of this section, MSPB will be considered to have denied the request for review of the MRP's decision, which will constitute a final decision of MSPB and is subject to judicial review in accordance with 5 U.S.C. 7703.

(d) *Subsequent action.* (1) If either the MRP or MSPB sustains an employee's appeal based on a finding that the employee did not commit an MRO, the Department is not precluded from subsequently proposing an adverse action (other than an MRO) based on the same record evidence. Such a proposal must be issued—

(i) In accordance with applicable law and regulation, including the procedures set forth in § 9701.609; and

(ii) Normally within 15 days after the date of MSPB's decision, unless the Department establishes good cause for exceeding this time limit.

(2) Nothing in this section precludes the Department from taking a subsequent action against an employee based, in part, on additional evidence that was not part of the record in the initial proceeding before the MRP.

(e) *Judicial review.* Except as otherwise provided by 5 U.S.C. 7702 with respect to cases involving allegations of discrimination, judicial review of any final MSPB order or decision on an MRO is as prescribed under 5 U.S.C. 7703.

(f) *OPM intervention.* (1) The Director may, as a matter of right at any time in the proceeding before the MRP or MSPB, intervene or otherwise participate in any proceeding under this section in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(2) Except as provided in § 9701.709, any decision under paragraph (c) of this section is final unless the Director petitions MSPB for review within 30 days after receipt of the decision. The Director may petition MSPB for review only if he or she believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. MSPB, for good cause shown, may extend the filing period.

(g) *Appeal rights of retirees.* If an employee has been removed under subpart F of this part, neither the employee's status under any retirement system established by Federal statute nor any election made by the employee under any such system will affect the employee's appeal rights.

§ 9701.708 Mandatory Removal Panel.

(a) *Composition.* (1) The Mandatory Review Panel is a standing panel composed of three members who will be appointed by the Secretary for terms of 3 years, except that the appointments of the initial MRP members will be for terms of 2, 3, and 4 years, respectively. The Secretary may extend the term of any member beyond 3 years when necessary to provide for an orderly transition and/or appoint the member for an additional term.

(2) Members of the MRP must be independent, distinguished citizens of the United States who are well known for their integrity and impartiality. Members must have expertise in either labor or employee relations or law enforcement/homeland security matters. At least one member of the Board must have experience in labor relations. Members may be removed by the Secretary on the same grounds as an MSPB member.

(3) An individual chosen to fill a vacancy on the MRP will be appointed for the unexpired term of the member who is replaced.

(b) *Appointment of the Chair.* The Secretary, at his or her sole and exclusive discretion, will appoint one member to serve as Chair of the MRP.

(c) *Appointment procedures for non-Chair MRP members.* (1) The appointments of the two non-Chair MRP members will be made by the Secretary after he or she considers any lists of nominees submitted by labor organizations that represent employees in the Department of Homeland Security.

(2) The submission of lists of recommended nominees by labor organizations must be in accordance with timelines and requirements set forth by the Secretary, who may provide for additional consultation in order to obtain further information about a recommended nominee. The ability of the Secretary to appoint MRP members may not be delayed or otherwise affected by the failure of any labor organization to provide a list of nominees that meets the timeframe and requirements established by the Secretary.

§ 9701.709 Actions involving discrimination.

Section 7702 of title 5, U.S. Code, is modified to read ''MSPB or MRP'' wherever the terms ''Merit Systems Protection Board'' or ''Board'' are used.

§ 9701.710 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

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Federal Register

Vol. 70, No. 20

Tuesday, February 1, 2005

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FEDERAL REGISTER PAGES AND DATE, FEBRUARY

5043–5348 1

CFR PARTS AFFECTED DURING FEBRUARY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

REMINDERS

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RULES GOING INTO EFFECT FEBRUARY 1, 2005

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Pistachios grown in—

California; published 7-26-04

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:

Caribbean, Gulf, and South Atlantic fisheries—

Grammanik Bank seasonal closure; published 1-4-05

Gulf of Mexico and South Atlantic coastal migratory pelagic resources; published 1-28-05

COMMERCE DEPARTMENT

Patent and Trademark Office

Patent cases:

Patent Cooperation Treaty applications entering the national stage; fees; published 2-1-05

FEDERAL COMMUNICATIONS COMMISSION

Television broadcasting:

Children's television programming—

Cable operators; digital television broadcast licensees' obligations and requirements; published 1-3-05

PENSION BENEFIT GUARANTY CORPORATION

Single employer plans:

Allocation of assets—

Interest assumptions for valuing and paying benefits; published 1-14-05

POSTAL SERVICE

Domestic Mail Manual:

Signature Confirmation service; signature waiver option elimination; published 1-7-05

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Cotton classing, testing and standards:

Classification services to growers; 2004 user fees; Open for comments until further notice; published 5-28-04 [FR 04-12138]

Fluid Milk Promotion Program:

National Fluid Milk Processor Promotion Board; membership; amendments; comments due by 2-11-05; published 1-12-05 [FR 05-00580]

Grapes grown in—

Southeastern California; comments due by 2-10-05; published 1-11-05 [FR 05-00470]

Pistachios grown in—

California; comments due by 2-8-05; published 12-10-04 [FR 04-27157]

Plant Variety and Protection Office; supplemental fees; comments due by 2-10-05; published 1-11-05 [FR 05-00472]

Spearmint oil produced in—

Far West; comments due by 2-11-05; published 1-12-05 [FR 05-00581]

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

Overtime services relating to imports and exports:

Agricultural and quarantine inspection services; user fees adjustment; comments due by 2-7-05; published 12-9-04 [FR 04-27053]

BLIND OR SEVERELY DISABLED, COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE

Committee for Purchase From People Who Are Blind or Severely Disabled

Javits-Wagner-O'Day Program:

Nonprofit agencies and central nonprofit agencies; governance standards; comments due by 2-10-05; published 12-3-04 [FR 04-26651]

COMMERCE DEPARTMENT

Census Bureau

Foreign trade statistics:

Automated Export System; rough diamonds; mandatory filing for exports (reexports); comments due by 2-11-05; published 1-12-05 [FR 05-00597]

COMMERCE DEPARTMENT

Government owned inventions; licensing; comments due by 2-7-05; published 1-7-05 [FR 05-00338]

COMMERCE DEPARTMENT

Industry and Security Bureau

Chemical Weapons Convention Regulations:

Requirements update and clarification; comments due by 2-7-05; published 1-6-05 [FR 05-00287]

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Endangered and threatened species:

Critical habitat designations—

Pacific salmon and steelhead; California evolutionary significant units; comments due by 2-8-05; published 12-10-04 [FR 04-26681]

Pacific salmon and steelhead; California evolutionary significant units; comments due by 2-8-05; published 1-4-05 [FR 05-00094]

Fishery conservation and management:

Northeastern United States fisheries—

Atlantic mackerel, squid, and butterfish; comments due by 2-9-05; published 1-10-05 [FR 05-00437]

Marine mammals:

Bottlenose Dolphin Take Reduction Plan; comments due by 2-8-05; published 11-10-04 [FR 04-25113]

Correction; comments due by 2-8-05; published 11-23-04 [FR C4-25113]

COMMERCE DEPARTMENT

Patent and Trademark Office

Cooperative Research and Technology Enhancement Act; implementation; comments due by 2-10-05; published 1-11-05 [FR 05-00461]

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

Semi-annual agenda; Open for comments until further notice; published 12-22-03 [FR 03-25121]

DEFENSE DEPARTMENT

Acquisition regulations:

Pilot Mentor-Protege Program; Open for comments until further notice; published 12-15-04 [FR 04-27351]

ENERGY DEPARTMENT

Meetings:

Environmental Management Site-Specific Advisory Board—

Oak Ridge Reservation, TN; Open for comments until further notice; published 11-19-04 [FR 04-25693]

ENERGY DEPARTMENT

Energy Efficiency and Renewable Energy Office

Commercial and industrial equipment; energy efficiency program:

Test procedures and efficiency standards—

Commercial packaged boilers; Open for comments until further notice; published 10-21-04 [FR 04-17730]

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Electric rate and corporate regulation filings:

Virginia Electric & Power Co. et al.; Open for comments until further notice; published 10-1-03 [FR 03-24818]

ENVIRONMENTAL PROTECTION AGENCY

Air pollution; standards of performance for new stationary sources:

Other solid waste incineration units; comments due by 2-7-05; published 12-9-04 [FR 04-26741]

Air programs; approval and promulgation; State plans for designated facilities and pollutants:

New Mexico; comments due by 2-9-05; published 1-10-05 [FR 05-00341]

Air quality implementation plans:

Preparation, adoption, and submittal—

Vehicle Inspection Maintenance Program; 8-hour ozone national ambient air quality standard requirements; comments due by 2-7-05; published 1-6-05 [FR 05-00177]

Air quality implementation plans; √A√approval and

promulgation; various States; air quality planning purposes; designation of areas:
West Virginia; comments due by 2-9-05; published 1-10-05 [FR 05-00418]
Air quality implementation plans; approval and promulgation; various States:
District of Columbia, Maryland, and Virginia; comments due by 2-11-05; published 1-12-05 [FR 05-00617]
Environmental statements; availability, etc.:
Coastal nonpoint pollution control program—
Minnesota and Texas; Open for comments until further notice; published 10-16-03 [FR 03-26087]
Hazardous waste program authorizations:
New York; comments due by 2-10-05; published 1-11-05 [FR 05-00503]
Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
Azoxystrobin, etc.; comments due by 2-8-05; published 12-10-04 [FR 04-27031]
Solid waste:
Hazardous waste; identification and listing—
Exclusions; comments due by 2-11-05; published 12-28-04 [FR 04-28199]
Water pollution control:
National Pollutant Discharge Elimination System—
Concentrated animal feeding operations in New Mexico and Oklahoma; general permit for discharges; Open for comments until further notice; published 12-7-04 [FR 04-26817]
Water pollution; effluent guidelines for point source categories:
Meat and poultry products processing facilities; Open for comments until further notice; published 9-8-04 [FR 04-12017]

FEDERAL COMMUNICATIONS COMMISSION
Common carrier services:
Interconnection—
Incumbent local exchange carriers unbounding obligations; local competition provisions; wireline services offering advanced telecommunications capability; Open for comments until further notice; published 12-29-04 [FR 04-28531]
Radio stations; table of assignments:
Indiana; comments due by 2-10-05; published 1-5-05 [FR 05-00117]

HEALTH AND HUMAN SERVICES DEPARTMENT
Food and Drug Administration
Reports and guidance documents; availability, etc.:
Evaluating safety of antimicrobial new animal drugs with regard to their microbiological effects on bacteria of human health concern; Open for comments until further notice; published 10-27-03 [FR 03-27113]
Medical devices—
Dental noble metal alloys and base metal alloys; Class II special controls; Open for comments until further notice; published 8-23-04 [FR 04-19179]

HEALTH AND HUMAN SERVICES DEPARTMENT
Inspector General Office, Health and Human Services Department
Medicare and State health programs; fraud and abuse:
Safe harbor provisions and special fraud alerts; intent to develop regulations; comments due by 2-8-05; published 12-10-04 [FR 04-27117]

HOMELAND SECURITY DEPARTMENT
Coast Guard
Anchorage regulations:
Maryland; Open for comments until further notice; published 1-14-04 [FR 04-00749]
Drawbridge operations:
New Jersey; comments due by 2-11-05; published 12-13-04 [FR 04-27217]
Ports and waterways safety:
Port of Mobile and Mobile Ship Channel, AL; security zone; comments due by 2-7-05; published 1-7-05 [FR 05-00379]
Regattas and marine parades:
Severn River, MD; marine events; comments due by 2-7-05; published 12-7-04 [FR 04-26842]

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Inspector General Office:
Subpoenas and production in response to subpoenas or demands of courts or other authorities; comments due by 2-7-05; published 12-7-04 [FR 04-26769]

INTERIOR DEPARTMENT
Fish and Wildlife Service
Endangered and threatened species permit applications
Recovery plans—
Paiute cutthroat trout; Open for comments until further notice; published 9-10-04 [FR 04-20517]
Endangered and threatened species:
Critical habitat designations—
Thread-leaved brodiaea; comments due by 2-7-05; published 12-8-04 [FR 04-26687]

JUSTICE DEPARTMENT
Drug Enforcement Administration
Controlled substances; manufacturers, distributors, and dispensers; registration:
Individual practitioner registration requirements; clarification; comments due by 2-7-05; published 12-7-04 [FR 04-26808]

NATIONAL SCIENCE FOUNDATION
Patents:
Inventions and patents resulting from grants, cooperative agreements, and contracts; electronic reporting and management system requirements; comments due by 2-7-05; published 12-9-04 [FR 04-27034]

NUCLEAR REGULATORY COMMISSION
Environmental statements; availability, etc.:
Fort Wayne State Developmental Center; Open for comments until further notice; published 5-10-04 [FR 04-10516]

NUCLEAR WASTE TECHNICAL REVIEW BOARD
Freedom of Information Act; implementation:
Public information and requests; comments due by 2-11-05; published 12-29-04 [FR 04-28342]

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
Airmen certification:
Air traffic control specialists; mandatory separation age; waiver; comments due by 2-7-05; published 1-7-05 [FR 05-00233]
Airworthiness directives:
Airbus; comments due by 2-7-05; published 12-7-04 [FR 04-26790]
Boeing; comments due by 2-7-05; published 12-7-04 [FR 04-26792]
Eagle Aircraft (Malaysia) Sdn. Bhd.; comments due by 2-11-05; published 1-12-05 [FR 05-00606]
Empresa Brasileira de Aeronautica S.A. (EMBRAER); comments due by 2-11-05; published 1-12-05 [FR 05-00539]
Kelly Aerospace Power Systems; comments due by 2-11-05; published 12-16-04 [FR 04-27283]
Airworthiness standards:
Special conditions—
Dassault-Breguet Model Falcon 10 airplane; comments due by 2-7-05; published 1-6-05 [FR 05-00236]
New Piper Aircraft, Inc.; PA-46-350P and PA-46-500TP model airplanes; comments due by 2-7-05; published 1-7-05 [FR 05-00294]
Special condtions—
Learjet Model 35, 35A, 36, and 36A airplanes; comments due by 2-11-05; published 1-12-05 [FR 05-00557]

TRANSPORTATION DEPARTMENT
National Highway Traffic Safety Administration
Fuel economy standards:

Credits and fines; manufacturer rights and responsibilities in corporate relationships changes context; comments due by 2-11-05; published 12-28-04 [FR 04-28237]

TREASURY DEPARTMENT
Internal Revenue Service
Income taxes:
Pension plan distributions under a phased retirement program; comments due by 2-8-05; published 11-10-04 [FR 04-24874]

LIST OF PUBLIC LAWS

This is the first in a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (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*.

A cumulative List of Public Laws for the second session of the 108th Congress will appear in the issue of January 31, 2005.

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.R. 241/P.L. 109-1

To accelerate the income tax benefits for charitable cash contributions for the relief of victims of the Indian Ocean tsunami. (Jan. 7, 2005; 119 Stat. 3)

Public Laws Electronic Notification Service (PENS)

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TABLE OF EFFECTIVE DATES AND TIME PERIODS—FEBRUARY 2005

This table is used by the Office of the Federal Register to compute certain dates, such as effective dates and comment deadlines, which appear in agency documents. In computing these dates, the day after publication is counted as the first day.

When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

DATE OF FR PUBLICATION	15 DAYS AFTER PUBLICATION	30 DAYS AFTER PUBLICATION	45 DAYS AFTER PUBLICATION	60 DAYS AFTER PUBLICATION	90 DAYS AFTER PUBLICATION
Feb 1	Feb 16	March 3	March 18	April 4	May 2
Feb 2	Feb 17	March 4	March 21	April 4	May 3
Feb 3	Feb 18	March 7	March 21	April 4	May 4
Feb 4	Feb 22	March 7	March 21	April 5	May 5
Feb 7	Feb 22	March 9	March 24	April 8	May 9
Feb 8	Feb 23	March 10	March 25	April 11	May 9
Feb 9	Feb 24	March 11	March 28	April 11	May 10
Feb 10	Feb 25	March 14	March 28	April 11	May 11
Feb 11	Feb 28	March 14	March 28	April 12	May 12
Feb 14	March 1	March 16	March 31	April 15	May 16
Feb 15	March 2	March 17	April 1	April 18	May 16
Feb 16	March 3	March 18	April 4	April 18	May 17
Feb 17	March 4	March 21	April 4	April 18	May 18
Feb 18	March 7	March 21	April 4	April 19	May 19
Feb 22	March 9	March 24	April 8	April 25	May 23
Feb 23	March 10	March 25	April 11	April 25	May 24
Feb 24	March 11	March 28	April 11	April 25	May 25
Feb 25	March 14	March 28	April 11	April 26	May 26
Feb 28	March 15	March 30	April 14	April 29	May 31