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# Rules and Regulations

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

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 842

**RIN 3206–AK73**

### Retirement Coverage of Air Traffic Controllers

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing this interim rule to revise the regulations governing the retirement coverage of air traffic controllers under the Federal Employees' Retirement System. These rules are necessary because of the recent enactment of new statutory provisions relating to the retirement definition of air traffic controllers. These rules also implement the deposit requirement for crediting past service as a second-level supervisor of air traffic controllers for retirement purposes.

**DATES:** This rule is effective June 6, 2005. We must receive your comments by July 6, 2005.

**ADDRESSES:** You may submit comments, identified by RIN number 3206–AK73, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- E-mail: *combox@opm.gov*. Include RIN number 3206–AK73 in the subject line of the message.
- Mail: Mary Ellen Wilson, Manager, Retirement Group, Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415–3200.

**FOR FURTHER INFORMATION CONTACT:** Mary Ellen Wilson, (202) 606–0299.

**SUPPLEMENTARY INFORMATION:** Section 226 of Public Law 108–176, 117 Stat. 2490, the Vision 100—Century of Aviation Reauthorization Act, amends subchapter III of chapter 83 of title 5, United States Code, the statutory provisions for the Civil Service Retirement System (CSRS), and chapter 84 of title 5, United States Code, the Federal Employees' Retirement System (FERS), by adding the definition of *air traffic controller* to each. The new definition of *air traffic controller* includes the class of employees traditionally considered to be air traffic controllers (ATC)—that is, civilian employees of the Department of Transportation or the Department of Defense working in air traffic control facilities or flight service station facilities as either frontline air traffic controllers or immediate supervisors (*i.e.* first-level supervisors) of frontline air traffic controllers. The new definition of *air traffic controller* expands the class of individuals eligible for special ATC retirement benefits to include second-level supervisors (*i.e.*, supervisors of immediate supervisors of frontline ATCs).

Subsection (a)(3)(A) of § 226 of Public Law 108–176 amends 5 U.S.C. 8335(a), the provisions applicable to ATC mandatory retirement under CSRS, to provide that the newly-added second-level supervisory ATCs are not subject to mandatory retirement. Subsection (a)(3)(B) of § 226 similarly amends 5 U.S.C. 8425(a), the provisions applicable to ATC mandatory retirement under FERS.

Subsection (c) provides that the amendments made by § 226 take effect 60 days after the date of enactment (December 12, 2003), making them effective on February 10, 2004. It further provides that, in general, second-level ATC service which was performed before February 10, 2004, is creditable as ATC service for CSRS and FERS retirement purposes when retirement eligibility is based on a separation which occurs on or after February 10, 2004. However, FERS credit for pre-February 10, 2004, second-level supervisory ATC service requires the payment of a deposit.

The deposit with respect to pre-February 10, 2004, FERS second-level supervisory ATC service consists of the amount by which the FERS deductions from pay which would have been required if at the time the service was performed the service had been air traffic controller service exceeds the unrefunded deductions or deposits actually made at the regular employee rate, plus interest. It should be noted that since an individual can receive credit for second-level supervisory ATC service only when the individual's retirement eligibility is based on a separation occurring on or after February 10, 2004, payment of the deposit under subsection (c) would benefit an individual only when the individual's retirement eligibility is based on a separation occurring on or after that date. Section 226 requires no additional contributions for pre-February 10, 2004, second-level supervisory ATC service under CSRS, because the regular and ATC contribution rates are the same under CSRS.

Therefore, OPM is amending 5 CFR part 842, subpart H, the subpart concerning retirement coverage of law enforcement officers, firefighters, and air traffic controllers under FERS. Specifically, subpart H is amended at 5 CFR 842.802 and 842.806, and a new section 842.811 is being added.

In § 842.802 the definition of *air traffic controller* is amended to include second-level supervisors of ATCs.

Section 842.806(a) is amended to exclude second-level supervisors of ATCs from mandatory separation.

Section 842.811 is being added to subchapter H to establish the time, form, and manner in which deposits permitted under subparagraph (c) of § 226 of Public Law 108–176 must be completed. Section 842.811 provides that agencies employing ATCs (*i.e.*, the Department of Transportation and the Department of Defense) are responsible for processing deposit applications and payments.

### Waiver of General Notice of Proposed Rulemaking

Under section 553(b)(3)(B), and (d)(3) of title 5, United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking and for making these rules effective in less than 30 days. The processing of deposits for air traffic controller service by qualifying air traffic controllers under these regulations will affect qualifying employees' retirement coverage and eligibility for special retirement benefits under the air traffic controller provisions. Publication of a general notice on proposed rulemaking would be contrary to the public interest

because it would delay the completion of the deposits of qualifying individuals.

**Executive Order 12866, Regulatory Review**

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

**Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect the retirement benefits of a small number of air traffic controllers.

**List of Subjects in 5 CFR Part 842**

Air traffic controllers, Alimony, Firefighters, Government employees, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management.

**Dan G. Blair,**

*Acting Director.*

■ For the reasons stated in the preamble, the Office of Personnel Management amends 5 CFR part 842 as follows:

## PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

■ 1. The authority citation for part 842 is revised to read as follows:

**Authority:** 5 U.S.C. 8461(g); Secs. 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); Sec. 842.104 also issued under sections 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); Sec. 842.106 also issued under section 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by section 153 of Pub. L. 104–134, 110 Stat. 1321–102; Sec. 842.107 also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251, and section 7(b) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.108 also issued under section 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.213 also issued under 5 U.S.C. 8414(b)(1)(B) and section 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Secs. 842.604 and 842.611 also issued under 5 U.S.C. 8417; Sec. 842.607 also issued under 5 U.S.C. 8416 and 8417; Sec. 842.614 also issued under 5 U.S.C. 8419; Sec. 842.615 also issued under 5 U.S.C. 8418; Sec. 842.703 also issued under section 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388; Sec. 842.707 also issued under section 6001 of Pub. L. 100–203, 101 Stat. 1300; Sec. 842.708 also issued under section 4005 of Pub. L. 101–239, 103 Stat. 2106 and section 7001 of Pub. L. 101–508, 104 Stat. 1388; subpart H also issued under 5 U.S.C. 1104; Sec. 842.810 also issued under section 636 of Appendix C to Pub. L. 106–554 at 114 Stat. 2763A–164; Sec. 842.811 also issued under section 226(c)(2) of Public Law 108–176, 117 Stat. 2529.

### Subpart H—Law Enforcement Officers, Firefighters, and Air Traffic Controllers

■ 2. In § 842.802, revise the definition of *air traffic controller* to read as follows:

**§ 842.802 Definitions.**

* * * * *

*Air traffic controller* means a civilian employee of the Department of Transportation or the Department of Defense in an air traffic control facility or flight service station facility who is actively engaged in the separation and control of air traffic or in providing preflight, inflight, or airport advisory service to aircraft operators, or who is the immediate supervisor of such an employee, as provided by 5 U.S.C. 8401(35)(A). Also included in this definition is a civilian employee of the Department of Transportation or the Department of Defense who is the immediate supervisor of a person described under 5 U.S.C. 2109(1)(B) (*i.e.*, a second-level supervisor), as provided by 5 U.S.C. 8401(35)(B).

* * * * *

■ 3. Amend § 842.806 by revising the first sentence of paragraph (a) to read as follows:

**§ 842.806 Mandatory separation.**

(a) The mandatory separation provisions of 5 U.S.C. 8425 apply to all law enforcement officers and firefighters, including those in secondary positions, and air traffic controllers, with the exception of a civilian employee of the Department of Transportation or the Department of Defense who is the immediate supervisor of a person described under 5 U.S.C. 2109(1)(B) (*i.e.*, a second-level supervisor). * * *

* * * * *

■ 4. Add §842.811 to read as follows:

**§ 842.811 Deposits for second-level supervisory air traffic controller service performed before February 10, 2004.**

(a)(1) *Eligibility—current and former employees, and retirees.* A current or former employee, or a retiree who was employed as a civilian employee of the Department of Transportation or the Department of Defense before February 10, 2004, as the immediate supervisor of a person described in 5 U.S.C. 2109(1)(B) may make a deposit for such service, in a form prescribed by OPM, so that such service may be credited as air traffic controller service for FERS purposes subject to paragraph (h) of this section.

(2) *Eligibility—survivors.* A survivor of a current employee, former employee, or a retiree eligible to make a deposit under paragraph (a)(1) of this section may make a deposit under this section when the current or former employee, or a retiree—

(i) Dies during the period beginning February 10, 2004, and ending November 28, 2006, without submitting an application under this section; or

(ii) Dies after submitting an application to make a deposit under this section within the time limit set out in paragraph (c) of this section without completing a deposit.

(b) *Filing of deposit application.* An individual eligible to make a deposit under paragraph (a) of this section for service described under paragraph (a)(1) of this section must submit a written application to make a deposit for such service with the appropriate office in the agency where such service was performed.

(c) *Time limit for filing application.* An application to make a deposit under this section must be submitted on or before November 28, 2006.

(d)(1) *Amount of deposit.* A deposit under this section shall be computed using distinct periods of service. For the purpose of this section, a distinct period of service means a period of service not interrupted by a break in service of more than 3 days. A deposit may be made for a distinct period of service; however, such a deposit shall be ineffective if deposits are not completed for all distinct periods of service described under paragraph (a) of this section.

(2) The amount of deposit under this section shall be an amount equal to the amount by which the deductions from pay which would have been required under 5 U.S.C. chapter 84, subchapter II, if at the time the service was performed the service had been air traffic controller service exceeds the unrefunded deductions or deposits actually made under 5 U.S.C. chapter 84, subchapter II, with respect to such service, plus interest.

(e)(1) *Interest.* Interest shall be computed as described under paragraphs (2) and (3) of 5 U.S.C. 8334(e). Interest shall be computed for each distinct period of service from the midpoint of the distinct period of service.

(2) The computation of interest is on the basis of 30 days to the month. Interest is computed for the actual calendar time involved in each case.

(f) *Forms of deposit.* A deposit under this section may be made as a single lump sum or in installments.

(g)(1) *Processing deposit applications and payments.* Upon receiving an application for deposit under this section, the agency shall determine whether the application meets the requirements of this section; compute

the deposit, including interest; and advise the applicant of the total amount of deposit due.

(2) The agency shall establish a deposit account showing the total amount due and a payment schedule (unless deposit is made in one lump sum) to record the date and amount of each payment.

(3) If an eligible individual cannot make payment in one lump sum, the agency shall accept installment payments (by allotments or otherwise). The agency, however, is not required to accept individual checks in amounts less than $50.

(4) Payments received by the agency shall be remitted to OPM immediately for deposit to the Civil Service Retirement and Disability Fund.

(5) Once a deposit has been paid in full or otherwise closed out, the agency shall submit the documentation pertaining to the deposit to OPM in accordance with instructions issued by OPM.

(h) *Effect of deposit.* An individual completing a deposit under this section whose entitlement to an annuity is based on a separation from service on or after February 10, 2004, will receive air traffic controller retirement credit for such service, for annuity entitlement and computation purposes, when OPM receives certification that the deposit has been paid in full, and the deposit payment is remitted to the Civil Service Retirement and Disability Fund.

[FR Doc. 05–11134 Filed 6–3–05; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

### 7 CFR Part 1738

**RIN 0572–AB81**

### Rural Broadband Access Loans and Loan Guarantees

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Notice of confirmation of direct final rule.

**SUMMARY:** The Rural Utilities Service (RUS), an agency delivering the United States Department of Agriculture's Rural Development Utilities Programs, gives notice that no adverse comments were received regarding the direct final rule amending its regulations to revise the definition for ''eligible rural community'' as it relates to the rural access broadband loans and loan guarantees program, and confirms the effective date of the direct final rule.

**DATES:** The direct final rule published in the **Federal Register** on April 4, 2005, (70 FR 16930) was effective on May 19, 2005.

**FOR FURTHER INFORMATION CONTACT:** Jonathan Claffey, Acting Assistant Administrator, Telecommunications Program, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., STOP 1590, Room 4056, Washington, DC 20250–1590. Telephone number (202) 720–9554, Facsimile (202) 720–0810.

**SUPPLEMENTARY INFORMATION:**

#### Background

The Rural Utilities Service (RUS) published in the **Federal Register** on January 30, 2003, at 68 FR 4684, a final rule amending its regulations in order to establish the Rural Broadband Access Loan and Loan Guarantee Program as authorized by the Farm Security and Rural Investment Act of 2002 (Pub. L. 101–171) (2002 Act). Section 6103 of the Farm Security and Rural Investment Act of 2002 amended the Rural Electrification Act of 1936, as amended (RE Act), to add Title VI, Rural Broadband Access, to provide loans and loan guarantees to fund the cost of construction, improvement, or acquisition of facilities and equipment for the provision of broadband service in eligible rural communities.

The direct final rule amended § 1738.2, Definitions, to conform the rule to substantive changes in authority. The definition for ''eligible rural community'' in section 601(b)(2) of the Rural Electrification Act of 1936 (7 U.S.C. 950bb(b)(2)) was amended on January 23, 2004, by section 772 of Pub. L. 108–199, of the Consolidated Appropriations Act, 2004 to eliminate the requirement that a community exist outside a standard metropolitan statistical area. The rule incorporated language of the revised statute and explained RUS'' interpretation of the language.

#### Confirmation of Effective Date

This is to confirm the effective date of May 19, 2005, for the direct final rule, 7 CFR 1738, Rural Broadband Access Loans and Loan Guarantees, published in the **Federal Register** on April 4, 2005.

Dated: May 26, 2005.

**Curtis M. Anderson,**

*Acting Administrator, Rural Utilities Service.*

[FR Doc. 05–11137 Filed 6–3–05; 8:45 am]

BILLING CODE 3410–15–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 23

**[Docket No. CE224, Special Condition 23–164–SC]**

### Special Conditions; West Star Aviation, EFIS on the Cessna 441; Protection of Systems for High Intensity Radiated Fields (HIRF)

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final special conditions; request for comments.

**SUMMARY:** These special conditions are issued to West Star Aviation, 796 Heritage Way, Grand Junction, CO 81506, for a Supplemental Type Certificate for the Cessna 441 Conquest. This airplane will have novel and unusual design features when compared to the state of technology envisaged in the applicable airworthiness standards. These novel and unusual design features include the installation of an electronic flight instrument system (EFIS) in the form of two digital altimeters. The digital altimeters will be Honeywell/Ametek AM–250 models, one on the pilot side and one on the copilot side, for which the applicable regulations do not contain adequate or appropriate airworthiness standards for the protection of these systems from the effects of high intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to the airworthiness standards applicable to these airplanes.

**DATES:** The effective date of these special conditions is May 18, 2005. Comments must be received on or before July 6, 2005.

**ADDRESSES:** Comments may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE–7, Attention: Rules Docket Clerk, Docket No. CE224, Room 506, 901 Locust, Kansas City, Missouri 64106. All comments must be marked: Docket No. CE224. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

**FOR FURTHER INFORMATION CONTACT:** Wes Ryan, Aerospace Engineer, Standards Office (ACE–110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4127.

**SUPPLEMENTARY INFORMATION:** The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA, therefore, finds that good cause exists for making these special conditions effective upon issuance.

## Comments Invited

Interested persons are invited to submit such written data, views, or arguments, as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. CE224.'' The postcard will be date stamped and returned to the commenter.

## Background

West Star Aviation made application to the FAA for a new Supplemental Type Certificate for the Cessna 441. The Cessna 441 is currently approved under TC No. A28CE. The proposed modification incorporates a novel or unusual design features, such as digital avionics consisting of digital air data computers that are vulnerable to HIRF external to the airplane.

## Type Certification Basis

Under the provisions of 14 CFR part 21, § 21.101, West Star Aviation must show that the Cessna 441 aircraft meets the original certification basis for the airplane, as listed on Type Data Sheet A28CE, the additional certification requirements added for the Honeywell/Ametek AM–250 system, exemptions, if any; and the special conditions adopted by this rulemaking action. The rules that were applied at the amendment appropriate for the application data for this STC are 23.1301 at Amendment 23–20, 23.1309 at Amendment 23–49, 23.1311 at Amendment 49, 23.1321 at Amendment 49, 23.1322 at Amendment 43, 23.1325 at Amendment 50, and 23.1543 at Amendment 50.

## Discussion

If the Administrator finds that the applicable airworthiness standards do not contain adequate or appropriate safety standards because of novel or unusual design features of an airplane, special conditions are prescribed under the provisions of § 21.16.

Special conditions, as appropriate, as defined in § 11.19, are issued in accordance with § 11.38 after public notice and become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model already included on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101.

## Novel or Unusual Design Features

West Star Aviation plans to incorporate certain novel and unusual design features into the Cessna 441 airplane for which the airworthiness standards do not contain adequate or appropriate safety standards for protection from the effects of HIRF. These features include EFIS, which are susceptible to the HIRF environment, that were not envisaged by the existing regulations for this type of airplane.

## Protection of Systems From High Intensity Radiated Fields (HIRF):

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

Furthermore, the HIRF environment has undergone a transformation that was not foreseen when the current requirements were developed. Higher energy levels are radiated from transmitters that are used for radar, radio, and television. Also, the number of transmitters has increased significantly. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling to cockpit-installed equipment through the cockpit window apertures is undefined.

The combined effect of the technological advances in airplane design and the changing environment has resulted in an increased level of vulnerability of electrical and electronic systems required for the continued safe flight and landing of the airplane. Effective measures against the effects of exposure to HIRF must be provided by the design and installation of these systems. The accepted maximum energy levels in which civilian airplane system installations must be capable of operating safely are based on surveys and analysis of existing radio frequency emitters. These special conditions require that the airplane be evaluated under these energy levels for the protection of the electronic system and its associated wiring harness. These external threat levels, which are lower than previous required values, are believed to represent the worst case to which an airplane would be exposed in the operating environment.

These special conditions require qualification of systems that perform critical functions, as installed in aircraft, to the defined HIRF environment in paragraph 1 or, as an option to a fixed value using laboratory tests, in paragraph 2, as follows:

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

| Frequency | Field strength* (volts per meter) | |
|---|---|---|
| | Peak | Average |
| 10 kHz–100 kHz | 50 | 50 |
| 100 kHz–500 kHz | 50 | 50 |
| 500 kHz–2 MHz | 50 | 50 |
| 2 MHz–30 MHz | 100 | 100 |
| 30 MHz–70 MHz | 50 | 50 |
| 70 MHz–100 MHz | 50 | 50 |
| 100 MHz–200 MHz | 100 | 100 |
| 200 MHz–400 MHz | 100 | 100 |
| 400 MHz–700 MHz | 700 | 50 |
| 700 MHz–1 GHz | 700 | 100 |
| 1 GHz–2 GHz | 2000 | 200 |
| 2 GHz–4 GHz | 3000 | 200 |
| 4 GHz–6 GHz | 3000 | 200 |
| 6 GHz–8 GHz | 1000 | 200 |
| 8 GHz–12 GHz | 3000 | 300 |
| 12 GHz–18 GHz0 | 2000 | 200 |

| Frequency | Field strength* (volts per meter) | |
|---|---|---|
| | Peak | Average |
| 18 GHz–40GHz ..... | 600 | 200 |

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

or,

(2) The applicant may demonstrate by a system test and analysis that the electrical and electronic systems that perform critical functions can withstand a minimum threat of 100 volts per meter, electrical field strength, from 10 kHz to 18 GHz. When using this test to show compliance with the HIRF requirements, no credit is given for signal attenuation due to installation.

A preliminary hazard analysis must be performed by the applicant for approval by the FAA to identify either electrical or electronic systems that perform critical functions. The term ''critical'' means those functions, whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane. The systems identified by the hazard analysis that perform critical functions are candidates for the application of HIRF requirements. A system may perform both critical and non-critical functions. Primary electronic flight display systems, and their associated components, perform critical functions such as attitude, altitude, and airspeed indication. The HIRF requirements apply only to critical functions.

Compliance with HIRF requirements may be demonstrated by tests, analysis, models, similarity with existing systems, or any combination of these. Service experience alone is not acceptable since normal flight operations may not include an exposure to the HIRF environment. Reliance on a system with similar design features for redundancy as a means of protection against the effects of external HIRF is generally insufficient since all elements of a redundant system are likely to be exposed to the fields concurrently.

## Applicability

As discussed above, these special conditions are applicable to the Cessna 441. Should West Star Aviation apply at a later date for a supplemental type certificate to modify any other model on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

## Conclusion

This action affects only certain novel or unusual design features on one model of airplane. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

## List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

## Citation

The authority citation for these special conditions is as follows:

**Authority:** 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.101; and 14 CFR 11.38 and 11.19.

## The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Cessna 441 airplane modified by West Star Aviation to add two Honeywell/Ametek AM–250 digital air data computers.

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

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

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

Issued in Kansas City, Missouri on May 18, 2005.

**John R. Colomy,**

*Acting Manager, Small Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 05–10907 Filed 6–3–05; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF AGRICULTURE

## Forest Service

## 36 CFR Part 228

**RIN 0596–AC17**

## Clarification as to When a Notice of Intent To Operate and/or Plan of Operation Is Needed for Locatable Mineral Operations on National Forest System Lands

**AGENCY:** Forest Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the regulations governing the use of National Forest System lands in connection with operations authorized by the United States mining laws. The final rule clarifies the regulations at 36 CFR 228.4(a) concerning the requirements for mining operators to submit a ''notice of intent'' to operate and requirements to submit and obtain an approved ''plan of operations.'' Clarification of the requirements in § 228.4(a) are necessary to minimize adverse environmental impacts to National Forest System lands and resources.

**DATES:** The final rule is effective July 6, 2005.

**ADDRESSES:** The documents used in developing this final rule are available for inspection and copying at the office of the Director, Minerals and Geology Management, Forest Service, USDA, 1601 N. Kent Street, 5th Floor, Arlington, VA 22209, during regular business hours (8:30 a.m. to 4:30 p.m.), Monday through Friday, except holidays. Those wishing to copy or inspect these documents are asked to call ahead (703) 605–4818 to facilitate access to the building.

**FOR FURTHER INFORMATION CONTACT:** Mike Doran, Minerals and Geology Management Staff, (703) 605–4818.

**SUPPLEMENTARY INFORMATION:**

## Background and Need for Final Rule

For purposes of this final rule, all references to 36 CFR part 228, Subpart A, without qualifying terms ''interim rule'' or ''final rule,'' refer to language

in that subpart in effect prior to issuance of the interim rule (69 FR 41428, Jul. 9, 2004).

Since 1974, the Forest Service has applied the regulations now set forth at 36 CFR part 228, subpart A, to minimize adverse environmental impacts from mineral operations authorized by the United States mining laws by requiring mineral operators to file proposed plans of operations for mineral operations which the District Ranger determines will likely cause significant surface disturbance of National Forest System (NFS) lands. These regulated operations may include, but are not limited to, the construction of storage facilities, mills, and mill buildings; placement of trailers or other personal equipment; residential occupancy and use; storage of vehicles and equipment; excavation of holes, trenches, and pits by mechanized or non-mechanized procedures; diversion of water; use of sluice boxes and portable devices for separating gold from sediments; off highway vehicle use; road and bridge construction; handling and disposal of mine and other wastes; and signing and fencing to restrict public use of NFS lands affected by mining operations. The Forest Service and the courts had consistently required locatable mineral operators to obtain approval of a plan of operations whenever such operations would likely cause a significant surface disturbance, whether or not those operations involve mechanized earth moving equipment or the cutting of trees.

However, two years ago, a District Court departed from this consistent interpretation and ruled that 36 CFR 228.4(a)(2)(iii) allowed a mining operation to occur on NFS lands without prior notification to the Forest Service or prior Forest Service approval of a plan of operations when the operation did not involve mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, irrespective of the surface disturbing impacts that the operation would likely cause. This unprecedented ruling severely restricted the ability of the Forest Service to regulate miners engaged in surface disturbing operations not involving mechanized earth moving equipment or the cutting of trees, but have serious environmental impacts, including impacts to water quality, visual quality, natural features, fisheries, and species listed under the Endangered Species Act, as well as conflicts with other NFS users.

To prevent confusion as to the proper interpretation of 36 CFR 228.4(a), the Forest Service published an interim rule in the **Federal Register** on July 9, 2004 (69 FR 41428), which took effect on August 9, 2004. The interim rule sought to clarify that the requirement to file a notice of intent to operate with the District Ranger is mandatory in any situation in which a mining operation might cause disturbance of surface resources, regardless of whether that operation would involve the use of mechanized earth moving equipment, such as a bulldozer or backhoe, or the cutting of trees. The interim rule also sought to eliminate possible confusion by more specifically addressing the issue of what level of operation requires prior submission of a notice of intent to operate and what level of operation requires prior submission and approval of a plan of operations. The interim rule directs a mining operator to submit a notice of intent to operate when the proposed operation might cause a disturbance of surface resources. After a notice of intent to operate is submitted, the District Ranger would determine whether the proposed operations would likely cause a significant disturbance of surface resources. If the District Ranger determines that the proposed operations would likely cause a significant disturbance of surface resources, the District Ranger would notify the operator that prior submission and approval of a plan of operations is required before the operations commence.

The opportunity for public comment was not legally required to promulgate the interim rule. Nonetheless, the Forest Service provided a 60-day comment period and stated that comments received on the interim rule would be considered in adopting a final rule. The Department has considered those comments and has modified several provisions of the interim rule in this final rule.

## Analysis of Public Comment

### *Overview*

The Forest Service received 2,373 responses to the interim rule (69 FR 41428), including fifteen responses which said they were responding to the interim rule, but in actuality were nonresponsive and dealt with different issues, such as timber harvesting and investment opportunities. The total number also includes three challenges to the interim rule: (1) A notice of appeal of the interim rule, (2) a petition seeking the repeal of the interim rule pursuant to rule making requirements that give an interested person the right to petition repeal of the rule at 5 U.S.C. 553(e), and (3) a lawsuit seeking to enjoin the interim rule. The three challenges to the interim rule were disposed of separately and consequently were not independently considered in the development of the final rule. However, every issue raised in the three challenges to the interim rule also was raised in one or more of the comments submitted on the interim rule. Also included in the total number were several responses received after the comment period ended.

There were 2,230 comments in favor of the interim rule. Most were an identical one-page email supporting the provisions in the interim rule, namely the long-standing requirement that miners either notify the Forest Service or obtain Forest Service approval before conducting proposed mining operations. Several industry organizations submitted detailed comments which expressed general support for the interim rule, but suggested specific revisions of the rule's text to make its requirements clearer. Other letters of support came from State regulatory agencies, environmental groups, and the United States Environmental Protection Agency.

Most of the 125 comments in opposition to the interim rule were submitted by individuals, many of whom identified themselves as miners or prospectors engaging in small scale mining operations.

All comments submitted on the interim rule and the administrative record are available for review in the Office of the Director, Minerals and Geology Management Staff, 1610 N. Kent St., 5th Floor, Arlington, Virginia, 22209, during regular business hours (8 a.m. to 5 p.m.), Monday through Friday, except Federal holidays. Those wishing to view the comments and the administrative record should call in advance to arrange access to the building (*see* **FOR FURTHER INFORMATION CONTACT**).

### *Response to Comments*

1. Comments on the Validity of the Interim Rule's Promulgation

*Comment:* Many respondents stated that the Forest Service cannot adopt a rule altering the interpretation of § 228.4(a), a portion of the rule promulgated in 1974, and adopted in *United States* v. *Lex*, 300 F. Supp. 2d 951 (E.D. Cal. 2003).

*Response:* Nothing in *Lex* could, or purports to, restrict the Forest Service's clear authority to promulgate rules regulating the effects of locatable mineral resources on NFS lands. Indeed, the court in *Lex*, after noting that it was ''not unsympathetic to the problem posed by the [former 36 CFR 228.4(a)] in this case,'' specifically stated that ''[t]he solution to this problem* * * is

to amend the regulations * * *'' *United States* v. *Lex*, 300 F. Supp. 2d 951, 962 n.10 (E.D. Cal. 2003). Thus, the contention that *Lex* somehow precludes the Forest Service from adopting the precise solution which the decision identified is untenable.

*Comment:* Four respondents said that the interim rule is a substantive rule which substantially, and improperly, changes exemptions to plan of operations and notice of intent to operate requirements previously applied to small scale mining operations. These comments appear to involve the application of the Administrative Procedure Act (APA) to the promulgation of the interim rule.

*Response:* These comments are predicated upon the interpretation of § 228.4(a) adopted in *United States* v. *Lex*, 300 F. Supp. 2d 951 (E.D. Cal. 2003). As the preamble to the interim rule notes, the departure from the long-standing interpretation of § 228.4(a) is not the interim rule, but *Lex* itself. The technical amendments to § 228.4(a) set forth in the interim rule simply reinforce the long-standing interpretation of that provision held by the Forest Service and previous reviewing courts that a locatable mineral operator may be required to submit a notice of intent to operate or to submit and obtain approval of a proposed plan of operations whether or not the proposed operations would involve the cutting of trees or the use of mechanized earth moving equipment, as do the amendments set forth in the final rule. Similarly, the technical amendments to § 228.4(a) in the interim rule simply reinforce the long-standing interpretation of that provision held by the Forest Service and previous reviewing courts that a locatable mineral operator is required to obtain approval of a proposed plan of operations whenever the operator or the applicable District Ranger determines that the proposed operations will likely result in significant disturbance of NFS lands and resources, irrespective of whether the operator first was required to submit a notice of intent to operate, as do the amendments set forth in the final rule.

Moreover, even if the changes to § 228.4(a) adopted in the interim rule were not technical amendments to that provision, the interim rule was proper under the APA given that the Department found for good cause that prior notice and public comment on the rule was ''impracticable, unnecessary, or contrary to the public interest'' (5 U.S.C. 553(b)(3)(B)).

*Comment:* A number of respondents stated that the Forest Service violated the public participation requirements of the Forest and Rangeland Renewable Resources Planning Act (RPA) (16 U.S.C. 1612(a)) by not giving the public notice and an opportunity to comment before adopting the interim rule.

*Response:* The public participation provisions of 16 U.S.C. 1612(a) do not mandate prior notice and an opportunity to comment before the Forest Service adopts a rule in every case. Rather, it requires the Forest Service to give ''adequate'' notice and an opportunity to comment. The Forest Service provided the public adequate notice and opportunity to comment in connection with the technical amendment of § 228.4(a) in the interim rule by providing for a public comment period on the interim rule and considering those comments in adopting the final rule.

*Comment:* Several respondents commented that the public participation requirements of RPA makes the exceptions of APA's rule making requirements at 5 U.S.C. 553(b)(3) and 553(d) inapplicable to the interim rule.

*Response:* The exceptions to the APA's requirements for prior notice and opportunity for public comment on the adoption of rules and for a delay in the effective date of certain rules are not overridden by the public participation requirements of RPA. That provision clearly did not specifically repeal or be construed as an implicit repeal of the rule making requirements at 5 U.S.C. 553(b)(3)(A)–(B) or 553(d)(1)–(3).

'' 'It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.' '' *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (citation omitted). Indeed, an implied partial repeal will not be recognized unless there is an irreconcilable conflict between the two statutes at issue or the later statute covers the whole subject of the earlier one and is clearly intended as a substitute. '' 'But, in either case, the intention of the legislature to repeal must be clear and manifest * * *' '' (alteration in original) (citation omitted). Moreover, '' '[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary.' '' at 155 (alteration in original) (citation omitted).

In adopting the public participation requirements of RPA, Congress' intention to repeal APA's exceptions at 5 U.S.C. 553(b)(3)(A)–(B) and 553(d)(1)–(3), insofar as Forest Service rules are concerned, certainly is not manifest. Furthermore, it is not necessary to read 16 U.S.C. 1612(a) as repealing the exceptions set forth at 5 U.S.C. 553(b)(3)(A)–(B) to the APA's requirement for prior notice and opportunity for public comment on the adoption of rules in E.O. to make 16 U.S.C. 1612(a) work, even assuming that 16 U.S.C. 1612(a) is applicable to the adoption of the interim rule. Adequate notice and opportunity to comment for purposes of 16 U.S.C. 1612(a) can be provided by accepting public comments on an interim rule which are considered in the adoption of the final rule, as is being done in the context of the revision of § 228.4(a). Nor is it necessary to read 16 U.S.C. 1612(a) as repealing the exceptions set forth at 5 U.S.C. 553(d)(1)–(3) to the APA's requirements for a delay in the effective date of certain rules in E.O. to make 16 U.S.C. 1612(a) work, even assuming that 16 U.S.C. 1612(a) is applicable to the adoption of the interim rule. Agencies can delay the effective dates of rules, as was done in the context of the interim rule.

*Comment:* Several respondents said that the interim rule's violation of the public participation requirements of RPA (16 U.S.C. 1612(a)) also constitutes a violation of the Congressional Review Requirements at 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

*Response:* Given that the Forest Service did not violate the public participation requirements of RPA in promulgating the interim rule for the reasons previously discussed, there is no cumulative violation of the Congressional review requirements as suggested by the respondents.

*Comment:* Five respondents commented that the Forest Service violated the Regulatory Flexibility Act by failing to prepare and make available for public comment both an initial and a final regulatory flexibility analysis on the rule and failed to list the interim rule on its regulatory flexibility agenda. Additionally, those respondents stated that these violations of the Regulatory Flexibility Act also constitutes a violation of the Congressional review requirements at 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

*Response:* The obligation to prepare and make available for public comment an initial regulatory flexibility analysis is triggered ''[w]henever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule * * *'' (5 U.S.C. 603(a)). As previously discussed, the interim rule made technical, rather than substantive, changes to § 228.4(a). Under the APA, a rulemaking which does not constitute a substantive rule is exempted from the notice and comment requirements of the Act by 5 U.S.C.

553(b)(3)(A) (*Animal Legal Defense Fund* v. *Quigg*, 932 F.2d 920, 927 (Fed. Cir. 1991)). Further, even if the changes which the interim rule made to § 228.4(a) were properly viewed as substantive changes to that provision, the APA still would not have required general notice of proposed rulemaking for the promulgation of the interim rule because the Department, for good cause, found that notice and public procedure on the interim rule was impracticable and contrary to the public interest pursuant to another of the Act's exception at 5 U.S.C. 553(b)(3)(B). Moreover, no other law required a general notice of proposed rulemaking for the interim rule. Consequently, the Forest Service was not under an obligation to prepare and make available for public comment an initial regulatory flexibility analysis for the interim rule because general notice of proposed rulemaking was not required for the promulgation of that rule.

The obligation to prepare a final regulatory flexibility analysis is triggered ''[w]hen an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking * * *.'' 5 U.S.C. 604(a). The interim rule is not a final rule. As the interim rule explained, ''[c]omments received on this interim rule will be considered in adoption of a final rule, notice of which will be published in the **Federal Register**. The final rule will include a response to comments received and identify any revisions made to the rule as a result of the comments'' (69 FR 41428, July 9, 2004).

Any failure to list the interim rule on the Forest Service's regulatory flexibility agenda prior to the rule's adoption does not constitute a violation of the Regulatory Flexibility Act which specifically provides that ''[n]othing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda * * *.'' 5 U.S.C. 602(d).

Given that the Forest Service did not violate the Regulatory Flexibility Act in promulgating the interim rule, there is no cumulative violation of the Congressional review requirements as suggested by the respondents.

*Comment:* Several respondents stated that the interim rule is a major rule for purposes of the Regulatory Flexibility Act, 5 U.S.C. 801–808.

*Response:* On March 15, 2004, the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB) found that the interim rule proposed for § 228.4(a) was not a major rule for purposes of 5 U.S.C. 801–808.

*Comment:* Three respondents said that the Forest Service violated the Congressional review requirements of the Regulatory Flexibility Act by failing to submit required reports on the rule to each House of Congress and the Comptroller General.

*Response:* The Forest Service did comply with this requirement. On July 19, 2004, the Forest Service submitted a Congressional Rulemaking Report to the House of Representatives (Congressman Hastert), the Senate (Vice President Cheney), and the General Accounting Office (Comptroller General Walker), containing the provision of the interim rule and therefore meeting the Congressional rulemaking reporting requirements in the Act.

*Comment:* Two respondents commented that the Forest Service violated the Unfunded Mandates Reform Act by failing to prepare a required written statement, failing to seek input from elected officers of State, local and tribal governments, and failing to consider regulatory alternatives to the rule. Those respondents further stated that these violations of the Act also constitute violations of the Congressional review requirements.

*Response:* The obligation to prepare the written statement required by the Unfunded Mandates Reform Act (act) (2 U.S.C. 1532) is triggered by the intention to publish certain ''general notice[s] of proposed rulemaking'' or ''any final rule for which a general notice of proposed rulemaking was published.'' As previously discussed, the interim rule is neither a general notice of proposed rulemaking or a final rule. Therefore, the Forest Service was not under an obligation to prepare a statement pursuant to the act in promulgating the interim rule.

The obligation to seek input from elected officers of State, local, and tribal governments as required by the act at § 1532 is triggered by ''the development of regulatory proposals containing significant Federal intergovernmental mandates.'' 2 U.S.C. 1534(a). For purposes of this act at § 15342, the term ''Federal intergovernmental mandate'' means:

(A) any provision in legislation, statute, or regulation that—

(i) would impose [certain] enforceable dut[ies] upon State, local, or tribal governments * * *; or

(ii) would reduce or eliminate the amount of [certain] authorization[s] of appropriations * * *; [or]

(B)[certain] provision[s] in legislation, statute, or regulation that relate[] to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority * * *. 2 U.S.C. 658(5), 1502(1).

Nothing in the interim rule imposes enforceable duties upon State, local, or tribal governments, reduces or eliminates appropriations, or relates to an existing program under which money is provided annually to State, local, or tribal governments. Consequently, the Forest Service was not under an obligation to seek input from elected officers of State, local, and tribal governments pursuant to this act in promulgating the interim rule.

Compliance with the requirements of § 1535 of this act concerning consideration of regulatory alternatives to a rule is mandated ''before promulgating any rule for which a written statement is required under section 1532 of this title * * *'' (2 U.S.C. 1535(a)). For the reasons previously stated, the Forest Service was not under an obligation to prepare a statement pursuant to § 1532 of the act in promulgating the interim rule.

Given that the Forest Service did not violate the Unfunded Mandates Reform Act in promulgating the interim rule, there is no cumulative violation of the Congressional review requirements.

*Comment:* Two respondents said that the Forest Service violated the Paperwork Reduction Act by failing to have a control number for the collection of information in paragraph 228.4(a) of the interim rule.

*Response:* The OMB control number for § 228.4 is 0596–0022 and was current upon adoption of the interim rule and is approved through July 31, 2005. While the interim rule amended the language of § 228.4(a), the amended language was a clarification which did not alter the meaning of that provision and did not change the scope of information or number of burden hours associated with this collection number. Therefore, the Forest Service did not need to obtain another control number or modify control number 0596–0022 prior to the adoption of the interim rule. Nothing in the Paperwork Reduction Act renders the interim rule or the final rule unenforceable.

*Comment:* Two respondents commented that the Forest Service violated the Endangered Species Act (ESA) by failing to engage in formal consultation with the Department of the Interior before publishing the rule. Those respondents further said that the violation of the ESA also constitutes a violation of Congressional review requirements.

*Response:* The assertion that formal consultation was required for the

promulgation of the interim rule is predicated upon a conclusion that the purpose of the interim rule was to prevent undue degradation coupled with an assumption that the undue degradation of concern involved threatened and endangered species. However, the purpose of the interim rule is not the prevention of undue degradation as is made evident by the rule's preamble. Indeed, the term ''undue degradation'' is not employed in either the text of the interim rule or its preamble.

Moreover, the interim rule itself has no impact on any threatened or endangered specie or the habitat of a threatened or endangered specie. Rather, in the context of 36 CFR part 228, subpart A, the action which the Forest Service takes which might have such an effect is approving a proposed plan of operations. The ESA consequently imposes no obligation upon the Forest Service to engage in formal consultation before the agency receives a proposed plan of operations from a miner.

Given that the Forest Service did not violate the ESA in promulgating the interim rule, there is no cumulative violation of Congressional review requirements.

*Comment:* Several respondents said that the Forest Service violated the National Environmental Policy Act (NEPA) by failing to prepare an environmental impact statement (EIS).

*Response:* The respondents' assertion that an EIS was required for the promulgation of the interim rule is solely predicated upon the conclusion that the rule's promulgation was a major Federal action which, under NEPA, requires the preparation of an EIS. However, NEPA requires the preparation of an EIS only for those major Federal actions significantly affecting the quality of the human environment (42 U.S.C. 4332(2)(C)) and does not require an EIS for a major action which does not have a significant impact on the environment. *Sierra Club* v. *Hassell*, 636 F.2d 1095, 1097 (5th Cir. 1981); *Cf. Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

The respondents do not identify or describe the significant environmental impacts which they believe resulted from promulgation of the interim rule. In fact, the interim rule has no impact on the human environment. For these reasons, NEPA did not require the preparation of an EIS prior to the promulgation of the interim rule.

*Comment:* Several respondents said that the Forest Service violated NEPA by failing to prepare both an environmental assessment (EA) and an EIS.

*Response:* The respondents did not explain the reasons for their conclusion that the interim rule should have been deemed a proposal for major Federal action significantly affecting the quality of the human environment such that an EIS should have been prepared in connection with the promulgation of the rule. Nor did the respondents explain why they concluded that an EA should have been prepared in connection with the promulgation of the interim rule. However, the comments do seem to imply that the interim rule should not have been categorically excluded from documentation in an EIS or an EA because extraordinary circumstances listed in Forest Service Handbook (FSH) 1905.15, section 30.3, paragraphs 1 & 2 are present. The comments also appear to suggest that an EA must always be prepared prior to the preparation of an EIS.

The assumption that an EA always must be prepared prior to an EIS clearly is incorrect, because an EA is not necessary if the agency has decided to prepare an EIS (40 CFR 1501.3(a)).

The Department has not independently identified a reason to conclude that the interim rule was inappropriately categorically excluded from documentation in an EIS or an EA. The interim rule squarely fits within the Forest Service's categorical exclusion for ''[r]ules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.'' (FSH 1909.15, sec. 31.1b, para 2).

Even if an action falls within a category of proposed actions normally excluded from further analysis and documentation in an EIS or an EA, the presence of certain resource conditions, such as wilderness or flood plains, specified in the Forest Service's NEPA procedures may, in some cases, constitute extraordinary circumstances warranting such analysis and documentation. Nonetheless, the mere existence of such resource conditions is not determinative in deciding whether it is proper to categorically exclude an action from documentation in an EIS or an EA. The Forest Service's NEPA procedures specifically provide that ''[t]he mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion. It is the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.''

Although the interim rule will govern locatable mineral operations which might affect the resource conditions listed in FSH 1909.15, section 31.1b, paragraph 2, the distinction quoted in the previous paragraph is crucial because the interim rule itself has no impact on the human environment, including the specified resource conditions. For these reasons, NEPA did not require the preparation of both an EA and an EIS prior to the promulgation of the interim rule.

*Comment:* A number of respondents stated that the Forest Service violated NEPA by failing to consider all reasonable alternatives to the rule.

*Response:* NEPA only requires consideration of alternatives to ''proposals for * * * major Federal actions significantly affecting the quality of the human environment'' (42 U.S.C. 4332(2)(C)(iii)). As previously discussed, the promulgation of the interim rule does not constitute a major Federal action significantly affecting the quality of the human environment.

Additionally, the interim rule does not involve unresolved conflicts concerning the alternative uses of available resources. Both the original and revised (interim rule) § 228.4(a) provide for the development of locatable mineral resources upon the completion of certain procedural requirements. Consequently, the promulgation of the interim rule was not a ''proposal which involves unresolved conflicts concerning alternative uses of available resources'' requiring the consideration of alternatives.

For these reasons, NEPA did not require the Forest Service to consider all reasonable alternatives to the interim rule.

*Comment:* A number of respondents commented that the Forest Service violated NEPA by failing to consider and disclose the direct, indirect, and cumulative effects of the interim rule and its reasonable alternatives. These respondents also faulted the Forest Service for failing to consider the cumulative adverse socio-economic impacts of the interim rule in connection with other Federal regulatory actions.

*Response:* The respondents did not identify or describe the direct, indirect, or cumulative impacts which they believe resulted from promulgation of the interim rule which the Forest failed to consider or assess. The respondents also neglected to identify the other Federal regulatory actions finalized and proposed in recent years, which work to increase the cumulative cost of the interim rule, while also diminishing marginal environmental benefit.

As previously discussed, the Department has not independently identified an impact on the environment

which would result from the promulgation of the interim rule, nor was the consideration of reasonable alternatives required given that the interim rule was properly categorically excluded from documentation in an EIS or an EA (40 CFR 1508.4).

The Department also disagrees with the respondents' statements that there have been other Federal regulatory actions proposed or finalized in recent years which would have, or have, had any impact on locatable mineral operations proposed or occurring on NFS lands. The rules governing these operations at 36 CFR part 228, subpart A, have not been substantively changed since their promulgation in 1974. Nor has a rule contemplating such a change been proposed.

For these reasons, NEPA did not require the consideration and disclosure of the direct, indirect, and cumulative effects of the interim rule and its reasonable alternatives.

*Comment:* Several respondents stated the Forest Service violated NEPA by failing to use reliable methodology.

*Response:* The respondents did not explain why they believe that the Forest Service used unreliable methodology in promulgating the interim rule. In fact, the totality of the respondents' description of this issue consists of the statement that ''[t]he Interim Rule fails to use reliable methodology in violation of NEPA and its implementing regulations.''

The Department's review of the interim rule identified no instance where unreliable methodology was used in the rule's promulgation.

*Comment:* Several respondents said that the Forest Service violated NEPA by failing to conduct scoping on the rule.

*Response:* The Council on Environmental Quality regulations implementing NEPA only require scoping where an agency is preparing an EIS (40 CFR 1501.4(d)). As previously discussed, NEPA did not require the preparation of an EIS prior to the promulgation of the interim rule. Accordingly, NEPA did not require scoping prior to the promulgation of the interim rule.

*Comment:* Two respondents said that the Forest Service violated 40 CFR part 25 by failing to meet the requirements for public participation set forth in that part. Those respondents also stated that the Forest Service's violation of the public participation requirement at 40 CFR part 25 also constitutes a violation of Congressional review requirements.

*Response:* The regulations at 40 CFR part 25 govern ''public participation in operations under the Clean Water Act (Pub. L. 95–217), the Resource Conservation and Recovery Act (Pub. L. 94–580), and the Safe Drinking Water Act (Pub. L. 93–523).'' The Forest Service's regulation of the impacts of locatable mineral operations on NFS resources is not an activity undertaken pursuant to any of these acts. Rather, the interim rule was adopted pursuant to authority conferred upon the Forest Service by portions of the Organic Administration Act (16 U.S.C. 478, 551). Consequently, 40 CFR part 25 is inapplicable to the adoption of the interim rule.

Given that the Forest Service did not violate 40 CFR part 25 in promulgating the interim rule, there is no cumulative violation of Congressional reporting requirements.

*Comment:* Two respondents stated that the interim rule is inconsistent with Executive Order (E.O.) 13132 because it would permit the Forest Service to regulate locatable mineral operations which take place in waters which the respondents believe is committed to States, not the Federal government. More specifically, those respondents said that the Forest Service, in promulgating the interim rule, violated the E.O. by failing to make a required disclosure as to the effect of the rule upon principles of Federalism. Those respondents also commented that the Forest Service violated the E.O. by failing to consult with affected State and local officials and that a violation of the E.O. also constitutes a violation of the Congressional reporting requirements.

*Response:* For purposes of 36 CFR part 228, subpart A, there can be no doubt that the Forest Service's authority to regulate the disturbance of NFS surface resources resulting from locatable mineral operations generally encompasses the effects of those operations on water, streambeds, or other submerged lands. Section 228.8 characterizes fisheries habitat as a ''National Forest surface resource'' and requires rehabilitation of fisheries habitat. Fisheries habitat, of course, can consist of nothing other than water, streambeds, or other submerged lands. Only where adjudication has established that watercourses were navigable at the time that a State was admitted to the Union are those resources solely subject to State regulation. Thus, the Forest Service has clear authority to regulate the effects which locatable mineral operations have on water, streambeds, or other submerged lands, whether or not those operations are taking place in waters themselves, except where adjudication has established that watercourses were navigable at the time that a State was admitted to the Union.

The disclosures and consultations required by E.O. 13132 only apply to those policies which have Federalism implications which by definition are those ''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'' (Sec. 1(a)). Nothing in the interim rule restricts State or local government's current regulatory powers over locatable mineral operations which take place in waters. Thus, as explained in the interim rule's preamble, that rule ''would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government'' (69 FR 41428–41430). Consequently, the Forest Service was not required to make the disclosures or undertake the consultation referenced in these comments.

Given that the Forest Service did not violate E.O. 13132 in promulgating the interim rule, there is no cumulative violation of Congressional reporting requirements.

*Comment:* Two respondents commented that the Forest Service violated E.O. 12630 by failing to disclose the potential impact of the rule on property rights. Those respondents further commented that this violation of the E.O. also constitutes a violation of 5 U.S.C. 801(a)(1)(B)(iii) and (iv).

*Response:* In their discussions of E.O. 12630, the respondents do not specifically identify or describe the impact of the interim rule which they believe would constitute a regulatory taking of mining claimants' property rights. Rather, the respondents simply state that ''[a]s was established above, the Interim Rule would affect a regulatory taking of all [mining claims].'' However, the respondents' only other reference to a regulatory taking appears in their discussion of the impact of requiring a bond from miners for small scale mining operations.

The interim rule does not address, or purport to address, bonding of locatable mineral operations. Moreover, it is well established that a rule such as the interim rule, which in certain circumstances requires a miner to obtain approval before conducting locatable mineral operations, does not deprive the miner of any property right conferred by a mining claim. *Freese* v. *United States*, 6 Cl. Ct. 1, 14–16 (1984), aff'd mem., 770

F.2d 177 (Fed. Cir. 1985); *Trustees for Alaska* v. *Environmental Protection Agency*, 749 F.2d 549, 559–60 (9th Cir. 1984); cf. *Clouser* v. *Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994), *cert. denied sub nom. Clouser* v. *Glickman*, 515 U.S. 1141 (1995). Therefore, the Department properly found that an analysis of the interim rule conducted pursuant to E.O. 12630 properly ''determined that the interim rule does not pose the risk of a taking of private property'' (69 FR 41430, Jul. 9, 2004).

For these reasons, the Forest Service did not violate E.O. 12630 in promulgating the interim rule. Given that, there is no cumulative violation of Congressional reporting requirements.

*Comment:* Two respondents said that the Forest Service, in promulgating the interim rule, violated E.O. 12866 by failing to make a required disclosure as to the effect of the rule on the Federal budget. Those respondents further stated that this violation of the E.O. also constitutes a violation of Congressional reporting requirements.

*Response:* The respondents did not cite the applicable provision of E.O. 12866 which they believe requires ''disclosures concerning whether the interim rule represents a government action that would significantly effect the Federal budget'' and the E.O. does not use the term ''Federal budget'' or any obvious synonym. The only provision in the E.O. to which the respondents might be referring appears to be Sec. 6(a)(3)(C)(ii) which requires ''an assessment * * * of costs anticipated from the regulatory action (such as, but not limited to, the direst cost * * * to the government in administering the regulation * * *).'' However, such an assessment only is required ''for those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action * * *.'' Sec. 6(a)(3)(C).

On March 15, 2004, the Administrator of the Office of Information and Regulatory Affairs of the OMB found that the interim rule proposed for 36 CFR 228.4(a) was non-significant for purposes of E.O. 12866. Thus, the assessment mandated by Sec. 6(a)(3)(C)(ii) of the E.O. was not required for the interim rule.

Given that the Forest Service did not violate E.O. 12866 in promulgating the interim rule, there is no cumulative violation of Congressional reporting requirements.

*Comment:* Two respondents commented that the Forest Service failed to solicit comment on the interim rule from western governors which violates the spirit of the 1998 Department of the Interior and Related Agencies Appropriations Act, Pub. L. 105–83, § 339, 111 Stat. 1543, 1602 (1997).

*Response:* The cited provision of the 1998 Department of the Interior and Related Agencies Appropriations Act required the Bureau of Land Management (BLM), Department of the Interior, to consult with the governors from each Western State containing public lands open to location under the United States mining laws before adopting a rule to amend or replace 43 CFR part 3800, subpart 3809. These regulations are the Department of the Interior's counterpart to 36 CFR part 228, subpart A. The Department's promulgation of the interim rule did not violate this provision because the provision, by its own terms, is not applicable to 36 CFR part 228, subpart A.

Prior to the enactment of the 1998 Department of the Interior and Related Agencies Appropriations Act, the Department of the Interior had announced its intent to prepare an EIS for the proposed revision of 43 CFR part 3800, subpart 3809 (62 FR 16177). That notice described the scope of the contemplated revisions to 43 CFR part 3800, subpart 3809, as ''comprehensive.'' In contrast, the scope of the interim rule at § 228.4(a) is limited and only concerns the form of authorization required for conducting locatable mineral operations on National Forest System lands.

Given the vastly different scopes of the Department of the Interior's 1997 proposal to a ''comprehensive'' revision of their regulations and the clarification of § 228.4(a) provided for in the Department's interim rule, there is no reason to presume that Congress would have intended that consultation, such as it required for the comprehensive revision of 43 CFR part 3800, subpart 3809, be performed for the promulgation of the interim rule. Therefore, the promulgation of the interim rule is not in any manner inconsistent with the ''spirit'' of Sec. 339 of the 1998 Department of the Interior and Related Agencies Appropriations Act.

*Comment:* Two respondents stated that the Small Business Administration (SBA) would find that the interim rule will have a major impact on small entities given the SBA's finding that a purportedly similar rule, 43 CFR part 3800, subpart 3809, would have a major impact on small entities.

*Response:* As discussed in the response to the previous comment, the scope of the interim rule, which only concerns the form of authorization required for conducting locatable mineral operations on NFS lands, is dramatically less sweeping than the scope the proposed changes to 43 CFR part 3800, subpart 3809. While 43 CFR part 3800, subpart 3809, addresses a similar issue for lands administered by the BLM, it additionally sets forth a host of other requirements. Therefore, any finding which the SBA made on the effect of 43 CFR part 3800, subpart 3809, on small entities consequently has exceedingly limited predictive value in terms of the SBA's possible assessment of the impact of the Forest Service's interim rule.

*Comment:* Many respondents noted that the Forest Service improperly invoked an emergency as the grounds for implementing the interim rule before receiving and responding to public comment.

*Response:* The Forest Service did not rely upon the existence of an emergency in adopting the interim rule. Neither the text of the interim rule nor its preamble employ the term ''emergency'' or any of its synonyms. The Forest Service consequently did not need to meet the test advocated by the respondents to assess the existence of an emergency prior to adopting and implementing the interim rule. Moreover, even if such terminology had been used, the legal standards governing the adoption of rules are set forth in the Administrative Procedure Act, 5 U.S.C. 553. The preamble to the interim rule explains the Department of Agriculture's compliance with that Act's standards in promulgating the interim rule.

2. Comments on the Effect of the Interim Rule

**General Issues**

*Comment:* Numerous respondents stated that the changes to 36 CFR 228.4(a) adopted by the interim rule have confused miners and are capable of being misapplied.

*Response:* Given these comments and other specific comments made on individual paragraphs of the interim rule, the Department agrees that changes are required to make the text of the interim rule clearer to foster the consistency of its application by Forest Service employees. These changes generally are described in the following subsection entitled ''Comments on Specific Sections of the Interim Rule,'' of this section of the Response to Comments. In addition, the final rule also reorganizes the text of the interim rule so that its sequence is more logical and reflects an increasing level of Forest Service consideration of the environmental impacts of locatable mining operations on NFS resources. As reorganized by the final rule, § 228.4(a)

will describe in sequence when an operator is required to submit a notice of intent to operate before commencing operations, what operations are exempt from the requirement for prior submission of a notice of intent to operate, when an operator is required to submit and obtain approval of a proposed plan of operations before commencing operations, what operations are exempt from the requirement for prior submission and approval of a proposed plan of operations, and a District Ranger's authority to require submission and approval of a proposed plan of operations before an operator commences proposed operations or continues ongoing operations. This reorganization parallels the typical progression of mining operations from the least functions, work, or activities for prospecting or casual use, which would not normally require prior submission and approval of a plan or operations, through exploration, which often would require prior submission of a notice of intent to operate, and might require prior submission and approval of a plan of operations, to development and production, which normally would require prior submission and approval of a plan of operations. These changes should enhance the final rule's clarity and comprehensibility.

*Comment:* Numerous respondents said that the interim rule unfairly restricts entities or persons, whom the respondents characterized as mining clubs, recreational miners, hobby miners, and recreational suction dredgers. Some of the respondents also commented that the interim rule could collapse the recreational mining industry. Other respondents said that United States mining laws authorize recreational and hobby mining.

*Response:* The Organic Administration Act (16 U.S.C. 482) makes the United States mining laws (30 U.S.C. 22 *et seq.*) applicable to NFS lands reserved from the public domain pursuant to the Creative Act of 1891 (§ 24, 26 Stat. 1095, 1103 (1891), repealed by Federal Land Policy and Management Act of 1976, § 704(a), 90 Stat, 2743, 2792 (1976)). Under the United States mining laws, United States citizens may enter those NFS lands to prospect or explore for and remove valuable deposits of certain minerals referred to as locatable minerals.

Neither the United States mining laws or 36 CFR part 228, subpart A, recognize any distinction between ''recreational'' versus ''commercial'' miners, or provide any exceptions for operations conducted by ''recreational'' miners. The same rules apply to all miners. Thus, to the extent that individuals or members of mining clubs are prospecting for or mining valuable deposits of locatable minerals, and making use of or occupying NFS surface resources for functions, work or activities which are reasonably incidental to such prospecting and mining, it does not matter whether those operations are described as ''recreational'' or ''commercial.'' However, functions, work, or activities proposed by individuals, members of mining clubs, or mining clubs themselves, such as educational seminars, treasure hunts, hunting camps, and summer homes, far exceed the scope of the United States mining laws. Accordingly, the purpose of both the interim rule and the final rule adopted by this rulemaking is to regulate all permissible operations under the United States mining laws. Thus, the interim rule, as well as the final rule being adopted by this rulemaking, apply to every person or entity conducting or proposing to conduct locatable mineral operations on NFS lands under the United States mining laws.

For purposes of the final rule being adopted by this rulemaking, the requirement for prior submission of a notice of intent to operate alerts the Forest Service that an operator proposes to conduct mining operations on NFS lands which the operator believes might, but are not likely to, cause significant disturbance of NFS surface resources and gives the Forest Service the opportunity to determine whether the agency agrees with that assessment such that the Forest Service will not exercise its discretion to regulate those operations. For purposes of both the interim rule and the final rule being adopted by this rulemaking, the requirement for prior submission and approval of a proposed plan of operations ensures that the Forest Service can evaluate the environmental impacts of potentially more impactive proposed mining operations on NFS resources and enables the Forest Service to require less disruptive means of conducting those operations. *Freese* v. *United States*, 6 Cl. Ct. 1, 15 (1984), *aff'd mem.*, 770 F.2d 177 (Fed. Cir. 1985). While these requirements do affect the manner in which mining operations are conducted, they do not deprive operators of the ability to conduct such operations. As such, the requirements fall within the Department's ''broad discretion to regulate the manner in which mining activities are conducted on the national forest lands.''

For these reasons, no change has been made in the final rule as a result of these comments.

*Comment:* One respondent said that a new provision should be added to the final rule which states that the use of small portable suction dredges, such as those with an intake of four inches or less, does not require prior submission of a notice of intent to operate or prior submission and approval of a proposed plan of operations. The respondent said that various studies, including those by the United States Environmental Protection Agency, the Department of Interior, United States Geological Survey, and the State of Alaska Department of Natural Resources, have shown that these dredges do not cause significant disturbance of streams or rivers. The respondent also stated that such a provision would be consistent with the recommendations of the National Academy of Sciences, National Research Council's 1999 report entitled, ''Hardrock Mining on Federal Lands.''

*Response:* The environmental impacts of operating suction dredges, even small ones, are highly site-specific depending on the circumstances and resource conditions involved. The environmental impacts of using a suction dredge on two bodies of water which are otherwise similar can vary greatly if a threatened or endangered specie inhabits one body of water but not the other. Even with respect to a particular body of water, the environmental impacts of suction dredge operations can vary by season due to climatic conditions or the life cycles of aquatic species. Given this variability, the Department believes that, insofar as suction dredge operations are concerned, the need for the prior submission of a notice of intent to operate or for the prior submission and approval of a proposed plan of operations must be evaluated on a site-specific basis. While the operation of suction dredges with intakes smaller than four inches may not require either a notice of intent to operate or an approved plan of operations in many cases, the prior submission of a notice of intent to operate will be required in some cases, and the prior submission and approval of a proposed plan of operations will be required in fewer cases.

For these reasons, no change has been made in the final rule in response to this comment.

*Comment:* Three respondents stated that the interim rule could be considered a taking of private property. Specifically, one of those respondents said that the rule could effect an unconstitutional regulatory taking of State land because States own the beds

beneath all waters and, in certain states, other riparian lands. Another respondent commented that delay inherent in the process of submitting a notice of intent to operate or submitting and obtaining approval of a proposed plan of operations could put a miner out of business or deny the miner the opportunity to extract minerals from the miner's mining claims, either of which could be considered a taking of private property. The remaining individual did not identify the impact of interim rule which he or she believes could constitute a regulatory taking of private property rights.

*Response:* As previously discussed, NFS surface resources subject to 36 CFR part 228, subpart A, usually include streambeds or other submerged lands. However, where adjudication has established that watercourses were navigable at the time that a State was admitted to the Union, those resources are solely subject to State regulation. The provisions of 36 CFR part 228, subpart A, as amended by the interim rule, are not applicable in a situation where streambeds or other submerged lands passed into a State's ownership upon that State's admission into the Union, because that subpart only applies to ''National Forest System lands'' (§ 228.2). Therefore, the interim rule clearly does not have the potential to take property owned by States.

In evaluating the effect of regulatory action on the property rights associated with a valid mining claim, it is important to remember that mining claims are a ''unique form of property'' (*Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963)), and the ''power to qualify [such] property rights is particularly broad * * *.'' (*United States* v. *Locke*, 471 U.S. 84, 104 (1985)).

> Claimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests. In addition, the property right here is the right to a flow of income from production of the claim. Similar vested economic rights are held subject to the Government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life (*Id.* at 105; citations omitted).

Moreover, as previously discussed, it is well established that a rule, such as the interim rule, which in certain circumstances requires a miner to obtain approval before conducting locatable mineral operations, does not deprive the miner of any property right conferred by a mining claim.

For these reasons, the interim rule does not pose the risk of taking private property and no change has been made in the final rule in response to these comments.

*Comment:* Several respondents said that the interim rule is fatally flawed because it has no enforcement provision and 36 CFR part 261 cannot be applied to mining operations conducted pursuant to 36 CFR part 228, subpart A, including the interim rule.

*Response:* The conclusion that 36 CFR part 261 is not applicable to locatable mineral operations conducted pursuant to the interim rule or the remainder of 36 CFR part 228, subpart A, is directly contrary to the holding of *United States* v. *Doremus*, 888 F.2d 630, 631–32 (9th Cir. 1989). In this case, the appellants contended that they are exempted from the prohibitions of 36 CFR part 261(b) which states that ''nothing in this part shall preclude operations as authorized by * * * the U.S. Mining Laws Act of 1872 as amended.'' They also contended that their operations were authorized by statute and, therefore, the regulations do not prohibit such operations. However, the court rejected their argument, stating that:

> Part 228 does not contain any independent enforcement provisions; it only provides that an operator must be given a notice of noncompliance and an opportunity to correct the problem. 36 CFR 228.7(b) (1987). The references to operating plans in § 261.10 would be meaningless unless Part 261 were construed to apply to mining operations, since that is the only conduct for which operating plans are required under Part 228. In addition, 16 U.S.C. 478 (1982), which authorizes entry into national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof, specifically states that such persons must comply with the rules and regulations covering such national forests. This statutory caveat encompasses all rules and regulations, not just those (such as Part 228) which apply exclusively to mining claimants. In this context, § 261.1(b) is merely a recognition that mining operations may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition. *United States* v. *Weiss*, 642 F.2d 296, 299 (9th Cir. 1981).

Further, the interim rule also is enforceable by means of civil litigation seeking declaratory, injunctive, or other appropriate relief.

For these reasons, no change has been made in the final rule as a result of these comments.

*Comment:* Several respondents commented that the interim rule is preclusive because it requires a bond from miners for small scale mining operations.

*Response:* The interim rule did not address, or purport to address, bonding of locatable mineral operations. Bonding of locatable mineral operations is governed by 36 CFR 228.13, which was not affected by the interim rule.

For this reason, no change has been made in the final rule in response to these comments.

*Comment:* A number of respondents expressed concern that the interim rule does not contain limitations on the time allowed for the Forest Service to process either a notice of intent to operate or a proposed plan of operations.

*Response:* Section 228.4(a)(2)(iii) of the rule in effect prior to adoption of the interim rule provided that ''[i]f a notice of intent is filed, the District Ranger will, within 15 days of receipt thereof, notify the operator whether a plan of operations is required. This requirement was not changed in the interim rule, but was moved to § 228.4(a)(2).

Limitations on the time available to process a plan of operations does not appear in § 228.4(a). That issue is addressed in § 228.5(a), which was not affected by the interim rule. However, § 228.5(a) cannot circumscribe the Forest Service's obligation to comply with statutes, such as the National Environmental Policy Act or the Endangered Species Act, even if this compliance takes longer than the time stated in § 228.5(a). *Baker* v. *United States Department of Agriculture*, 928 F. Supp. 1513, 1519–21 (D. Idaho 1996); cf. *United States* v. *Boccanfuso*, 882 F.2d 666, 671 (2d Cir. 1989).

For these reasons, no change has been made in the final rule as a consequence of these comments.

*Comment:* Several respondents commented that the Forest Service lacks jurisdiction to manage suction dredge mining because suction dredge mining has been exempted through agreements with each of the Western States. Additionally, these respondents said that each of the Western States regulate suction dredge mining thereby precluding Forest Service enforcement of the interim rule insofar as suction dredge mining operations are concerned.

*Response:* None of the agreements between the Forest Service and a State government exempts persons wishing to conduct locatable mineral operations on NFS lands from complying with the interim rule, or any other provision of 36 CFR part 228, subpart A, in conducting those operations, including suction dredge mining.

A State cannot preclude the Federal Government from regulating those things over which the Federal Government has authority, including Federal lands. Rather, Congress has absolute power to adopt legislation governing the use of Federal lands and to delegate authority to the executive

branch of government to adopt further rules for this purpose, as Congress did in the context of the Organic Administration Act, 16 U.S.C. 478, 482, 551, which made the United States mining laws applicable to NFS lands reserved from the public domain pursuant to the Creative Act of 1891, § 24, 26 Stat. 1095, 1103 (1891), repealed by Federal Land Policy and Management Act of 1976, § 704(a), 90 Stat, 2743, 2792 (1976), but which also made miners subject to regulations adopted by what is now the Department of Agriculture. Thus, it is State regulation of suction dredge mining operations which is pre-empted when it conflicts with Federal law, including rules adopted by executive agencies, such as the interim rule.

For these reasons, no change has been made in the final rule in response to these comments.

*Comment:* Several respondents stated that the interim rule will effectively revoke State of California Suction Dredge Permits held by miners operating on NFS lands. Those respondents also said that the Forest Service must provide those miners a hearing prior to that revocation.

*Response:* These comments seem to presume that the Forest Service's regulation of suction dredge mining occurring on NFS lands pursuant to the interim rule will preclude the State of California from issuing suction dredge permits for those same operations. However, as previously stated, this assumption is inaccurate. It is entirely possible that both the Forest Service and a State can permissibly regulate suction dredge mining operations for locatable minerals occurring on NFS lands. Indeed, the Forest Service's locatable mineral regulations (36 CFR 228.8) specifically provide that persons conducting locatable mineral operations on NFS lands also must comply with applicable State imposed requirements, such as water quality requirements.

The State of California itself recognizes that a miner who has obtained a suction dredge permit pursuant to California Fish & Game Code § 5653 must also obtain all required authorizations from the Federal agency managing lands on which proposed suction dredge mining operations will occur. Specifically, Cal. Code Regs. tit. 14, § 228(g) provides that ''[n]othing in any permit issued pursuant to these regulations authorizes the permittee to trespass on any land or property, or relieves the permittee of the responsibility of complying with applicable Federal, State, or local laws or ordinances.'' Similarly, the State of California Department of Fish and Game's Notice to All Suction Dredge Permittees states on the second page under the heading ''General Information Concerning Suction Dredging'' that:

> [t]he regulations in Sections 228 and 228.5 of title 14 in the California Code of Regulations govern suction dredging in California. In addition to those regulations, other laws, regulations, and policies may apply, including, but not limited to, the following:
>
> A suction dredge permit does not allow trespassing. Be sure you have permission from the landowner or the land managing agency before entering private or public lands.

Thus, it is clear that the interim rule will not effect a revocation of State of California Suction Dredge Permits held by miners operating on NFS lands and no change has been made in the final rule as a consequence of these comments.

*Comment:* A number of respondents said that the interim rule is vague and standardless and consequently a court would construe it in the manner most favorable to mining operators.

*Response:* If a rule is vague or standardless, which is not the case insofar as the interim rule is concerned, the consequence is that the rule is not enforceable against the public. However, only the judicial branch of government can conclusively resolve the question of the proper interpretation of any rule or decide whether a rule is impermissibly vague.

For these reasons, no change has been made in the final rule in response to these comments.

*Comment:* Several respondents commented that the interim rule is inconsistent with a National Research Council report entitled ''Hardrock Mining on Federal Lands.''

*Response:* The comments do not identify or describe in any manner inconsistencies between the interim rule and the National Research Council report, whose main body is 126 pages in length. The Department's review of the National Research Council report identified no inconsistencies between it and the interim rule.

For these reasons, no change has been made in the final rule as a result of these comments.

*Comment:* One respondent stated that the Forest Service should issue internal guidance documents to its employees about the intent and application of the interim rule. The respondent also commented that the internal guidance document should state that the final rule is not intended to change the long-standing interpretation of § 228.4(a) concerning the circumstances in which prior submission of a notice of intent to operate or prior submission and approval of a proposed plan of operations is required.

*Response:* The Forest Service has a large and active national minerals and geology training program and certification and training requirements for all of its mineral administrators. The Forest Service will appropriately revise its internal agency guidance documents and the instruction given as part of its national training curriculum to reflect any substantive change to the requirements for prior submission of a notice of intent to operate and prior submission and approval of a proposed plan of operations which are adopted by the final rule.

No change was required in the final rule in response to this comment.

**Comments on Specific Sections of the Interim Rule**

The following discusses and responds to public comments to specific paragraphs in the interim rule for § 228.4(a) received during the 60-day comment period. As a result of the comments received, the section has been reorganized and revised. The reorganization of § 228.4(a) is displayed in the following table:

TABLE 1.—COMPARISON OF THE INTERIM RULE AND FINAL RULE

| Interim Rule | Final Rule |
|---|---|
| § 228.4 Plan of operations—notice of intent—requirements | § 228.4 Notice of intent—plan of operations—requirements |
| (a) If the District Ranger determines that the operation is causing or will likely cause significant surface disturbance a plan of operations is required. | This provision is redesignated at paragraph (a)(3). |
| | (a) A notice of intent is required from any person proposing to conduct operations that might cause significant surface disturbance. |

TABLE 1.—COMPARISON OF THE INTERIM RULE AND FINAL RULE—Continued

| Interim Rule | Final Rule |
|---|---|
| § 228.4 Plan of operations—notice of intent—requirements | § 228.4 Notice of intent—plan of operations—requirements |
| (1) Unless there are significant surface disturbing activities, a plan of operations is not required when one of the provisions in paragraphs (i) through (iv) are met. | This provision with respect to plan of operations is redesignated at paragraph (a)(3). |
| | (1) A notice of intent is not required when one of the provisions in paragraphs (i) through (vii) are met. |
| (i) A plan of operations is not required for operations limited to existing roads. | This provision with respect to plan of operations is redesignated at paragraph (a)(3) by referencing paragraph (a)(1)(i). |
| | (i) A notice of intent is not required for operations limited to existing roads. |
| (ii) A plan of operations is not required when individuals search for and remove small mineral samples. | This provision with respect to plan of operations is redesignated at paragraph (a)(3) by referencing paragraph (a)(1)(ii). |
| | (ii) A notice of intent is not required for prospecting and sampling not causing significant surface disturbance and other listed examples. |
| (iii) A plan of operations is not required for prospecting and sampling ... | This provision with respect to plan of operations is redesignated at paragraph (a)(3) by referencing paragraph (a)(1)(ii). |
| | (iii) A notice of intent is not required for monumenting and marking a mining claim. |
| (iv) A plan of operations is not required for monumenting and marking a mining claim. | This provision with respect to plan of operations is redesignated at paragraph (a)(3) by referencing paragraph (a)(1)(iii). |
| | (iv) A notice of intent is not required for underground operations. |
| (v) A plan of operations is not required for subsurface operations ..... | This provision with respect to plan of operations is redesignated at paragraph (a)(3) by referencing paragraph (a)(1)(iv). |
| | (v) A notice of intent is not required for operations, which in their entirety, have the same resource disturbance as other users of NFS lands who are not required to get a Forest Service authorization. This provision was not provided for in the interim rule. |
| | (vi) A notice of intent is not required for operations not involving mechanized earthmoving equipment or the cutting of trees unless these operations might cause significant disturbance to surface resources. This provision was in paragraph (a)(2)(iii) in the interim rule. |
| | (vii) A notice of intent is not required when a plan of operations is submitted. This provision was in paragraph (a)(2)(i) in the interim rule. |
| (2) A notice of intent is required from any person proposing to conduct operations that might cause significant surface disturbance; the District Ranger has 15 days to notify the operator if a plan of operations is needed. A notice of intent is not needed if one of the provisions in paragraphs (a)(2)(i) through (iii) are meet. | The provision for filing a notice of intent is redesignated at paragraph (a); the 15-day requirement is redesignated at paragraph (a)(2); and the exceptions for filing a notice of intent are redesignated at paragraphs (a)(1)(i)–(vii). |
| | (2) The District Ranger has 15 days to notify the operator if a plan of operations is needed. |
| (i) A notice of intent is not required when a plan of operations is submitted. | This provision is redesigned at paragraph (a)(1)(vii). |
| (ii) Exempts the requirement for a notice of intent for operations exempt from the requirement of a plan of operation found in paragraph (a)(1). | This provision is redesignated in paragraphs (a)(1)(i)–(iv). |
| (iii) A notice of intent is not required for operations not involving mechanized earthmoving equipment or the cutting of trees unless these operations might cause significant disturbance to surface resources. | This provision is redesignated at paragraph (a)(1)(vi). |
| | (3) Requires an operator to submit a plan of operations when proposed operations will likely cause significant disturbance of surface resources, except as exempted in paragraph (a)(1)(i)–(v). |
| | (4) Requires the District Ranger to notify an operator of the requirement to submit a plan of operations for operations causing or will likely cause significant disturbance of surface resources and that operations can not be conducted until a plan of operations is approved. These provisions were not explicitly provided for in the interim rule. |

The analysis and response to comments on the interim rule is organized sequentially by the paragraphs of the interim rule.

*Section 228.4(a)*

*Comment:* One respondent commented that the term ''significant'' in the prefatory language of § 228.4(a) of the interim rule, which requires the submission of a proposed plan of operations for operations which a District Ranger determines are causing or will likely cause a significant disturbance of surface resources, was not defined and consequently was arbitrary and capricious.

*Response:* The interim rule did not change the requirement initially adopted in 1974 that an operator must submit a proposed plan of operations if the applicable District Ranger determines that the proposed operations ''will likely cause significant disturbance of surface resources.'' Questions and Answers developed by the Forest Service when the 1974 rule was adopted explained that it was impossible to precisely define the term ''significant disturbance.''

A definition cannot be given that would apply to all lands subject to these regulations. Disturbance by a particular type of operation

on flat ground covered by sagebrush, for example, might not be considered significant. But that same sort of operation in a high alpine meadow or near a stream could cause highly significant surface resource disturbance. The determination of what is significant thus depends on a case-by-case evaluation of proposed operations and the kinds of lands and other surface resources involved. In general, operations using mechanized earthmoving equipment would be expected to cause significant disturbance. Pick and shovel operations normally would not. Nor would explosives used underground, unless caving to the surface could be expected. Use of explosives on the surface would generally be considered to cause significant disturbance. Almost without exception, road and trail construction and tree clearing operations would cause significant surface disturbance.

The Department continues to believe that a universal definition of the term ''significant disturbance'' cannot be established for NFS lands. The lands within the NFS subject to the United States mining laws stretch from Alaska on the north, the Mississippi River on the east, the border with Mexico on the south, and the Pacific Ocean on the west. NFS lands within that large area occur in widely diverse climates, hydrogeologic conditions, landforms, and vegetative types. Due to the great variability of NFS ecosystems, identical operations could cause significant disturbance in one situation and insignificant disturbance in another.

However, the record for the 1974 rulemaking at 36 CFR part 228, subpart A, does identify tests that are of use in deciding whether proposed disturbance of NFS resources constitutes ''significant disturbance'' for purposes of that rule. A March 28, 1974, letter from Forest Service Chief John McGuire to Senator Ted Stevens in response to Senator Stevens' comments on the rule proposed in 1973 explains that ''significant disturbance'' refers to operations ''for which reclamation upon completion of [that operation] could reasonably be required,'' and to operations that could cause impacts on NFS resources that reasonably can be prevented or mitigated.

The March 28, 1974, letter also emphatically makes the point that the Forest Service's locatable mineral regulations do not use the term ''significant'' in the same manner as that term is used in the National Environmental Policy Act.

Significant disturbance to the environment, we find, needs to be clearly distinguished from ''significant'' disturbance of surface natural resources. The former could be interpreted as an automatic invocation of Section 102(2)(C) of the National Environmental Policy Act of 1969 for an environmental statement. This was never intended. Some few, by no means all, proposals are expected to require environmental statements, which would be prepared by the Forest Service.

Judicial decisions rendered in the 30 years since the rule at 36 CFR part 228, subpart A, was promulgated also give context to the meaning of the term ''significant disturbance.'' For example, it is well established that the construction or maintenance of structures, such as cabins, mill buildings, showers, tool sheds, and outhouses on NFS lands constitutes a significant disturbance of NFS resources. *United States* v. *Brunskill*, 792 F.2d 938, 941 (9th Cir. 1986); *United States* v. *Burnett*, 750 F. Supp. 1029, 1035 (D. Idaho 1990).

For these reasons, no change has been made in the final rule in response to this comment. However, the Department finds that the Forest Service has interpreted the terms ''significant'' and ''significant disturbance'' in the same manner since 1974, including for purpose of the interim rule. It also is how these terms should be interpreted for purposes of the final regulation being adopted by this rulemaking.

*Comment:* A number of respondents said that the interim rule did not resolve widespread confusion about the level of activity which requires the filing of a proposed plan of operations, and its approval, before mining operations can be conducted.

*Response:* As previously stated, the interim rule did not alter the requirement initially adopted in 1974 that an operator must submit a proposed plan of operations if the applicable District Ranger determines that the proposed operations ''will likely cause significant disturbance of surface resources.'' The phrase ''will likely cause significant disturbance of surface resources'' means that, based on past experience, direct evidence, or sound scientific projection, the District Ranger reasonably expects that the proposed operations would result in impacts to NFS lands and resources which more probably than not need to be avoided or ameliorated by means such as reclamation, bonding, timing restrictions, and other mitigation measures to minimize adverse environmental impacts on NFS resources.

No change has been made in the final rule in response to these comments.

*Comment:* One respondent stated that the term ''surface'' in the prefatory language of § 228.4(a) of the interim rule was not defined and that as a consequence suction dredge mining, which occurs underwater, could be considered a subsurface activity which was beyond the regulatory authority of the Forest Service.

*Response:* As previously discussed, section 228.8 characterizes fisheries habitat as a NFS surface resource and it is clear that for purposes of 36 CFR part 228, subpart A, including § 228.4(a)(1)(v) of the interim rule, water, streambeds, or other submerged lands generally should be construed as a NFS surface resource. Only where adjudication has established that watercourses were navigable at the time that a State was admitted to the Union are those resources solely subject to State regulation. Thus, the Forest Service has clear authority to regulate the effects which locatable mineral operations have on water, streambeds, or other submerged lands, whether or not those operations are taking place wholly or partially in waters themselves, except where adjudication has established that watercourses were navigable at the time that a State was admitted to the Union.

For these reasons, no change was required in the final rule in response to these comments. However, for purposes of the final regulation being adopted by this rulemaking, the term ''surface resources'' should be interpreted as including water, streambeds, or other submerged lands, except where adjudication has established that the applicable watercourse was navigable at the time that the State in which the watercourse occurs was admitted to the Union.

The provisions in § 228.4(a) in the interim rule have been redesignated to § 228.4(a)(3) in the final rule.

*Section 228.4(a)(1)*

*Comment:* Numerous respondents commented that the phrase, ''[u]nless the District Ranger determines that an operation is causing or will likely cause a significant disturbance of surface resources'' gives too much discretion to District Rangers. Those respondents stated that the phrase would permit a District Ranger to require a plan of operations for surface disturbance of any magnitude, including that which will likely result from the operations listed in the exemptions in paragraphs 4(a)(1)(i)–(v) of the interim rule, such as vehicle use on existing roads, removal of small mineral samples, and marking or monumenting mining claims. Other respondents characterized the phrase as eliminating the exemptions to the requirement for prior submission and approval of a plan of operations previously in § 228.4(a)(1)(i)–(v).

Two respondents specifically requested the deletion of the phrase and its replacement by the prefatory

language of § 228.4(a)(1) and the language of § 228.4(a)(1)(i)–(v). Those respondents commented that this change would ensure the continuation of the historic application of the terms ''disturbance'' and ''significant disturbance.''

*Response:* The intent in adopting § 228.4(a)(1) of the interim rule was not to authorize a District Ranger to require a plan of operations for operations which will not exceed the scope of one or more of the exemptions in § 228.4(a)(1)(i)–(v) of the interim rule. To ensure that the final rule is not interpreted in such an unintended manner, the phrase ''unless the District Ranger determines that an operation is causing or will likely cause a significant disturbance of surface resources'' is not included in the final rule. Thus, pursuant to § 228.4(a)(3) of the final rule, it is clear that prior submission and approval of a proposed plan of operations is not required if the proposed operations will be confined in scope to one or more of the exempted operations mentioned in that paragraph.

*Comment:* Several respondents stated that the Forest Service should add more specific examples of operations which do not require prior submission and approval of a plan of operations to the listing in § 228.4(a)(1)(i)–(v) of the interim rule.

*Response:* The Department agrees with this suggestion. By virtue of its incorporation by reference of § 228.4(a)(1)(v), § 228.4(a)(3) of the final rule adds an additional category of operations which can be conducted without prior submission and approval of a plan of operations. This includes operations which, in their totality, will not cause surface resource disturbance substantially different than that caused by other users of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization. Section 228.4(a)(3) of the final rule also adds another category of operations which can be conducted without prior submission and approval of a plan of operations and include operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise will likely cause a significant disturbance of surface resources. The incorporation by reference of § 228.4(a)(1)(ii) in § 228.4(a)(3) of the final rule adds more specificity to two categories of operations exempted from the requirement for prior submission and approval of a plan of operations which were included in the interim rule as section 228.4(a)(1)(ii) and (iii), but are combined into one category in the final rule at § 228.4(a)(1)(ii).

These changes to the final rule better delineate the level of work, functions, or activities which constitutes significant disturbance of NFS resources and requires the filing of a proposed plan of operations, and its approval, before mining operations can be conducted. Conversely, the changes also better identify the level of work, functions or activities which does not constitute significant disturbance of NFS resources and therefore does not trigger the requirement for prior submission and approval of a plan of operations. Section 228.4(a)(3) of the final rule makes it clear that prior submission and approval of a plan of operations is required for any proposed operation which will not be limited to one or more of the categories of exempted work, functions and activities mentioned in that paragraph if the operation will likely cause a significant disturbance of surface resources. Section 228.4(a)(3) of the final rule, also makes it clear that an operator lacking a currently approved plan of operations must submit and obtain approval of a proposed plan of operations in order to continue to conduct ongoing operations which actually are causing a significant disturbance of surface resources. Furthermore, pursuant to § 228.4(a)(3) of the final rule, an operator holding a currently approved plan of operations must submit and obtain approval of a supplemental plan of operations in order to continue to conduct any portion of an ongoing operation not covered by the currently approved plan which actually is causing a significant disturbance of surface resources.

*Comment:* One respondent said that the use of small portable suction dredges, such as those with an intake of four inches or less, should be added to the listing of operations in 228.4(a)(1) of the interim rule which are exempt from the requirement for prior submission and approval of a proposed plan of operations providing that use of such a dredge is authorized by State law. The respondent said that various studies, including those by the United States Environmental Protection Agency, the Department of Interior, United States Geological Survey, and the State of Alaska Department of Natural Resources, have shown that these dredges do not cause significant disturbance of streams or rivers. The respondent also stated that such a provision would be consistent with the recommendations of the National Academy of Sciences, National Research Council's 1999 report entitled, ''Hardrock Mining on Federal Lands.''

*Response:* As previously discussed, the environmental impacts of operating suction dredges, even small ones, are highly site-specific depending on the circumstances and resource conditions involved. Given this variability, the Department believes that insofar as suction dredge mining operations are concerned, the need for the prior submission and approval of a proposed plan of operations must be evaluated on a site-specific basis. While the operation of suction dredges with intakes smaller than four inches may not require an approved plan of operations in many cases, the prior submission and approval of a proposed plan of operations will be appropriately required in some cases.

For these reasons, no change has been made in the final rule as a result of this comment.

*Comment:* Several respondents commented that § 228.4(a)(1) of the interim rule eliminated the exemptions to the requirement that an operator proposing to conduct operations which might cause disturbance of surface resources must submit a notice of intent to operate to the Forest Service before commencing those operations.

*Response:* Section 228.4(a)(1) in effect prior to the interim rule and § 228.4(a)(1) of the interim rule only set forth exemptions to the requirement for prior submission and approval of a plan of operations. Section 228.4(a)(2) in effect prior to the interim rule and § 228.4(a)(2) of the interim rule set forth the exemptions to the requirement that an operator must submit a notice of intent to operate to the Forest Service before commencing specified operations, although each section did so by incorporating the exemptions in (a)(1)(i)–(v). Specifically, § 228.4(a)(2) of both rules provides that ''[a] notice of intent need not be filed * * * (ii) For operations excepted in paragraph (a)(1) of this section from the requirement to file a plan of operations * * *.''

Technically, the changes to § 228.4(a)(1) of the interim rule had no effect on the exemptions to the requirement for a notice of intent to operate. As a practical matter, however, since § 228.4(a)(2) of the interim rule adopts the same exemptions for purposes of the submission of a notice of intent to operate that § 228.4(a)(1) of the interim rule adopts for the submission and approval of a proposed plan of operations, the changes made in the exemptions at § 228.4(a)(1)(i)–(v) of the interim rule do affect the exemptions to the requirement to submit a notice of intent to operate.

To understand the effect of these changes, please see the comments and responses to § 228.4(a)(1) and § 228.4(a)(1)(ii)–(v).

The provisions in § 228.4(a)(i) in the interim rule have been redesignated at § 228.4(a)(3) in the final rule.

*Section 228.4(a)(1)(i)*

No specific comments were submitted regarding § 228.4(a)(1)(i) of the interim rule.

Except for redesignation of this provision to paragraph (a)(1)(i) by reference in paragraph (a)(3), no significant changes were made in the final rule

*Section 228.4(a)(1)(ii)*

*Comment:* A number of respondents said that § 228.4(a)(1)(ii) of the interim rule, which exempts individuals searching for and occasionally removing small mineral samples or specimens from the requirement for prior submission and approval of a plan of operations, unfairly places those who use gold pans, non-motorized sluices, and metal detectors and who do not cause a significant disturbance of NFS resource in the same category as those who operate heavy earth-moving equipment causing significant disturbance of NFS resources. These respondents stated they should be treated the same as those exempted in 228.4(a)(1)(ii).

*Response:* The Department believes that a number of operations, such as gold panning and non-motorized hand sluicing, are within the scope of § 228.4(a)(1)(ii) of the interim rule. Nonetheless, to eliminate any question about this concern, the Department is including gold panning, non-motorized hand sluicing, and the use of battery operated dry washers to the exempted category of operations described in § 228.4(a)(1)(ii) of the interim rule.

Metal detecting is another example that is being added to the category of operations which § 228.4(a)(1)(ii) of the interim rule exempts from the requirement for prior submission and approval of a proposed plan of operations. However, the type of metal detecting that is permissible under 36 CFR part 228, subpart A, is metal detecting associated with locating gold or other locatable mineral deposits subject to the United States mining laws. This subpart does not authorize metal detecting for other purposes, such as metal detecting to locate treasure trove, historic or prehistoric artifacts, lost coins, or jewelry.

The Department also notes that comments on § 228.4(a)(1)(iii) of the interim rule, which exempts closely related operations from the requirement for prior submission and approval of a plan of operations, suggest that a virtually identical listing of examples be included in that section. Given the similarity and overlapping nature of paragraphs (a)(1)(ii) and (iii) of the interim rule, these paragraphs are being combined in § 228.4(a)(1)(ii) the final rule, which by virtue of § 228.4(a)(3) of the final rule will exempt specified operations from the requirement for prior submission and approval of a plan of operations.

*Comment:* One respondent commented that § 228.4(a)(1)(ii) of the interim rule should define the phrase ''small mineral samples or specimens.''

*Response:* Section 228.4(a)(1)(ii) of the interim rule, which is an exemption to the requirement for prior submission and approval of a plan of operations, applies ''[to individuals desiring to search for and occasionally remove small mineral samples or specimens.'' There are commonly accepted standards for sampling mineral deposits which can vary depending upon surface conditions or the matrix in which the deposit is found. The United States Bureau of Mines' publication ''Standard Procedures for Sampling,'' states that the recommended sample size for a stream sediment sample would be about ''* * * 200 grams collected in streambeds, or pools, or accumulations of fine grained material beneath boulders.'' That publication also recommends a procedure for taking a soil sample: ''a shovel or hoe is usually used with horizons as deep as 2 feet. * * * [A] 50 gram sample is usually sufficient.'' Similarly, in discussing stream sediment sampling, a widely accepted mining industry textbook, ''Exploration and Mining Geology'' by William Peters, states that ''in detailed stream sediment surveys, samples may be taken every 50 to 100 meters along a stream. About 50 to 100 grams of 80 mesh material is taken for each sample. * * *'' With respect to rock sampling, that textbook states that ''a 500 gram sample is commonly taken in fine-grained rocks; up to 2 kilograms are taken in very coarse grained rock.''

Further, the examples in § 228.4(a)(1)(ii) of the final rule will give context to the outer limits of what permissibly can be construed as the removal of ''small mineral samples or specimens.'' Those examples generally include ''gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools.''

For these reasons, the Department believes that the phrase ''small mineral samples or specimens'' should be defined with reference to generally accepted practices appropriate for the operations involved and that it is not necessary to include a definition of this phrase in the final rule. Therefore, no change has been made in the final rule as a result of this comment.

The provisions in § 228.4(a)(1)(ii) in the interim rule have been redesignated in the final rule at § 228.4(a)(1)(ii) by reference in § 228.4(a)(3).

*Section 228.4(a)(1)(iii)*

*Comment:* One respondent stated that § 228.4(a)(1)(iii) of the interim rule, which exempts certain prospecting and sampling from the requirement for prior submission and approval of a plan of operations, should define the phrase ''a reasonable amount of mineral deposit for analysis and study.''

*Response:* Section 228.4(a)(1)(iii) of the interim rule applies ''to prospecting and sampling which will not involve removal of more than a reasonable amount of mineral deposit for analysis and study.'' As discussed in response to the previous comment, there are commonly accepted standards for sampling mineral deposits. Further, the examples in § 228.4(a)(1)(ii) of the final rule will give context to the outer limits of what permissibly can be construed as the removal of ''a reasonable amount of mineral deposit for analysis and study.'' For these reasons, the Department believes that the phrase ''a reasonable amount of mineral deposit for analysis and study'' should be defined with reference to generally accepted practices appropriate for the operations involved and that it is not necessary to include a definition of this phrase in the final rule. Consequently, no change has been made in the final rule as a result of these comments.

*Comment:* One respondent recommended that § 228.4(a)(1)(iii) of the interim rule be revised in the final rule to apply ''to prospecting and sampling which will not involve removal of more than a reasonable amount of mineral deposit for analysis and study, including but not limited to gold panning, metal detecting, hand slushing, dry washers, and the collecting of mineral specimens using hand tools so long as the excavation of the material is by hand and not by mechanized equipment.'' Another respondent recommended that § 228.4(a)(1)(iii) of the interim rule be revised in the final rule to apply ''to prospecting and sampling which will not involve removal of more than a reasonable amount of mineral deposit for analysis and study, including but not limited to gold panning, metal

detecting, non-motorized hand slushing, battery operated dry washers, and the collecting of mineral specimens using hand tools.'' Each respondent explained that the suggested revision would help clarify, for both mining operators and Forest Service employees, the level of work, functions, or activities which do not require prior submission and approval of a plan of operations. Each respondent also characterized the proposed examples of operations which it recommends be listed in this exemption as being similar to the casual use exemptions contained in BLM's regulations at 43 CFR part 3800, subpart 3809.

*Response:* The Department agrees that the changes suggested by the respondents will provide better guidance to mining operators and Forest Service personnel on the character of mineral operations which do not constitute a significant disturbance of NFS resources and which consequently do not require prior submission and approval of a plan of operations. This change will also improve the consistency of the description of the exempted operations in § 228.4(a)(1)(ii) of the final rule and the ''casual use'' exemption set forth in BLM's regulations at 43 CFR part 3800, subpart 3809.

For these reasons, paragraph (a)(1)(ii) of the final rule will provide an exemption to the requirement for prior submission and approval of a plan of operations, through reference in § 228.4(a)(3), and apply to ''prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study which generally might include searching for and occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools.''

The provisions in § 228.4(a)(1)(iii) in the interim rule have been redesignated in the final rule at § 228.4(a)(1)(ii) by reference in § 228.4(a)(3).

*Section 228.4(a)(1)(iv)*

*Comment:* Numerous respondents commented that the interim rule unfairly treats prospectors or miners differently than other users of the NFS, such as campers, backpackers, and all terrain vehicle users who cause similar disturbance of NFS resources but are not required to submit and obtain approval of a document comparable to a plan of operations prior to causing such disturbance.

Two respondents recommended the addition of virtually identical language to the final rule to address this discrepancy. One suggested that § 228.4(a)(1)(iv) of the interim rule, which exempts certain operations from the requirement for prior submission and approval of a plan of operations, be revised in the final rule to apply to marking and monumenting a mining claim, or to any mining-related activities and disturbances that are substantially the same as those of other users of the National Forests and which do not require a Forest Service permit or approval.

*Response:* The Department agrees that it is inappropriate to require prior approval of the disturbance of NFS resources caused by one category of user but not another category of user causing identical surface disturbance. For this reason, the Department agrees that an exemption to the requirement for prior submission and approval of a plan of operations should be included in the final rule to insure that prospectors and miners are not required to obtain approval of operations which will have no effect on the NFS beyond that which other users can permissibly cause without prior approval of that use. However, this exemption should set forth in a separate paragraph, rather than being added to a dissimilar paragraph, such as paragraph 4(a)(1)(iv) of the interim rule.

Therefore, a new paragraph (a)(1)(v) is being added to the final rule. This paragraph, incorporated by reference in § 228.4(a)(3), is an exemption to the requirement for prior submission and approval of a plan of operations involving operations which, in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the NFS who are not required to obtain a Forest Service special use authorization, contract, or other written authorization.

The provisions in § 228.4(a)(1)(iv) in the interim rule have been redesignated in the final rule at § 228.4(a)(1)(iii) by reference in § 228.4(a)(3).

*Section 228.4(a)(1)(v)*

*Comment:* Several respondents said that § 228.4(a)(1)(v) of the interim rule, which exempts ''subsurface operations'' from the requirement for prior submission and approval of a plan of operations, applies to the use of suction dredges because suction dredge mining operations occur below the water's surface and consequently are ''subsurface'' operations. One respondent also stated that if the term ''subsurface operations'' means underground operations, § 228.4(a)(1)(v) should be revised to say precisely that.

*Response:* As previously discussed, fisheries habitat is a NFS surface resource, and for purposes of 36 CFR part 228, subpart A, water, streambeds, or other submerged lands generally should be construed as a NFS surface resource. Only where adjudication has established that watercourses were navigable at the time that a State was admitted to the Union are those resources solely subject to State regulation. Thus, § 228.4(a)(1)(v) of the interim rule does not to strip the Forest Service of the clear authority which the agency generally has to regulate the effects which locatable mineral operations have on water, streambeds, or other submerged lands, whether or not those operations are taking place wholly or partially in waters themselves.

Nevertheless, the Department agrees with the suggestion that for purposes of clarity the term ''underground operations'' be substituted for the term ''subsurface operations'' in the exemption to the requirement for prior submission and approval of a plan of operations in § 228.4(a)(1)(iv) of the final rule.

The provisions in § 228.4(a)(1)(v) in the interim rule have been redesignated in the final rule at § 228.4(a)(1)(iv) by reference in § 228.4(a)(3).

*Section 228.4(a)(2)*

*Comment:* A number of respondents said that the interim rule did not resolve widespread confusion about the level of activity which requires the submission of a notice of intent to operate before proposed mining operations can be conducted.

*Response:* The interim rule did not change the requirement initially adopted in 1974 that a notice of intent to operate ''is required from any person proposing to conduct operations which might cause disturbance of surface resources,'' although the interim rule moved that requirement from the prefatory language of 36 CFR 228.4(a) to paragraph 4(a)(2) of the interim rule for clarity.

The requirement for a notice of intent to operate was added to the final rule adopted in 1974 in response to comments on that proposed rule. A June 20, 1974, letter from Congressman John Melcher to Forest Service Chief John McGuire explains why the Forest Service was urged to provide for the submission of notices of intent to operate in the 1974 final rule.

The National Wildlife Federation * * *, the American Mining Congress * * *, and the Idaho Mining Association * * * all seem

to agree that prior notification of proposed operations is a reasonable requirement. The Subcommittee therefore recommends that the Forest Service provide a simple notification procedure in any regulations it may issue. The objective in so doing would be to assist prospectors in determining whether their operations would or would not require the filing of an operating plan. Needless uncertainties and expense in time and money in filing unnecessary operating plans could be avoided thereby.

Questions and answers developed by the Forest Service when the 1974 rule was adopted explain the purpose of a notice of intent to operate in similar terms. In response to the question ''What should an operator do if the operator isn't sure that the proposed operations will be significant enough to require a plan of operations?'' the document states:

[y]ou should file a ''notice of intent[] to operate'' with the District Ranger. It should describe briefly what you intend to do, where and when it is to be done, and how you intend to get yourself and your equipment to the site. The District Ranger will analyze your proposal and will, within 15 days, notify you as to whether or not an operating plan will be necessary. In this way, you can avoid advance preparation of an operating plan until you know that it is necessary to do so and have some information as to what must be included.

This record makes it clear that a notice of intent to operate was not intended to be a regulatory instrument; it simply was meant to be a notice given to the Forest Service by an operator which describes the operator's plan to conduct operations on NFS lands. Further, this record demonstrates that the intended trigger for a notice of intent to operate is reasonable uncertainty on the part of the operator as to the significance of the potential effects of the proposed operations. In such a circumstance, the early alert provided by a notice of intent to operate would advance the interests of both the Forest Service and the operator by facilitating resolution of the question, ''Is submission and approval of a plan of operations required before the operator can commence proposed operations?''

Given the intended function of a notice of intent to operate, there can be no definitive answer to the question of what level of activity requires the submission of a notice of intent to conduct operations. As previously mentioned in the discussion on § 228.4(a), that given the variability of the lands within the NFS subject to the United States mining laws, identical operations could have vastly different effects depending upon the condition of the lands and other surface resources which would be affected by those mining operations. Thus, while it is possible to identify some categories of operations which will never require the prior submission of a notice of intent to operate, in many cases the need for the submission of a notice of intent to operate must be determined based upon a case-by-case evaluation of the proposed operations and the kinds of lands and other surface resources involved.

However, the Department notes that it is likely that some operators will not have the same perception or understanding of the impacts which their proposed operations may have on NFS resources that trained Forest Service specialists will have. Indeed, Congress recognized this in Congressman John Melcher's June 20, 1974, letter to Forest Service Chief John McGuire:

It is unreasonable, in the judgment of the Subcommittee, to expect operators—particularly for small prospectors and miners—to describe * * * the effects their operations are having or may have upon the environment and surface resources. Most operators do not have the knowledge to do so and many cannot afford to hire environmental consultants to do it for them.

Accordingly, in § 228.4(a)(4) of the final rule, the District Ranger shall retain final authority to decide whether prior submission and approval of a plan of operations is required and can make this determination at any time, whether or not the operator first submits a notice of intent to operate.

For these reasons, no change was made in the final rule in response to these comments.

*Comment:* Numerous respondents commented on the requirement in § 228.4(a)(2) of the interim rule that ''a notice of intent to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources'' stating that the test ''might cause disturbance of surface resources'' was far too broad. Some respondents noted that wading in a stream or rolling over a rock would require a notice of intent to operate if a District Ranger interpreted the term ''disturbance'' as it is commonly understood to mean ''any change from the existing condition.'' Many of these respondents suggested that the requirement be revised to read: ''a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources.'' Some respondents reasoned that this change would rationalize § 228.4(a) of the interim rule by bringing to the attention of the Forest Service, by means of the submission of a notice of intent to operate, only those operations which an operator thinks might cause a significant disturbance of NFS surface resources. This act would give the District Ranger the opportunity to evaluate the likelihood that the operations would result in such significant disturbance and require prior submission and approval of a proposed plan of operations, if appropriate.

*Response:* As discussed in the response to the previous comment, the interim rule did not change the requirement initially adopted in 1974 that a notice of intent to operate ''is required from any person proposing to conduct operations which might cause disturbance of surface resources,'' although the interim rule moved that requirement within § 228.4(a) for purposes of clarity. However, the Department examined the record for the 1974 rulemaking to see what light it sheds on the question of the appropriate test for assessing the need for the submission of a notice of intent to operate before an operator conducts proposed operations. That record reveals that the Department never intended to require an operator to submit a notice of intent to operate whenever there is a possibility that the proposed operations would cause even the most inconsequential disturbance of NFS resources. Indeed, the Questions and Answers pamphlet developed by the Forest Service when the 1974 rule was adopted leaves no doubt that it was the Department's intent that the test for the submission of a notice of intent to operate should be whether the proposed operations might cause significant disturbance of NFS surface resources. This issue was further explained in the following question and answer in the 1974 pamphlet:

Question:

I'm a rockhound or mineral collector. How are my activities covered by requirements for [plans of operations] or notices of intent[ ] to operate?

Answer:

Your activities do not generally require either an operating plan or a notice of intent[ ] to operate. However, if you have any doubt about whether or not your activities will cause significant surface resource disturbance, you should file a notice of intent[ ].

The Department's intent that the test for the submission of a notice of intent to operate should be whether the proposed operations might cause significant disturbance of NFS surface resources also is reflected by a second question in the 1974 pamphlet which states: ''What should an operator do if the operator isn't sure that the proposed

operations will be significant enough to require a plan of operations?''

After considering this issue again, the Department agrees that an operator only should be required to submit a notice of intent to operate for those operations which might cause significant disturbance of NFS resources and, therefore, conceivably might require prior submission and approval of a proposed plan of operations. Requiring the submission of a notice of intent to operate for operations which will cause insignificant disturbance of NFS surface resources places an unjustified burden upon persons exercising the rights granted by the United States mining laws. Requiring Forest Service professionals to review notices of intent to operate submitted for operations which have no potential to significantly disturb NFS resources also diverts those specialists from the important task of regulating those operations which are likely to significantly disturb those resources.

Therefore, section 228.4(a) of the final rule will require the operator's prior submission of a notice of intent to operate for ''operations which might cause significant disturbance of surface resources.'' This means that the trigger for the submission of a notice of intent to operate is the operator's reasonable uncertainty as to the significance of the disturbance which the proposed operations will cause on NFS resources. If the operator reasonably concludes that the proposed operations will not cause significant disturbance of NFS resources, the operator is not required to submit a notice of intent to operate (or a proposed plan of operations). If the operator reasonably concludes that the proposed operations more probably than not will cause a significant disturbance of NFS resources, the operator should submit a proposed plan of operations to the District Ranger. However, if the operator reasonably concludes that the proposed operations might, but probably will not, cause significant disturbance of NFS resources, the operator should submit a notice of intent to operate to the District Ranger.

Once a notice of intent to operate is filed, the Forest Service has an opportunity to determine whether the agency agrees with the operator's assessment that the operations are not likely to cause significant disturbance of NFS resources such that the Forest Service will not exercise its discretion to regulate those operations. If the District Ranger, based on past experience, direct evidence, or sound scientific projection, disagrees with the operator's assessment and determines that the proposed operations, more probably than not, would cause significant disturbance of NFS resources, the District Ranger shall require the operator to submit and obtain approval of a proposed plan of operations before commencing those operations. By means of the approved plan of operations, the District Ranger shall obtain the operator's agreement to perform specific reclamation, post a reclamation performance bond, avoid unnecessary or unreasonable impacts on NFS resources, and implement other mitigation measures, as appropriate.

However, as noted in the response to the previous comment, it is likely that some operators will not have the same perception or understanding of the impacts which their proposed operations may have on NFS resources that trained Forest Service specialists will have. Therefore, in § 228.4(a)(4) of the final rule the District Ranger retains final authority to decide whether prior submission and approval of a plan of operations is required and can make this determination at any time, whether or not the operator first submits a notice of intent to operate.

*Comment:* Numerous respondents said that the interim rule treats prospectors or miners unfairly compared to other users of the NFS, such as hikers, fishermen, hunters, and rock climbers, who cause similar limited disturbance of NFS resources but are not required to submit a document comparable to a notice of intent to operate prior to causing this disturbance.

*Response:* The Department agrees that it is inappropriate to require prior notice of the disturbance of NFS resources caused by one category of user but not other categories of users of the NFS causing identical surface disturbance. Therefore, for the reasons discussed in the response to the comment on paragraph 4(a)(1)(iv) of the interim rule, a new paragraph 4(a)(1)(v) is included in the final rule which provides that a notice of intent to operate is not required for ''operations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization.''

*Comment:* A number of respondents stated that the Forest Service should add more specific examples of operations which do not require prior submission of a notice of intent to operate to the exemptions listed in § 228.4(a)(1)(i) through (v) of the interim rule. Several other respondents said that the interim rule should contain a well-defined description of operations that do not require the submission of a notice of intent to operate.

*Response:* For the reasons cited in the response to the first comment on § 228.4(a)(2) of the interim rule, the need in many situations for the submission of a notice of intent to operate must be determined through a case-by-case evaluation of the proposed operations and the kinds of lands and other surface resources which those operations will effect. However, it is possible to identify some categories of operations which will never require the prior submission of a notice of intent to operate and the Department agrees that the final rule should identify those categories with more specificity as suggested by the respondents.

Therefore, the Department is adding to § 228.4(a)(1) of the final rule another category of operations which can be conducted without prior submission of a notice of intent to operate. This category will include ''operations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization.'' In addition, the final rule also adds more specificity to two categories of operations exempted from the requirement for prior submission of a notice of intent to operate which are included in the interim rule at § 228.4(a)(1)(ii) and (iii) but combined into one category in the final rule at § 228.4(a)(1)(ii).

These changes to the final rule better delineate the level of work, functions, or activities which clearly do not constitute a significant disturbance of NFS resources and, therefore, do require the submission of a notice of intent to operate before proposed mining operations can be initiated.

*Comment:* One respondent said that § 228.4(a)(2) of the interim rule, which requires a District Ranger to advise the operator, within 15 days of the Ranger's receipt of a notice of intent to operate, whether approval of a plan of operations is required before the proposed operations commence fails to give the miner any recourse if the District Ranger does not respond within that period.

*Response:* The respondent's characterization of § 228.4(a)(2) of the interim rule is accurate. However, this does not mean that the operator lacks a remedy for a District Ranger's failure to comply with the requirement to respond within 15 days of receipt of a notice of intent to operate. Indeed, as the respondent observed, the operator could

consider filing an administrative appeal or a civil lawsuit challenging the District Ranger's noncompliance with this requirement. These are same remedies which an operator has with respect to any other duty which the operator believes a District Ranger has not fulfilled. The Department sees no reason to provide a unique remedy for a District Ranger's failure to comply with this particular paragraph of the interim rule.

For these reasons, no change has been made in the final rule as a consequence of this comment.

The provisions of § 228.4(a)(2) of the interim rule have been redesignated as follows: provisions for filing a notice of intent redesignated to § 228.4(a); the 15-day requirement redesignated at § 228.4(a)(2); and exceptions for filing a notice of intent at § 228.4(a)(1)(i)–(vii).

*Section 228.4(a)(2)(i)*

No specific comments were submitted on § 228.4(a)(2)(i) of the interim rule. Except for redesignation of this provision to paragraph (a)(1)(vii) in the final rule, no changes were made in the final rule.

*Section 228.4(a)(2)(ii)*

No specific comments were submitted on § 228.4(a)(2)(ii) of the interim rule. Except for redesignation of this provision to paragraphs (a)(1)(i)–(iv) in the final rule, no changes were made in the final rule.

*Section 228.4(a)(2)(iii)*

*Comment:* With respect to the phrase ''[u]nless those operations otherwise might cause a disturbance of surface resources'' found in § 228.4(a)(2)(iii) of the interim rule, and which qualifies an exemption to the requirement that an operator must submit a notice of intent to operate, numerous respondents commented that this phrase gives too much discretion to District Rangers. Those respondents stated that the test ''might cause a disturbance of surface resources'' was far too broad and would permit a District Ranger to require a notice of intent to operate for any virtually any surface disturbance. Many of those respondents also suggested that the exemption to the requirement for prior submission of a notice of intent to operate in § 228.4(a)(2)(iii) of the interim rule be revised to apply to: ''operations which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources.''

*Response:* As previously discussed, the Department agrees that an operator should only be required to submit a notice of intent to operate for those operations which might cause significant disturbance of NFS resources and conceivably might require prior submission and approval of a proposed plan of operations. Accordingly, § 228.4(a)(1)(vi) of the final rule, which corresponds to § 228.4(a)(2)(iii) of the interim rule, has been revised to apply to ''operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources.''

*Comment:* Several respondents said that an exception to the requirement for prior submission of a notice of intent to operate in 36 CFR § 228.4(a)(2)(iii) should be broadened.

*Response:* 36 CFR 228.4(a)(2) provided that ''[a] notice of intent need not be filed * * * (iii) [f]or operations which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes and will not involve the cutting of trees.''

As previously discussed, identical operations could have vastly different effects depending upon the condition of the lands and other surface resources which would be affected by those mining operations. In fact, identical operations might cause significant disturbance of NFS resources in one situation and insignificant disturbance of those resources in another. Thus, determining whether operations might cause a significant disturbance of NFS resources necessarily depends upon a case-by-case evaluation of a proposed operation and the kinds of lands and other NFS surface resources involved. Consequently, the Department does not believe that it is possible to develop exemptions to the requirement to submit a notice of intent to operate in addition to those in paragraphs 4(a)(1)(i) through (vii) of the final rule which would be universally appropriate.

For these reasons, no change has been made in the final rule in response to these comments.

The provisions in § 228.4(a)(2)(iii) in the interim rule have been redesignated at § 228.4(a)(1)(vi) in the final rule.

**Regulatory Certifications**

*Regulatory Impact*

This final rule has been reviewed under USDA procedures and Executive E.O. 12866 of September 30, 1993, ''Regulatory Planning and Review.'' This final rule will not have an annual effect of $100 million or more on the economy, nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This final rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this final rule will not alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients of such programs. Therefore, it has been determined that this final rule is not an economically significant regulatory action.

This final rule also has been considered in light of the Regulatory Flexibility Act, as amended, (5 U.S.C. 601 *et seq.*). In promulgating this final rule, publication of a general notice of proposed rulemaking was not required by law. Further, it has been determined that this final rule will not have a significant economic impact on a substantial number of small business entities as defined by that Act. Therefore, it has been determined that preparation of a final regulatory flexibility analysis is not required for this final rule.

*Environmental Impacts*

This final rule clarifies the criteria for determining when a notice of intent to operate or a plan of operations should be submitted by a mining operator. Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43168; Sept. 18, 1992) excludes from documentation in an environmental assessment or environmental impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instruction.'' This final rule clearly falls within this category of actions and the Department has determined that no extraordinary circumstances exist which would require preparation of an environmental assessment or an environmental impact statement. Moreover, this rule itself has no impact on the human environment. Rather, in the context of 36 CFR part 228, subpart A, of which this final rule will be a part, the action which the agency takes which might have an impact on the human environment is approving a proposed plan of operations. Therefore, it has been determined that preparation of an environmental assessment or an environmental impact statement is not required in promulgating this final rule.

*Energy Effects*

This final rule has been reviewed under E.O. 13211 of May 18, 2001, ''Actions Concerning Regulations That

Significantly Affect Energy Supply, Distribution, or Use.'' This final rule will not have a significant adverse effect on the supply, distribution, or use of energy. Nor has the Office of Management and Budget designated this rule as a significant energy action. Therefore, it has been determined that this final rule does not constitute a significant energy action requiring the preparation of a Statement of Energy Effects.

*Controlling Paperwork Burdens on the Public*

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or reporting requirements for notices of intent to operate and plans of operation contained in this final rule were previously approved by the Office of Management and Budget and assigned control number 0596–0022, expiring on July 31, 2005. This final rule does not contain any new recordkeeping or reporting requirements or other information collection requirements as defined by the Act or its implementing regulations (5 CFR part 1320) that are not already required by law or not already approved for use. Accordingly, it has been determined that the review provisions of the Paperwork Reduction Act of 1995 and its implementing regulations do not apply to this final rule.

*Federalism*

This final rule has been considered under the requirements of E.O. 13132 of August 9, 1999, ''Federalism.'' This final rule conforms with the Federalism principles set out in this E.O.; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it has been determined that this final rule does not have federalism implications.

*Consultation With Indian Tribal Governments*

This final rule has been reviewed under E.O. 13175 of November 6, 2000, ''Consultation and Coordination With Indian Tribal Governments.'' This final rule does not have substantial direct effects 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. Nor does this final rule impose substantial direct compliance costs on Indian tribal governments or preempt tribal law. Therefore, it has been determined that this final rule does not have tribal implications requiring advance consultation with Indian tribes.

*No Takings Implications*

This final rule has been analyzed in accordance with the principles and criteria contained in E.O. 12630 of March 15, 1988, ''Governmental Actions and Interference With Constitutionally Protected Property Rights.'' It is well established that a rule, such as the final rule, which in certain circumstances requires a miner to obtain Federal approval before conducting mineral operations on Federal lands, does not deprive the miner of any property right. Therefore, it has been determined that the final rule does not pose the risk of a taking of Constitutionally protected private property.

*Civil Justice Reform*

This final rule has been reviewed under E.O. 12988 of February 7, 1996, ''Civil Justice Reform.'' The Department has not identified any State or local laws or regulations that are in conflict with this regulation or that would impede full implementation of this final rule. Nevertheless, in the event that such a conflict was to be identified, this final rule would preempt State or local laws and regulations found to be in conflict with this final rule or that impede its full implementation. However, in that case, (1) no retroactive effect would be given to this final rule; and (2) this final rule does not require use of administrative proceedings before parties may file suit in court challenging its provisions.

*Unfunded Mandates*

Pursuant to title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the effects of this final rule on State, local, and tribal governments and the private sector have been assessed. This final rule does not compel the expenditure of $100 million or more by any State, local, or tribal government or anyone in the private sector. Nor, in promulgating this final rule, was the publication of a general notice of proposed rulemaking required by law. Therefore, it has been determined that a statement under section 202 of the Act is not required for this final rule.

**List of Subjects in 36 CFR Part 228**

Environmental protection, Mines, National forests, Oil and gas exploration, Public lands—mineral resources, Public lands—rights-of-way, Reporting and-recordkeeping requirements, Surety bonds, Wilderness areas.

Therefore, for the reasons set forth in the preamble, amend part 228 of title 36 of the Code of Federal Regulations as follows:

## PART 228—MINERALS

### Subpart A—Locatable Minerals

■ 1. The authority citation for part 228 continues to read as follows:

**Authority:** 30 Stat. 35 and 36, as amended (16 U.S.C. 478, 551); 41 Stat. 437, as amended sec. 5102(d), 101 Stat. 1330–256 (30 U.S.C. 226); 61 Stat. 681, as amended (30 U.S.C. 601); 61 Stat. 914, as amended (30 U.S.C. 352); 69 Stat. 368, as amended (30 U.S.C. 611); and 94 Stat. 2400.

■ 2. Amend § 228.4 to revise paragraph (a) to read as follows:

**§ 228.4 Notice of intent—plan of operations—requirements.**

(a) Except as provided in paragraph (a)(1) of this section, a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources. Such notice of intent to operate shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. Each notice of intent to operate shall provide information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport.

(1) A notice of intent to operate is not required for:

(i) Operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest System purposes;

(ii) Prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study which generally might include searching for and occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools;

(iii) Marking and monumenting a mining claim;

(iv) Underground operations which will not cause significant surface resource disturbance;

(v) Operations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users

of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization;

(vi) Operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources; or

(vii) Operations for which a proposed plan of operations is submitted for approval;

(2) The District Ranger will, within 15 days of receipt of a notice of intent to operate, notify the operator if approval of a plan of operations is required before the operations may begin.

(3) An operator shall submit a proposed plan of operations to the District Ranger having jurisdiction over the area in which operations will be conducted in lieu of a notice of intent to operate if the proposed operations will likely cause a significant disturbance of surface resources. An operator also shall submit a proposed plan of operations, or a proposed supplemental plan of operations consistent with § 228.4(d), to the District Ranger having jurisdiction over the area in which operations are being conducted if those operations are causing a significant disturbance of surface resources but are not covered by a current approved plan of operations. The requirement to submit a plan of operations shall not apply to the operations listed in paragraphs (a)(1)(i) through (v). The requirement to submit a plan of operations also shall not apply to operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise will likely cause a significant disturbance of surface resources.

(4) If the District Ranger determines that any operation is causing or will likely cause significant disturbance of surface resources, the District Ranger shall notify the operator that the operator must submit a proposed plan of operations for approval and that the operations can not be conducted until a plan of operations is approved.

* * * * *

Dated: May 31, 2005.

**David P. Tenny,**

*Deputy Under Secretary, NRE.*

[FR Doc. 05–11138 Filed 6–3–05; 8:45 am]

**BILLING CODE 3410–11–P**

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## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

**RIN 1018–AU31**

## Endangered and Threatened Wildlife and Plants; Opening of the Comment Period for the Proposed and Final Designation of Critical Habitat for the Klamath River and Columbia River Populations of Bull Trout (Salvelinus confluentus); Clarification

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule; opening of comment period; clarification.

**SUMMARY:** We are publishing additional information pertaining to a recent **Federal Register** document that opened a comment period on a proposed and final rule to designate critical habitat for the Klamath River and Columbia River populations of bull trout. This information provides clarification to that document. We hope that this additional information will benefit the public in understanding our actions in regard to the bull trout critical habitat designation.

**DATES:** We will accept public comments on the proposed and final rules until June 24, 2005.

**ADDRESSES:** Please see our May 25, 2005, **Federal Register** document (70 FR 29998) for information regarding how and where to submit comments.

**FOR FURTHER INFORMATION CONTACT:** John Young, 503–231–6194.

**SUPPLEMENTARY INFORMATION:**

### Background

We published a document in the May 25, 2005, **Federal Register** (70 FR 29998) that announced the opening of a public comment period on the proposed and final designations of critical habitat for the Klamath River and Columbia River populations of bull trout. The proposed rule published on November 29, 2002, at 67 FR 71236, and the final rule published on October 6, 2004, at 69 FR 59996. The following information provides clarification to the May 25, 2005, document.

On April 28, 2005, the government filed a motion for voluntary remand. If the court grants this motion, the October 6, 2004, final critical habitat designation will be remanded to the Service for a new decision. The voluntary remand would have the effect of reinstating the November 29, 2002, proposed rule. In a declaration supporting the motion for voluntary remand, the Service informed the court that in mid-May the Service would reopen the comment period on the November 29, 2002, proposed rule and seek comment on the exclusions made in the October 6, 2004, final rule. Further, the Service indicated that the culmination of the administrative process initiated with the opening of the comment period would be conditional upon the court's ruling. In other words, the Service will only be making a new final determination on the November 2002 proposed rule to the extent that this is consistent with the court's ruling on the government's motion.

Subsequently, we published the May 25, 2005, document that announced the opening of a public comment period. Should the court deny the government's motion, the Service will still collect and analyze all comments received as a result of the May 25, 2005, notice for use in any future rulemaking regarding bull trout critical habitat, and comply with any court order issued. The Service published the notice reopening the comment period before the court ruled on the government's motion to ensure that a new final determination could be made as quickly as possible.

### Authority

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

Dated: May 31, 2005.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 05–11166 Filed 6–3–05; 8:45 am]

**BILLING CODE 4310–55–P**

# Proposed Rules

Federal Register
Vol. 70, No. 107
Monday, June 6, 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 AGRICULTURE

### Animal and Plant Health Inspection Service

### 7 CFR Part 301

**[Docket No. 04–031–1]**

### Pine Shoot Beetle; Interstate Movement of Pine Bark Products From Quarantined Areas

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the pine shoot beetle regulations to allow pine bark products to be moved interstate from quarantined areas during the shoot feeding stage (July 1 through October 31) of the pine shoot beetle's life cycle without treatment. We are proposing this change because pine shoot beetles are not present in pine bark products during this stage. We are also proposing to establish a management method to allow pine bark products to be moved interstate from quarantined areas during the overwintering stage (November 1 through March 31) and spring flight stage (April 1 through June 30) of the pine shoot beetle's life cycle. This action would relieve restrictions on the interstate movement of pine bark products from quarantined areas during 4 months of the year and provide for the use of a management method as an alternative to fumigation with methyl bromide for pine bark products moved interstate from quarantined areas during the rest of the year.

**DATES:** We will consider all comments that we receive on or before August 5, 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. 04–031–1, 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. 04–031–1.
- *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 on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html*.

**FOR FURTHER INFORMATION CONTACT:** Mr. Weyman Fussell, Program Manager, Invasive Species and Pest Management, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1231; (301) 734–5705.

**SUPPLEMENTARY INFORMATION:**

## Background

The regulations in 7 CFR 301.50 through 301.50–10 (referred to below as the regulations) restrict the interstate movement of certain regulated articles from quarantined areas in order to prevent the spread of pine shoot beetle (PSB) into noninfested areas of the United States.

PSB is a pest of pine trees that can cause damage in weak and dying trees, where reproduction and immature stages of PSB occur. During shoot feeding, young beetles tunnel into the center of pine shoots (usually of the current year's growth), causing stunted and distorted growth in host trees. PSB is also a vector of several diseases of pine trees. Factors that may result in the establishment of PSB populations far from the location of the original host tree include: (1) Adults can fly at least 1 kilometer, and (2) infested trees and pine products are often transported long distances. This pest damages urban ornamental trees and can cause economic losses to the timber, Christmas tree, and nursery industries.

PSB hosts include all pine species (*Pinus* spp.). The beetle has been found in a variety of pine species in the United States. Scotch pine (*P. sylvestris*) is the preferred host of PSB. White pine (*P. strobus*) is the most common pine species in many of the quarantined areas, but it is not well-suited for PSB reproduction and thus is not a preferred host for PSB.[1] The Animal and Plant Health Inspection Service (APHIS) has determined, based on scientific data from European countries, that fir (*Abies* spp.), larch (*Larix* spp.), and spruce (*Picea* spp.) are not hosts of PSB.

Section 301.50–2 lists articles regulated because of PSB. Regulated articles are the following pine products: Bark nuggets (including bark chips), Christmas trees, logs with bark attached, lumber with bark attached, nursery stock, raw pine materials for pine wreaths and garlands, and stumps. Section 301.50–4 provides that regulated articles that originate within a quarantined area may be moved interstate only if they are moved with a certificate or limited permit issued and attached in accordance with §§ 301.50–5 and 301.50–8 of the regulations or they are moved by the U.S. Department of Agriculture for experimental or scientific purposes.

Section 301.50–5 sets out conditions under which an inspector will issue either a certificate or a limited permit for the interstate movement of regulated articles from a quarantined area. One of the conditions for issuing a limited permit is that the regulated article must be moved interstate to a specific destination in a nonquarantined area or to another quarantined area. In order for a regulated article to move freely once it exits a quarantined area, the conditions for the issuance of a certificate in § 301.50–5(a) must be fulfilled. Pine bark nuggets (including

[1] Ryall, K.L. and S.M. Smith. 2000. Reproductive success of the introduced pine shoot beetle, *Tomicus piniperda*, (Coleoptera: Scolytidae) on selected North American and European conifers. Proc. Ent. Soc. Ont. 131:113–121.

bark chips) are only eligible for a certificate if they are treated in accordance with § 301.50–10 and meet the transportation requirements in § 301.50–5(a)(2); fumigation with methyl bromide is the only treatment authorized in § 301.50–10 for pine bark nuggets (including bark chips) to be moved interstate from a quarantined area.

**Definition of Pine Bark Products**

Some confusion exists as to which products produced from pine bark are included in the term ''pine bark nuggets (including bark chips).'' We intend to regulate the movement of mulch and compost produced from pine bark in the PSB regulations, as the interstate movement of PSB-infested mulch and compost could contribute to the spread of PSB from quarantined areas. To clarify this matter, we are proposing to add a definition of *pine bark products* to § 301.50–1 that would read ''Pieces of pine bark including bark chips, bark nuggets, bark mulch, and bark compost.'' We would also replace the term ''pine bark nuggets (including bark chips)'' everywhere it occurs in the regulations with ''pine bark products.'' We will use the term ''pine bark products'' in our discussion of the other changes we are proposing to make to the regulations.

*Mitigating the Risks Associated With the Interstate Movement of Pine Bark Products From a Quarantined Area*

As discussed above, fumigation with methyl bromide is currently the only treatment for pine bark products provided for by the regulations. However, we have reexamined the risks associated with the interstate movement of pine bark products from a quarantined area based on the habitats and activities of PSB during each stage of its life cycle:

- Overwintering (November 1 through March 31): During this stage, adult PSB bore into the bark of pine trees and overwinter at the base of those trees.
- Spring flight (April 1 through June 30): During this stage, adult PSB emerge from the base of pine trees and form broods in dead and dying pine logs. Larvae develop under the bark, feeding on the inner bark and cambium. They emerge as adult beetles in about 4 to 8 weeks.
- Shoot feeding (July 1 through October 31): During this stage, adult PSB are only found in pine branch shoots, where they feed, and are no longer present in pine bark.

Given these changing habitats and activities, different procedures to mitigate the risk of spreading PSB from a quarantined area via the interstate movement of pine bark products are appropriate for each stage in the PSB life cycle. In addition, recent research indicates that combinations of mechanical procedures and, in some cases, composting are effective at killing PSB that may be present in pine bark products. Finally, the fact that PSB is not present in pine bark during the shoot feeding stage means that no specific risk mitigation measures are necessary for pine bark products that are produced from trees felled during the shoot feeding stage and moved interstate from a quarantined area.

Accordingly, staff from the Maine Department of Agriculture, the Maine Forest Service, and plant regulatory staff in other States developed a management method for the interstate movement of pine bark products from a quarantined area that could be used as an alternative to fumigation with methyl bromide to mitigate the risk of the spread of PSB via such movement. After it was proposed to APHIS in 2002, the management method underwent numerous revisions and was subsequently submitted to the National Plant Board, a group composed of plant regulatory officials from the 50 States, for review in the summer of 2003. In October 2003, the National Plant Board's Board of Directors voted unanimously to support the use of the management method. APHIS has reviewed the management method and the research behind it and concurs in the judgment of the other reviewers. (For further information on the management method, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.)

Therefore, we are proposing to amend the regulations in § 301.50–5(a)(1)(v) to allow a certificate to be issued for the interstate movement of pine bark products produced from trees felled during the shoot feeding cycle, without mandatory treatment or inspection. We are also proposing to add to the regulations in § 301.50–10 a management method for pine bark products generated from trees of four pine species: White pine, Scotch pine, red pine (*P. resinosa*), and jack pine (*P. banksiana*). Under this proposed rule, pine bark products that are produced from pines of those species felled during the period November 1 through June 30 and that have been produced in accordance with these management methods would satisfy the conditions for the issuance of a certificate for interstate movement from a quarantined area if they meet the transportation requirements in § 301.50–5(a)(2).

*Interstate Movement During the Shoot Feeding Stage (July 1 Through October 31)*

The regulations in § 301.50–5(a)(1)(v) provide that a certificate will be issued for the interstate movement of a pine log with bark attached, pine lumber with bark attached, or a pine stump from a quarantined area if the source tree has been felled during the period of July through October; § 301.50–5(a)(2)(iii) additionally provides that articles meeting that condition may be transported without restrictions if they are shipped interstate during the period of July through October. No treatment or inspection is required; these measures are presumed not to be necessary due to the fact that adult PSB are only found in pine branch shoots during the shoot feeding stage. This fact also means that PSB would not be present in any pine bark products generated from logs that were felled and debarked during the period of July through October and moved interstate from a quarantined area during that same period, especially considering that stockpiles of loose bark are not known to attract PSB. However, we neglected to include pine bark products in § 301.50–5(a)(1)(v) when we established that paragraph in an interim rule effective and published in the **Federal Register** on May 13, 1993 (58 FR 28333–28335, Docket No. 92–139–3).

Accordingly, this proposed rule would amend § 301.50–5(a)(1)(v) to add pine bark products generated from source trees felled and debarked during the period of July through October to the list of regulated articles for which a certificate for interstate movement from a quarantined area may be issued without treatment or inspection if the source tree has been felled during the period of July through October. We would also amend § 301.50–5(a)(2)(iii) to add pine bark products generated from source trees felled and debarked during the source feeding stage to the parallel list of regulated articles in that paragraph.

In addition, we would make two minor changes to paragraph § 301.50–5(a)(2)(iii). We would add language to indicate that the articles from trees felled during the period of July through October must be moved interstate during the period of July through October of the year in which the source tree was felled in order to be eligible under that paragraph to move under a certificate. This change would clarify the regulations. We would also replace all the references in the regulations to the period July through October with references to the period July 1 through

October 31, to make the duration of the period of time in question clearer.

*Management Method for the Interstate Movement of Pine Bark Products*

The management method APHIS has determined to be effective for pine bark products moved interstate during the overwintering and the spring flight stages draws on several means of mitigating the risk of spreading PSB that is associated with such movement, including mechanical debarking of the pine logs, grinding of the pine bark into pieces of 1 inch or less in size, and composting.

Mechanically debarking pine logs, a common process which produces pine bark as a byproduct, can be assumed to kill almost all PSB that may be present in the pine logs when a ring debarker or a Rosser head debarker is used. Ring debarkers consist of a ring of cutting heads or knives that are mounted on a series of arms in a circular position; the cutting heads rotate around the log as it is fed through the ring. The rings have a variable pressure capacity, so they relax or constrict to accommodate the different dimensions and contours of each log. Rosser head debarkers consist of a unit in which the log is turned while a moving cutter head debarks it.

While no research has yet been conducted regarding the mortality rate for PSB that results from mechanical debarking, research on mortality rates for two beetles that are of a size similar to PSB, *Ips typographus* and *I. calligraphus*, indicates that mechanical debarking produces mortality rates of 93 percent and 99 percent, respectively, for those beetles.[2]

After pine logs are debarked, the resulting pine bark products may be processed, either by bark grinding or by composting. If the pine bark is ground into pieces of 1 inch in diameter or less, we believe the grinding process is sufficient to mitigate the risk of spreading PSB via the interstate movement of the pine bark. One study using unprocessed, composted pine bark whose surface was infested with *Tribolium confusum* duVal (Coleoptera; Tenebrionidae) found no survivors after the bark was ground in a manner simulating final bark mulch processing.[3] Another investigator reported similar results using loblolly pine with infestations of *Ips* spp.[4]

Composting procedures can raise the temperature of pine bark products to 120 °F (49 °C), which is sufficient to kill PSB. However, experiments by APHIS's Center for Plant Health Science and Technology (CPHST) indicate that care must be taken to ensure that all parts of a pile of composting pine bark reach this temperature, as the exterior portions of a pile will not compost. CPHST has developed a procedure for composting pine bark that addresses this problem and ensures that the composting process is lethal to PSB:

- The pile of pine bark to be composted must be at least 200 cubic yards in size.
- The compost pile must remain undisturbed until the interior temperature of the pile reaches 120 °F (49 °C) and remains at or over that temperature for 4 consecutive days.
- After the 4-day period is completed, the outer layer of the compost pile must be removed to a depth of 3 feet.
- A second compost pile must be started using the cover material previously removed as a core. Core material must be removed from the first compost pile and used to cover the second compost pile to a depth of 3 feet.
- The second compost pile must remain undisturbed until the interior temperature of the pile reaches 120 °F (49 °C) and remains at or over that temperature for 4 consecutive days. After this 4-day period, the composting procedure is complete.
- Previously composted material generated using this procedure may be used as cover material for subsequent compost piles. A compost pile that uses previously composted material as cover material must remain undisturbed until the interior temperature of the pile reaches 120 °F (49 °C) and remains at or over that temperature for 4 consecutive days. After this 4-day period, the composting procedure is complete.

The procedures we are proposing to allow as an alternative to fumigation with methyl bromide for the management of pine bark products generated from trees felled during the overwintering stage and the spring flight stage of the life cycle of PSB are described below.

*Management Procedure For the Overwintering Stage (November 1 Through March 31)*

During this stage, PSB bore into the bark of pine trees and overwinter at the base of those trees. Research on PSB overwintering behavior in small-diameter Scotch pine trees indicates up to 97 percent of adults choose overwintering sites on the bases of those trees that are 4 inches or less above the duff layer.[5] Pine trees are typically cut 4 to 6 inches above the duff layer when harvested; thus, if any PSB are present in pine trees that are harvested during the overwintering period, most or all of them are not present in the pine logs that are removed from the harvesting site.

As mentioned above, Scotch pine is the preferred host for PSB. In general, PSB prefers to overwinter in 2–3 needle hard pines, such as Scotch pine, red pine, and jack pine, rather than white pine, which is a 5-needle soft pine. When overwintering, PSB chooses sites close to the ground on preferred hosts first. If those sites are too crowded, it will either overwinter higher on the tree in a preferred host or close to the ground in a nonpreferred host. Thus, in crowded conditions, PSB may be present at locations higher than 4 inches above the duff layer on hard pines. However, it is unlikely that PSB would be present in high concentrations on soft pines, regardless of crowding conditions, and it is highly unlikely that PSB would be present more than 4 inches above the duff layer.

Given the above considerations, we are proposing to allow inspectors to issue a certificate for the interstate movement of pine bark products from white pines from a quarantined area during the overwintering period if the pines are harvested with a stump height of 4 inches above the duff layer and the pine logs are subsequently mechanically debarked with a ring debarker or a Rosser head debarker. PSB is highly unlikely to be present in white pines at more than 4 inches above the duff layer, and the debarking process further mitigates the risk of spreading PSB via interstate movement of pine bark products from quarantined areas.

Because PSB is more likely to be present 4 inches above the duff layer in hard pines, we are proposing to allow inspectors to issue a certificate for the interstate movement of pine bark products from Scotch pines, red pines, and jack pines from a quarantined area during the overwintering period if the pines are harvested with a stump height of 4 inches above the duff layer, the pine logs are subsequently mechanically debarked with a ring debarker or a Rosser head debarker, and the resulting pine bark products are either ground

[2] Dubbel, V. 1993. Survival rate of spruce bark beetles with machine debarking. Allgemeine Forst Zeitschrift: 48(7): 359–360; and Haack, R.A. (unpublished data).

[3] Barak, A.V. 1999. Pine Shoot Beetle compliance: Cooperative Investigation with Webb Brothers Inc., Sherburne, NY. USDA/APHIS unpublished report, USDA/APHIS Otis Plant Protection Center, Otis ANGB, MA.

[4] Haack, R.A. (unpublished data).

[5] Petrice, T.R., R.A. Haack and T.M. Poland. 2002. Selection of overwintering sites by *Tomicus piniperda* (Coleoptera: Scolytidae) during fall shoot departure. J. Entomol. Sci. 37(1): 48–59.

into pieces of 1 inch or less in size or composted in accordance with the procedure described above.

*Management Procedure for the Spring Flight Stage (April 1 to June 30)*

During this period, PSB attempts to establish broods in dead and dying pine logs, meaning that any pine logs or any material generated from pine logs may be infested with PSB. Therefore, we are proposing to allow an inspector to issue a certificate for the interstate movement of pine bark products generated from white pine, Scotch pine, red pine, and jack pine from a quarantined area if the logs from which the pine bark products were generated were mechanically debarked with a Ring debarker and the pine bark was subsequently either ground into pieces of 1 inch or less in size or composted in accordance with the procedure described above.

**Miscellaneous Changes**

We are proposing to add the management method described above for the overwintering and spring flight stages to § 301.50–10 in a new paragraph (d). Currently, the section heading for § 301.50–10 is ''Treatments.'' Because the management method requires mitigations that are not typically classified as treatments, such as mechanical debarking, we would amend this section heading to read ''Treatments and management method.'' In addition, paragraph (a)(1)(i) of § 301.50–5 currently requires that regulated articles to be moved interstate must be treated in accordance with § 301.50–10; we would amend this paragraph to reflect the fact that § 301.50–10 would contain a management method in addition to treatments.

**Executive Order 12866 and Regulatory Flexibility Act**

This proposed 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.

In accordance with 5 U.S.C. 603, we have performed an initial regulatory flexibility analysis, which is set out below, regarding the effects of this proposed rule on small entities. We do not currently have all the data necessary for a comprehensive analysis of the effects of this proposed rule on small entities. Therefore, we are inviting comments concerning potential effects. In particular, we are interested in information on the costs of the stump cutting, debarking, bark grinding, and composting processes that serve as components of the management plan described in this proposed rule.

In accordance with the Plant Protection Act (7 U.S.C. 7701–7772), the Secretary of Agriculture is authorized to promulgate regulations to prevent the dissemination of plant pests or noxious weeds within the United States.

We are proposing to amend the PSB regulations to allow pine bark products to be moved interstate from quarantined areas during the shoot feeding stage (July 1 through October 31) of the PSB's life cycle without treatment. We are proposing this change because PSB is not present in pine bark products during this stage. We are also proposing to establish a management method to allow pine bark products to be moved interstate from quarantined areas during the overwintering stage (November 1 through March 31) and spring flight stage (April 1 through June 30) of the PSB's life cycle.

The regulations currently require that pine bark products be fumigated with methyl bromide before a certificate can be issued allowing the interstate movement of pine bark products from a quarantined area into a nonquarantined area. The pine logging and processing industry does not consider fumigation with methyl bromide a viable treatment option due to its costs. This proposed rule would establish a pine bark product management method under which a certificate would be issued for the interstate movement of pine bark products from a quarantined area without the use of methyl bromide. Only mechanical procedures or composting would be required, and at some times pine bark products would be allowed to move without treatment. This proposed rule has the strong backing of the pine bark industry as well as the National Plant Board. APHIS, along with the National Plant Board, has found that the mechanical methods, composting, and specific handling procedures this proposal would require provide the necessary protection against the artificial spread of PSB into noninfested areas.

The groups affected by this action would be any logging, sawmill, paper mill, wood chip-energy, and wood chip-mulch operations in the 405 counties currently quarantined because of PSB.[6] The proposed rule would benefit all of these operations, allowing them to move pine bark products out of a quarantined area without the economic burden of first fumigating the bark products with methyl bromide.

States in the northeast region, specifically Maine, New Hampshire, New York, and Vermont, would benefit from this regulation due to the significant contribution the forest industry makes to their economies. According to a study published by the North East State Foresters Association in March 2001, forest-based manufacturing in this 4-State region provides employment for almost 97,000 people and generates $15.7 billion annually in receipts.[7]

The forest industry relies heavily on the wood chip processors to remove waste bark. The waste pine chips are used for landscaping material, burned to produce energy, or used to produce paper. Not only do the sawmill and logging operations benefit from this waste removal, but the wood chip industry is able to package and sell the bark to consumers for landscaping needs. Turning this waste into mulch or other products is financially and environmentally beneficial to the forest industry and consumers.

**Treatment Costs**

Putting aside the environmental impact of using methyl bromide and the consumer's possible reluctance to purchase mulch treated with methyl bromide, the treatment costs alone of fumigation with methyl bromide are prohibitive. The average cost of fumigating a 48-foot tractor-trailer loaded with mulch with methyl bromide according to the treatment schedule in § 301.50–10(a) is estimated to be $1,435.[8] Considering that a 48-foot tractor trailer holds between 82 and 96 yards of mulch, the cost of fumigation with methyl bromide is approximately $14.95 to $17.50 per yard.

The treatment costs are so high that the wood chip industry is unable to absorb these costs, as pine mulch retails for $16 a yard. The wood chip industry would have to pass these treatment costs on to consumers, approximately doubling the retail price of mulch to $32 per yard. Wood chip processors in areas quarantined for PSB are unable to compete with wood chip processors in nonquarantined areas due to the treatment costs. Sawmill and logging

[6] Under § 301.50–3, part or all of 13 States are quarantined for PSB: Illinois, Indiana, Maine, Maryland, Michigan, New Hampshire, New York, Ohio, Pennsylvania, Vermont, Virginia, West Virginia, and Wisconsin.

[7] The Economic Importance of the Northeast's Forests, North East State Foresters Association (NESFA), March 2001.

[8] Based on information provided by the Michigan State University, Agricultural Extension Service. Cost includes labor and materials; sealing of 48-ft. trailer; monitoring of fumigant (4–5 lbs. per 1,000 cubic ft.); aeration of trailer; and loading and unloading of pine mulch and nuggets.

operations are forced to dispose of the wood chips themselves.

Precise cost estimates for the management plan for pine bark products could not be obtained. However, for 4 months of the year, pine bark products would be able to be moved without restrictions. With regard to the other mitigations that would be required in the pine bark products management plan, most loggers already cut pine trees more than 4 inches above the stump, and most pine logs are already debarked using a mechanical debarker, meaning that the costs associated with these procedures should be low, if they impose any new burden at all. Pine bark mulch is typically made either by bark grinding or composting; without data on bark processors' current bark grinding and composting procedures, it is difficult to estimate what, if any, costs would be associated with implementing the management method for pine bark processors. However, we believe that any additional costs would still be far lower than the cost of fumigation with methyl bromide.

**Impact on Small Entities**

The Regulatory Flexibility Act requires that agencies specifically consider the economic impact of their regulations on small entities. The Small Business Administration (SBA) has established size criteria using the North American Industry Classification System (NAICS) to determine which economic entities meet the definition of a small firm.

Most businesses that would be affected by this proposed rule belong to one of two NAICS categories: (1) Logging firms, which would fall within NAICS category 113310, ''Logging,'' and (2) sawmills and other wood processing firms, which would fall within NAICS category 321113, ''Sawmills.'' Firms in both of these categories are considered by the SBA to be small entities if they employ fewer than 500 people. Using the data provided by the National Agricultural Statistics Service's 2002 Census of Agriculture, we can assume that most firms in these categories would be considered small entities. We do not have any specific data regarding how many firms that would be affected by the proposed rule are considered to be small entities; we invite public comment on this issue.

We believe that this proposed rule would have a positive impact on all affected entities, because we believe the management method in this proposed rule would dramatically lower treatment costs for pine bark products derived from trees during 8 months of the year and eliminate such costs entirely for pine bark products derived from trees felled during 4 months of the year. We welcome comments from affected entities on the possible economic impacts of this proposed rule.

This proposed rule contains no new information collection or recordkeeping requirements (see ''Paperwork Reduction Act'' below).

**Executive Order 12372**

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

**Executive Order 12988**

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

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

**List of Subjects in 7 CFR Part 301**

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

Accordingly, we proposed to amend 7 CFR part 301 to read as follows:

## PART 301—DOMESTIC QUARANTINE NOTICES

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

**Authority:** 7 U.S.C. 7701–7772; 7 CFR 2.22, 2.80, and 371.3.

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

2. In § 301.50–1, a new definition of *pine bark products* would be added in alphabetical order to read as follows:

**§ 301.50–1 Definitions.**

* * * * *

*Pine bark products*. Pieces of pine bark including bark chips, bark nuggets, bark mulch and bark compost.

* * * * *

**§ 301.50–2 [Amended]**

3. In § 301.50–2, paragraph (a) would be amended by removing the words ''Bark nuggets (including bark chips)'' and adding the words ''Bark products'' in their place.

4. Section 301.50–5 would be amended as follows:

a. In paragraph (a)(1)(i), by adding the words '', or, if pine bark products, produced according to the requirements of the management method in § 301.50–10(d) of this subpart'' after the word ''subpart''.

b. In paragraph (a)(1)(v), by removing the words ''July through October'' and adding the words ''July 1 through October 31'' in their place; and by adding the words ''or if the regulated article is pine bark products produced from a tree felled and debarked during the period of July 1 through October 31'' before the word ''; and''.

c. By revising paragraph (a)(2)(iii) to read as set forth below.

**§ 301.50–5 Issuance and cancellation of certificates and limited permits.**

(a) * * *

(2) * * *

(iii) The pine log with pine bark attached, pine lumber with bark attached, or pine stump from a tree felled during the period of July 1 through October 31, or the pine bark products produced from a tree felled and debarked during the period of July 1 through October 31, will be shipped interstate from the quarantined area during the period of July 1 through October 31 of the same year in which the source tree was felled; and

* * * * *

5. Section 301.50–10 would be amended as follows:

a. By revising the section heading to read as set forth below.

b. In paragraph (a), by removing the words ''pine bark nuggets (including bark chips)'' and adding the words ''pine bark products'' in their place.

c. By adding a new paragraph (d) to read as set forth below.

**§ 301.50–10 Treatments and management method.**

* * * * *

(d) *Management method for pine bark products*. The following procedures are authorized for use with pine bark products derived from white pine (*Pinus strobus*), Scotch pine (*P. sylvestris*), red pine (*P. resinosa*), and jack pine (*P. banksiana*) trees. Pine bark products will only be considered to have been produced in accordance with this management method if the following procedures are followed:

(1) For pine bark products produced from trees felled during the period November 1 through March 31:

(i) The trees must be harvested at a height of 4 inches or more above the duff line; and

(ii) The trees must have been mechanically debarked with a ring debarker or a Rosser head debarker; and

(iii) For Scotch pine, red pine, and jack pine, the bark must either be ground into pieces of 1 inch or less in size or composted in accordance with the procedure in paragraph (d)(3) of this section.

(2) For pine bark products produced from trees felled during the period April 1 through June 30:

(i) The trees must have been mechanically debarked with a ring debarker or a Rosser head debarker; and

(ii) The bark must either be ground into pieces of 1 inch or less in size or composted in accordance with the procedure in paragraph (d)(3) of this section.

(3) Composting for pine bark products for the management method in this paragraph (d) must be performed as follows:

(i) The pile of pine bark to be composted must be at least 200 cubic yards in size; and

(ii) The compost pile must remain undisturbed until the interior temperature of the pile reaches 120 °F (49 °C) and remains at or over that temperature for 4 consecutive days; and

(iii) After the 4-day period is completed, the outer layer of the compost pile must be removed to a depth of 3 feet; and

(iv) A second compost pile must be started using the cover material previously removed as a core. Core material must be removed from the first compost pile and used to cover the second compost pile to a depth of 3 feet; and

(v) The second compost pile must remain undisturbed until the interior temperature of the pile reaches 120 °F (49 °C) and remains at or over that temperature for 4 consecutive days. After this 4-day period, the composting procedure is complete.

(vi) Previously composted material generated using this procedure may be used as cover material for subsequent compost piles. A compost pile that uses previously composted material as cover material must remain undisturbed until the interior temperature of the pile reaches 120 °F (49 °C) and remains at or over that temperature for 4 consecutive days. After this 4-day period, the composting procedure is complete.

Done in Washington, DC, this 31st day of May 2005.

**Elizabeth E. Gaston,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 05–11150 Filed 6–3–05; 8:45 am]

**BILLING CODE 3410–34–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2005–20836; Directorate Identifier 2005–NM–028–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Boeing Model 727–200 and 727–200F Series Airplanes; 737–200, 737–200C, 737–300, and 737–400 Series Airplanes; 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747SR, and 747SP Series Airplanes; 757–200 and 757–200PF Series Airplanes; and 767–200 and 767–300 Series Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM); extension of comment period.

**SUMMARY:** This document extends the comment period for the above-referenced NPRM, which proposes the adoption of a new airworthiness directive (AD) that applies to certain Boeing transport category airplanes. The NRPM would require replacing any insulation blanket constructed of polyethyleneteraphthalate (PET) film, ORCON Orcofilm® AN–26 with a new insulation blanket. The NPRM results from reports of in-flight and ground fires on certain airplanes manufactured with insulation blankets covered with AN–26, which may contribute to the spread of a fire when ignition occurs from sources such as electrical arcing or sparking. This extension of the comment period is necessary to ensure that all interested persons have ample opportunity to submit any written relevant data, views, or arguments regarding the NPRM.

**DATES:** We must receive comments on this NPRM by August 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.
- 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 FURTHER INFORMATION CONTACT:** Sue Rosanske, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6448; fax (425) 917–6590.

**SUPPLEMENTARY INFORMATION:** We proposed to amend 14 CFR part 39 with a notice of proposed rulemaking (NPRM) for an AD (the ''original NPRM'') for certain Boeing Model 727–200 and 727–200F series airplanes; 737–200, 737–200C, 737–300, and 737–400 series airplanes; 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747SR, and 747SP series airplanes; 757–200 and 757–200PF series airplanes; and 767–200 and 767–300 series airplanes. The original NPRM was published in the **Federal Register** on April 4, 2005 (70 FR 16986). The original NPRM proposed to require replacing any insulation blanket constructed of polyethyleneteraphthalate (PET) film, ORCON Orcofilm® AN–26 with a new insulation blanket. The original NPRM also invites comments on its overall regulatory, economic, environmental, and energy aspects.

### Events Leading to Extension of Comment Period

Since the issuance of that original NPRM, a commenter has requested a 60-day extension of the comment period because of the extensive scope and significant potential impact of the original NPRM, the lack of associated service information, and the need for proper review of the results of prototype efforts. The commenter states that the additional time would provide operators time to study the proposed requirements of the original NPRM, to assess and compare compliance concepts with the manufacturers, to develop initial plans for developing and getting FAA approval of service information, and to prepare comments for the Rules Docket.

**FAA's Determination**

We have considered the commenter's request and find it appropriate to extend the comment period to give all interested persons additional time to examine the proposed requirements of the original NPRM and submit comments. We have determined that extending the comment period by 60 days will not compromise the safety of these airplanes.

**Extension of Comment Period**

The comment period for Docket No. FAA–2005–20836, Directorate Identifier 2005–NM–028–AD, has been revised. The comment period now closes on August 3, 2005.

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

Issued in Renton, Washington, on May 27, 2005.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 05–11252 Filed 6–2–05; 10:56 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

### 29 CFR Part 1926

**[Docket No. H023]**

**RIN 1218–AC18**

### Notice of a Regulatory Flexibility Act Review of Lead in Construction

**AGENCY:** Occupational Safety and Health Administration, Labor.

**ACTION:** Notice of a section 610 review; request for comments.

**SUMMARY:** The Occupational Safety and Health Administration (OSHA) is conducting a review of the lead in construction standard under section 610 of the Regulatory Flexibility Act and section 5 of Executive Order 12866 on Regulatory Planning and Review. In 1993, in response to a statutory mandate to adopt a standard to protect construction workers from lead exposures, OSHA promulgated a standard that requires testing of construction sites for lead exposures, provisions to protect workers from exposure where lead is present, and medical monitoring of exposed workers. The purpose of this review is to determine whether there are ways to modify this standard to make implementation more practical, to reduce regulatory burden on small business, and to improve its effectiveness, while still protecting worker health. OSHA solicits comments from the public on these and other relevant issues.

**DATES:** Written comments to OSHA must be sent or postmarked by September 6, 2005.

**ADDRESSES:** You may submit three copies of your written comments to the OSHA Docket Office, Docket No. H023, Technical Data Center, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2350. If your written comments are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693–1648. You do not have to send OSHA a hard copy of your faxed comments. Supplemental information such as studies and journal articles cannot be attached. Instead, three copies of each study, article, or other supplemental document must be sent to the OSHA Docket Office at the address above. These materials must clearly identify the associated comments to which they will be attached in the docket by the following information: Name of person submitting comments; date of comment submission; subject of comments; and docket number to which comments belong.

You may submit comments electronically at either of the following:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- OSHA Web Site: *http://ecomments.osha.gov*. Follow the instructions for submitting comments on OSHA's Web page.

Please note that you may not attach materials such as studies or journal articles to your electronic comments. If you wish to include such materials, you must submit three copies of the material to the OSHA Docket Office at the above address. When submitting such material to the OSHA Docket Office, you must clearly identify your electronic comments by name, date, subject, and docket number so that the Docket Office can attach the materials to your electronic comments.

Note that security-related problems may result in significant delays in receiving comments and other materials by regular mail. Telephone the OSHA Docket Office at (202) 693–2350 for information regarding security procedures concerning delivery of materials by express delivery, hand delivery, and messenger service.

All comments and submissions will be available for inspection and copying in the OSHA Docket Office at the address above. Most comments and submissions will be posted on OSHA's Web page (*http://www.osha.gov*). Contact the OSHA Docket Office at (202) 693–2350 for information about materials not available on the OSHA Web page and for assistance in using this Web page to locate docket submissions. Because comments sent to the docket or to OSHA's Web page are available for public inspection, the Agency cautions interested parties against including in these comments personal information, such as social security numbers and birth dates.

**FOR FURTHER INFORMATION CONTACT:** Joanna Dizikes Friedrich, Directorate of Evaluation and Analysis, Occupational Safety and Health Administration, Room N–3641, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone (202) 693–1939, Fax (202) 693–1641.

**SUPPLEMENTARY INFORMATION:**

**Background**

In 1971, in accordance with section 6(a) of the Occupational Safety and Health Act (OSH Act), OSHA adopted standards incorporating a permissible exposure limit (PEL) of 200 μg/m³ to regulate occupational exposure to lead in general industry, 29 CFR 1910.1000, and in the construction industry, 29 CFR 1926.55. In both standards, the PEL had to be achieved by engineering and work practice controls, where feasible. In 1978, after a section 6(b) rulemaking, OSHA promulgated a final lead standard for general industry which lowered its PEL to 50 μg/m³, and included requirements for medical surveillance, monitoring, and other provisions, 29 CFR 1910.1025. The 1978 lead standard in paragraph (a) excluded the construction industry from its coverage. OSHA, in the preamble, explained that it had exempted the industry because of insufficient information in the record to resolve issues specific to conditions in the construction industry. Therefore, after 1978, there was a less stringent lead standard for employees in the construction industry than for employees in general industry.

OSHA, in the fall of 1990, announced it would develop a proposal for a comprehensive standard regulating occupational lead exposure in construction. To expedite that rulemaking, in October 1992, Congress passed sections 1031 and 1032 of Title X of the Housing and Community Development Act of 1992 (''the Act,''

Pub. L. 102–550). In those sections, Congress provided that:

(1) No later than 180 days after enactment (April 26, 1993), the Secretary of Labor must issue an interim final lead standard covering the construction industry.

(2) The standard must be as protective as the worker protection guidelines for identification and abatement of lead-based paint (LBP) in public and Indian housing issued by the Department of Housing and Urban Development (HUD) (Revised Chapter 8, ''HUD Guidelines; (55 FR 38973, August 1991).

(3) The interim final standard is to take effect upon ''issuance,'' except that the standard may include a reasonable delay in the effective date.

(4) The standard will have the effect of an OSH Act standard and will apply until a final standard becomes effective under section 6 of the OSH Act.

(5) The Secretary of Labor in developing this standard must consult and coordinate with the Environmental Protection Agency (EPA) to achieve maximum enforcement of the Toxic Substances Control Act (TSCA) and the OSH Act while minimizing duplication.

Congress indicated that OSHA was to include medical surveillance, a preference for engineering controls, housekeeping, air monitoring, recordkeeping, and hazard communication provisions similar to those in the Guidelines and general industry lead standard, except insofar as it was necessary to adapt requirements of the interim final to conditions in the construction industry. OSHA promulgated, as an interim final rule, § 1926.62, the lead in construction standard on May 4, 1993 (58 FR 26590), which included these and other requirements. The final rule became effective June 3, 1993.

**Regulatory Review**

In 2002, the Office of Management and Budget (OMB) solicited suggestions from the public for regulations that should be reviewed to determine if the regulations were still needed or could be revised to mitigate the burden imposed. The National Association of Home Builders recommended that OSHA review the lead in construction standard to determine whether it has become unnecessary, to seek stakeholder input, and to assess the economic impact on small entities. In response, OSHA is reviewing the lead in construction standard under section 610 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and section 5 of Executive Order 12866 (59 FR 51739, October 4, 1993).

The purpose of a review under section 610 of the Regulatory Flexibility Act: (S)hall be to determine whether such rule should be continued without change, or should be rescinded, or amended consistent with the stated objectives of applicable statutes to minimize any significant impact of the rule on a substantial number of small entities.

The Agency shall consider the following factors:

(1) The continued need for the rule;

(2) The nature of complaints or comments received concerning the rule from the public;

(3) The complexity of the rule;

(4) The extent to which the rule overlaps, duplicates or conflicts with other Federal rules; and, to the extent feasible, with State and local governmental rules; and

(5) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the areas affected by the rule.

The review requirements of section 5 of Executive Order 12866 require agencies:

To reduce the regulatory burden on the American people, their families, their communities, their State, local and tribal governments, and their industries; to determine whether regulations promulgated by the [Agency] have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive Order, within applicable law; and to otherwise improve the effectiveness of existing regulations.

An important step in the review process involves the gathering and analysis of information from affected persons about their experience with the rule and any material changes in circumstances since issuance of the rule. This notice requests written comments on the continuing need for the lead in construction standard, its adequacy or inadequacy, its effectiveness in protecting construction workers, its small business impacts, and all other issues raised by section 610 of the Regulatory Flexibility Act and section 5 of the Executive Order. It would be particularly helpful for commenters to address how the applicability or requirements could be changed or tailored to reduce the burden on employers whose employees rarely, if ever, are exposed to lead while continuing to protect workers who are exposed during construction projects.

**Lead Use in Construction**

In 2001, the construction industry had 691,000 firms employing about 6.5 million workers, about 5 million of whom were construction workers.[1] In addition, the construction industry includes about 2 million self-employed independent contractors.[2] At the end of 2002, there were 697,514 construction firms employing 6,953,001 workers.[3] Assuming that the ratio of construction workers to the total number of employees in the construction industry is the same as in 2001, there were approximately 5.4 million construction worker employees in 2002. In addition, there were approximately 2,071,317 self-employed construction workers in 2002.[4] Furthermore, according to the Bureau of Labor Statistics (BLS), there were 6.965 million employees and 5.3 million production workers in construction in 2004.[5]

For the purpose of industrial classification, the construction industry is divided into construction of buildings, heavy and civil engineering construction, and specialty trade contractors. For the purpose of considering the lead in construction standard; however, it is more useful to focus on activities where lead exposures are most likely to occur: paint removal, building and bridge renovation, plumbing and water system repair and replacement. The use of lead-based paint (LBP) in residences and other buildings where consumers could be exposed was banned in 1978; the use of lead solder and piping in public water systems and buildings was banned in 1988.

**Health Effects**

As detailed in Appendix A to § 1926.62, lead is a potent systemic poison. A short-term acute dose of lead can lead to acute encephalopathy, seizures, coma, and death. Chronic overexposure to lead may result in severe damage to the blood-forming, nervous, urinary and reproductive systems. Chronic overexposure to lead also impairs the reproductive systems of both men and women. Children born of parents, either one of whom were exposed to excess lead levels, are more likely to have birth defects, mental

[1] United States Census Bureau, Economic Survey 2001.

[2] *Ibid.*

[3] United States Census Bureau, Economic Census 2002.

[4] *Ibid.*

[5] United States Department of Labor, Bureau of Labor Statistics, Employment Statistics 2004.

retardation, behavioral disorders, or die during the first year of childhood.[6]

Exposures to lead in construction work have resulted in high blood lead levels (BLLs) in employees. According to the Centers for Disease Control and Prevention, clinical symptoms of lead poisoning usually occur when BLLs exceed 40 μg/dL, though lower levels may have adverse effects. In 1988, OSHA found that five of nine workers employed to demolish a bridge had BLLs from 58 μg/dL to 160 μg/dL.[7] Four workers at a 1992 bridge demolition in Georgia where exposures were measured at 10 times the permissible limit had BLLs that ranged from 59 μg/dL to 93 μg/dL.[8] In 1994, eight workers who had been sandblasting the interior of 100-year-old Texas building were found to have BLLs that ranged from 15 μg/dL to 245 μg/dL (the worker with the 15 μg/dL had been at the site for only a week).[9] A 1994 physicians monitoring database that tracked 373 bridge workers found that nine percent of the workers had BLLs above 50 μg/dL.[10] An EPA study in the late 1990s on residential renovation and remodeling workers found less evidence of elevated BLLs among these workers, which may be the result of the subjects' relatively short-term and infrequent exposure to high levels of lead dust.[11]

**Prevalence of Lead**

Although lead based paint (LBP) was not banned at the national level until 1978, its use was not widespread on residential interiors after 1940. Use of LBP was more common on exteriors. Overall, between 21 percent to 25 percent of U.S. housing stock of about 120 million units has some LBP, but there is considerable regional variation primarily related to age of the housing stock. A HUD study of pre-1999 housing reported that in the Northeast and Midwest 36 percent of that housing has LBP hazards compared with about 16 percent of the housing in South and West. The study indicated that there is no difference between large urban and small urban and rural areas, but low-income housing is more likely to have LBP hazards (35 percent) than middle to upper income housing (19 percent).[12]

The prevalence of LBP in the housing stock is relevant because construction workers engaged in renovation and remodeling work may be exposed to lead. This is particularly true for painters, the specialty trade most likely to be disturbing significant amounts of LBP. A painting contractor's employees could work on a substantial number of separate projects in a year. In some areas, most of the projects may not involve potential LBP exposures, but in other areas many projects could expose workers to lead.

In some industrial construction, the likelihood of lead exposures is greater. The U.S. has about 200,000 structural steel bridges; bridges built prior to the 1970s generally had lead-based paint coatings. When these bridges are cleaned and repainted the LBP is removed, which is usually done by abrasive blasting that produces high concentrations of lead. Similarly there are thousands of water and chemical storage tanks that were painted with LBP and require LBP removal before repainting. Exposed steel structures, such as sports stadiums, and pipelines also may require LBP removal. These projects share the characteristic of involving potential exposure to high levels of lead over months. Repair and renovation of older municipal water supply systems may result in lead exposure because lead piping was often used.

**Other Regulations**

Other factors OSHA must consider in this lookback are the requirements imposed by other Federal agencies on lead abatement and lead pollution. Both the EPA [13] and HUD [14] have programs that address lead abatement to limit the exposure of residents, particularly children, who are susceptible to illness from lead exposure. EPA [15] and the states also bar the release of lead to water, which affects construction projects over or next to waterways.

**Request for Comments**

OSHA is seeking comments and information on the following questions and all other issues raised by section 610 of the Regulatory Flexibility Act and section 5 of the Executive Order. Specific data on the issues, questions, and relevant projects are particularly helpful. OSHA understands that in many cases, commenters may be able to provide only anecdotal evidence and welcomes that information as well. OSHA also requests comments on current lead exposures of construction workers, current health data, and the effectiveness of current controls in protecting workers.

The following questions are arranged by topic. Your answers should be keyed to the topics and, where possible, the specific question.

*Cost Issues*

1. What does a lead testing and protection program cost construction employers? (This includes, for example, the costs for monitoring, medical surveillance, respirators, and the other costs required by the Standard.) Which elements impose the highest/lowest costs? Indicate the type of construction project.

2. How much does compliance with the OSHA standard affect the cost of a project for the consumer? Indicate the type of construction project.

3. Does lead abatement affect the value of a housing unit? If so, by how much or what percentage?

*Compliance Issues*

4. How do employers determine whether LBP is present at a site? How often is the site tested for lead prior to the start of a project? On what basis is the decision to test made? Please identify the type of site.

5. How much time does it take for initial site testing results to be known?

6. How often is LBP identified? At what percentage of sites is LBP identified?

7. When LBP is found, how widespread is it? Which parts of housing units are most likely to have LBP and deteriorated LBP?

8. How often are the action levels of the OSHA standard exceeded?

9. Do you measure worker blood lead levels? If so, please submit data.

10. Are there confusing, conflicting, or duplicative requirements in the OSHA, EPA, and HUD programs that could be clarified?

*Renovation/Remodeling Industry Structure Issues*

11. How much time do your renovation/remodeling and painting projects typically take?

12. How many separate projects (separate residential/commercial units) do you complete in a year?

13. Where there is deteriorated paint, how much time does it normally take you to prepare the surface for

[6] 29 CFR 1926.62, Appendix A, Section II.

[7] CDC, ''Lead Poisoning in Bridge Demolition Workers—Massachusetts,'' MMWR, October 13, 1989/38)40): 687–688, 693–694.

[8] CDC, ''Lead Poisoning in Bridge Demolition Workers—Georgia, 1992,'' MMWR, May 28, 1993/42(20); 388–390.

[9] CDC, ''Epidemiological Notes and Reports Lead Poisoning Among Sandblasting Workers—Galveston, Texas, March 1994,'' MMWR, January 27, 1995/44(03); 44–45.

[10] CDC, ''Current Trends Controlling Lead Toxicity in Bridge Workers—Connecticut, 1991–1994,'' MMWR, February 3, 1995/44(04); 76–79.

[11] ''Lead Exposure Associated with Renovation and Remodeling Activities, Final Summary Report,'' EPA 747–S–00–001, January 2000.

[12] Jacobs, David E., *et al.*, ''The Prevalence of Lead-Based Paint Hazards in U.S. Housing,'' Environmental Health Perspectives, 110: A599–A606 (2002).

[13] 40 CFR part 745.

[14] 24 CFR part 35.

[15] 40 CFR 141.43; 40 CFR part 141, subpart I.

repainting? What percentage of the total project is this?

14. What is the annual rate of your employee turnover?

15. What is the average age of the units on which you have worked?

16. Are there sources of lead exposure in construction other than LBP and older plumbing, piping, and solder?

17. If your firm specializes in lead abatement, what are its characteristics (*e.g.*, number of employees, size, total revenue, percent of business that performs lead abatement, etc.)?

18. Do you know of data or studies on the extent to which older structures have already been renovated (*e.g.*, window change-out)? If so, please submit the information.

*Industrial Construction Issues*

19. Where is LBP being used and on what structures?

20. What is the average length of time for your project? What is the length of your shortest project? What is the length of your longest project?

21. What is the annual rate of employee turnover? How many employees do you have, and what are your annual revenues?

22. Are there elements of the standard that pose particular compliance problems?

23. Have there been technological changes or improvements that facilitate lead removal and compliance? If so, what impact have they had on the cost of lead removal and employee exposure levels?

24. Are there areas where additional employee protections are needed?

*Health Issues*

25. Can you provide data or studies subsequent to the 1993 Lead in Construction Standard that provide both air lead exposure and blood lead levels for construction workers?

26. Can you provide data or studies subsequent to the 1993 Lead in Construction Standard that address the short-term and long-term health effects of intermittent and/or continuing exposures to lead?

27. Are current monitoring, respirator, engineering controls, and medical surveillance requirements protecting workers from lead exposures?

*Compliance Assistance*

28. Is there additional compliance assistance or outreach that OSHA could provide to help employers and workers understand and comply with the Standard?

Comments must be mailed or submitted by September 6, 2005. Comments should be submitted to the addresses and in the manner specified at the beginning of this notice.

**Authority:** This document was prepared under the direction of Jonathan L. Snare, Acting Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW., Washington, DC 20210. It is issued under section 610 of the Regulatory Flexibility Act (5 U.S.C. 610) and section 5 of Executive Order 12866 (59 FR 51724, October 4 1993).

Signed in Washington, DC, this 27th day of May, 2005.

**Jonathan L. Snare,**

*Acting Assistant Secretary, Occupational Safety and Health Administration.*

[FR Doc. 05–11149 Filed 6–3–05; 8:45 am]

**BILLING CODE 4510–26–P**

# Notices

Federal Register
Vol. 70, No. 107
Monday, June 6, 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

### National Agricultural Statistics Service

### Notice of Intent To Seek Approval To Revise and Extend an Information Collection; Correction

**AGENCY:** National Agricultural Statistics Service, USDA.

**ACTION:** Notice and request for comments; correction.

**SUMMARY:** The National Agricultural Statistics Service published a notice in the **Federal Register** of May 5, 2005, concerning request for comments on the revision and extension of the Livestock Slaughter Survey. The document contained an incorrect date.

**FOR FURTHER INFORMATION CONTACT:** Carol House, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

**Correction**

In the **Federal Register** of May 5, 2005, in FR Doc. 05–8982, on page 23841, correct the **DATES** caption to read:

**DATES:** Comments on this notice must be received by July 5, 2005, to be assured of consideration.

Signed at Washington, DC, May 31, 2005.

**Carol House,**

*Associate Administrator.*

[FR Doc. 05–11132 Filed 6–3–05; 8:45 am]

BILLING CODE 3410–20–P

## DEPARTMENT OF AGRICULTURE

### National Agricultural Statistics Service

### Notice of Intent To Seek Approval To Revise and Extend an Information Collection; Correction.

**AGENCY:** National Agricultural Statistics Service, USDA.

**ACTION:** Notice and request for comments; correction.

**SUMMARY:** The National Agricultural Statistics Service published a notice in the **Federal Register** of May 5, 2005, concerning request for comments on the revision and extension of the Mink Survey. The document contained an incorrect date.

**FOR FURTHER INFORMATION CONTACT:** Carol House, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

**Correction**

In the **Federal Register** of May 5, 2005, in FR Doc. 05–8981, on page 23840, correct the **DATES** caption to read:

**DATES:** Comments on this notice must be received by July 5, 2005, to be assured of consideration.

Signed at Washington, DC, May 31, 2005.

**Carol House,**

*Associate Administrator.*

[FR Doc. 05–11133 Filed 6–3–05; 8:45 am]

BILLING CODE 3410–20–P

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

**[Docket No. 04–BIS–11]**

### In the Matter of: Petrom GmbH International Trade, Maria-Theresa Strasse 26, Munich 81675, Germany, Respondent; Decision and Order

On March 29, 2004, the Bureau of Industry and Security (''BIS'') filed a charging letter against the respondent, Petrom GmbH International Trade (''Petrom''), that alleged one violation of Section 764.2(d), and six violations each of Sections 764.2(c) and 764.2(e) of the Export Administration Regulations (''Regulations''),[1] which were issued under the Export Administration Act of 1979, as amended (50 U.S.C. app. 2401–2420 (2000)) (''Act'').[2]

Specifically, the charging letter alleged that from on or about March 1999 to on or about May 2000, Petrom conspired and acted in concert with others, known and unknown, to bring about acts that constitute violations of the Regulations by arranging the export from the United States to Iran via Germany of items subject to the Regulations and the Iran Transaction Regulations without the required U.S. Government authorizations. In doing so, Petrom committed one violation of Section 764.2(d) of the Regulations. These items included check valves, regulatory valves, test kits, electrical equipment, ship tire curing bladders, and other spare parts, all of which were classified as EAR99 items under the Regulations.

The charging letter also alleged that from on or about March 1999 to on or about May 2000, Petrom solicited on six separate occasions violations of the Regulations by ordering the shipment of the items at issue from the United States to Iran via Germany. Petrom thereby committed six violations of Section 764.2(c) of the Regulations. Furthermore, the charging letter alleged that in making each of these six unlawful solicitations, Petrom acted with knowledge that a violation of the Regulations was intended to occur, as Iran was the intended ultimate destination of the items. The charging letter alleged that at all relevant times, Petrom knew that prior authorization was required from the U.S. Government to ship the items at issue to Germany for further shipment to Iran, and ordered the shipment of the items knowing that the shipment would occur without the required authorizations. In doing so, Petrom violated Section 764.2(e) of the Regulations.

On July 5, 2004, Petrom filed an answer denying the formal charges. As ordered by the Administrative Law Judge (''ALJ''), on October 20, 2004, BIS filed a Memorandum and Submission of Evidence To Supplement the Record (''Agency Brief'') and, on November 26, 2004, Petrom filed its submission to

[1] The violations charged occurred in 1999 and 2000. The Regulations governing the violations at issue are found in the 1999 and 2000 versions of the Code of Federal Regulations (15 CFR Parts 730–774 (1999–2000)). The 2005 Regulations establish the procedures that apply to this matter.

[2] From August 21, 1994 through November 12, 2000, the Act was in lapse. During that period, the President, through Executive Order 12924, which had been extended by successive Presidential Notices, the last of which was August 3, 2000 (3 CFR, 2000 Comp. 397 (2001)), continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)) (''IEEPA''). On November 13, 2000, the Act was reauthorized by Pub. L. 106–508 (114 Stat. 2360 (2000)) and it remains in effect through August 20, 2001. Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp., p. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 6, 2004 (69 FR 48763, August 10, 2004), continues the Regulations in effect under IEEPA.

supplement the record. On January 24, 2005, BIS filed a Memorandum of Proposed Findings of Fact and Conclusions of Law. Petrom did not submit any further filings to the ALJ.

Based on the record before it, on April 25, 2005, the ALJ issued a Recommended Decision and Order (''Recommended Decision and Order'') in which he found that Petrom committed the 13 violations of the Regulations described above. In considering the record as a whole, the ALJ found that Petrom conspired or acted in concert with others, mainly Sunshine Technology and Supplies, Inc. (''Sunshine''), to export items subject to the Regulations to Iran without authorization from the Department of Treasury's Office of Foreign Assets Control (''OFAC'') in violation of Section 746.7 of the Regulations. According to the ALJ, Petrom developed a scheme to facilitate the ordering of parts, equipment, and other items from U.S. companies, mainly through Sunshine, for export to Germany with the intent to reexport the items to Iran. The ALJ found that Sunshine was established in March 1999 to serve as a front company in the United States for procuring U.S.-origin items. *See* Recommended Decision and Order, 39. Indeed, the agreement that Petrom was the ''actual owner'' of Sunshine, and that Sunshine was established to ''exclusively carry out [the] business activities of Petrom. Petrom shall provide the necessary info, instructions, payment etc. for such business activities.'' Agency Brief, Exhibit 25.

In addition, the ALJ found that BIS proved by the preponderance of evidence that Petrom solicited on six separate occasions unauthorized exports for parts, equipment, and other items subject to the EAR from the United States to Iran via Germany in violation of Section 764.2(c) of the Regulations. According to the ALJ, based on ''pertinent, reliable, and credible'' evidence provided by the German Customs Authority, Petrom used a client identification system in its orders, invoices, and correspondence that included unique identifiers for Iranian customers. Recommended Decision and Order, 32. Based on these unique identifiers, as well as invoices, facsimiles, letters, and other documents related to the specific transactions at issue, BIS established that Petrom ordered parts, equipment, and items subject to the EAR for export to Iran, as alleged in the charging letter. *See* Recommended Decision and Order, 32–33.

In each of these six solicitations, the ALJ found by the preponderance of the evidence that Petrom ordered the parts, equipment, and other items at issue with knowledge that a violation of the Regulations was intended to occur. According to the ALJ, Petrom possessed ''actual knowledge'' that the United States maintained an embargo against Iran. Recommended Decision and Order, 38. In February 2000, in correspondence to the German Customs Authority, Petrom states that ''it is the expressed business policy of our company to also consider embargo regulations of other States,'' and that a particular transaction involving Iran would have been executed only ''after clarification if it is permissible according to American regulations.'' Agency Brief, Exhibit 28. In June 1992, Petrom directed a company in the United States to obtain export licenses from the Department of Commerce for a shipment to Iran. *See* Recommended Decision and Order, 38. In light of these facts, the ALJ held that Petrom committed one violation of Section 764.2(d), and six violations each of Sections 764.2(c) and 764.2(e) of the Regulations. He also recommended the penalty proposed by BIS—denial of Petrom's export privileges for 20 years and a civil monetary sanction of $143,000.

Pursuant to Section 766.22 of the Regulations, the ALJ's Recommended Decision and Order has been referred to me for final action. Based on my review of the entire record,[3] I find that the record supports the ALJ's findings of fact and conclusions of law regarding the above-referenced charge.[4] I also find that the penalty recommended by the ALJ is appropriate given Petrom's severe disregard and contempt for U.S. export control laws, the extensive and far-reaching nature of the violations, and the importance of preventing future unauthorized exports to Iran, a country against which the United States maintains an economic embargo because of its support for international terrorism. Specifically, Petrom attempted to circumvent U.S. export control laws by setting up and conspiring with a front company in the United States in an effort to order U.S.-origin items for ultimate delivery to Iran though Germany. It ordered these items for export to Iran knowing that such exports would violate the U.S. embargo on Iran. In addition, the proposed denial order is consistent with penalties imposed in recent cases under the Regulations involving shipments to Iran. *See In the Matter of Adbulamir Mahdi,* 68 FR 57406 (October 3, 2003) (affirming the recommendations of the ALJ that a 20-year denial was appropriate where violations involved multiple shipments of EAR99 items as part of a conspiracy to ship such items through Canada to Iran); *In the Matter of Arian Transportvermittlungs GmbH,* 69 FR 28120 (May 18, 2004) (affirming the recommendations of the ALJ that a 10-year denial order was appropriate where knowing violations involved a shipment of a controlled item to Iran); and *In the Matter of Jabal Damavand General Trading Company,* 67 FR 32009 (May 13, 2002) (affirming the recommendations of the ALJ that a 10-year denial was appropriate where knowing violations involved a shipment of an EAR99 item to Iran). In light of these circumstances, I affirm the findings of fact and conclusions of law of the ALJ's Recommended Decision and Order.

*It is hereby ordered,*

*First,* that a civil penalty of $143,000 is assessed against Petrom GmbH International Trade (''Petrom''), which shall be paid to the U.S. Department of Commerce within 30 days from the date of entry of this Order. Payment shall be made in the manner specified in the attached instructions.

*Second,* that, pursuant to the Debt Collection Act of 1982, as amended (31 U.S.C. §§ 3701–3702E (2000)), the civil penalty owed under this Order accrues interest as more fully described in the attached Notice, and, if payment is not made by the due date specified herein, Petrom will be assessed, in addition to the full amount of the civil penalty and interest, a penalty charge and an administrative charge, as further described in the attached Notice.

[3] On May 12, 2005, BIS submitted a response to the ALJ's Recommended Decision and Order, but failed to file its response by the deadline set forth in the Regulations. Under Section 766.22(b) of the Regulations, parties have 12 days from the date of issuance of the ALJ's Recommended Decision and Order in which to submit a response. As the Recommended Decision and Order was issued on April 25, 2005, responses were due no later than May 9, 2005. BIS, however, filed its response on May 12, 2005. As BIS failed to file its response by the deadline set forth in the Regulations, the response was considered in the Under Secretary's deliberations concerning this matter. Petrom did not file a response to the ALJ's Recommended Decision and Order.

[4] There are two minor clarifications to the Recommended Decision and Order that need to be made:

(1) On pages 9 and 28, the Recommended Decision and Order states that the Respondent's Answer to the Memorandum and Submission of Evidence To Supplement the Record Submitted by the Bureau of Industry and Security was dated November 24, 2004. The correct date of this submission was November 26.

(2) On page 39, in the second paragraph of the section entitled ''Conspiracy or Acting in Concert,'' the first sentence should read ''Further, Petrom's compliance with all German export laws does *not* shield it from violating United States export laws.'' (emphasis added).

*Third,* that, for a period of twenty years from the date on which this Order takes effect, Petrom GmbH International Trade, Maria-Theresa Strasse 26, Munich 81675, Germany, and all of its successors or assigns, and when acting for or on behalf of Petrom, its officers, representatives, agents, and employees (individually referred to as ''a Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software, or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in connection with any other activity subject to the Regulations.

*Fourth*, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of a Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a Denied Person acquires or attempts to acquire such ownership, possession, or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from a Denied Person of any item subject to the Regulations that has been exported from the United States.

D. Obtain from a Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States an that is owned, possessed, or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed, or controlled by a Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, ''servicing'' means installation, maintenance, repair, modification, or testing.

*Fifth,* that, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to a Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

*Sixth,* that this Order shall be served on the Denied Person and on BIS, and shall be published in the **Federal Register.** In addition, the ALJ's Recommended Decision and Order, except for the section related to the Recommended Order, shall be published in the **Federal Register.**

This Order, which constitutes the final agency action in this matter, is effective upon publication in the **Federal Register.**

Dated: May 26, 2005.

**Peter Lichtenbaum,**

*Acting Under Secretary of Commerce for Industry and Security.*

## Instructions for Payment of Civil Penalty

1. The civil penalty check should be made payable to: U.S. Department of Commerce.

2. The check should be mailed to: U.S. Department of Commerce, Bureau of Industry and Security, Export Enforcement Team, Room H–6883, 14th Street and Constitution Avenue, NW., Washington, DC 20230, Attn: Sharon Gardner.

## Notice

The Order to which this Notice is attached describes the reasons for the assessment of the civil monetary penalty. It also specifies the amount owed and the date by which the civil penalty is due and payable.

Under the Debt Collection Act of 1982, as amended (31 U.S.C. 3701–3720E (2000)), and the Federal Claims Collection Standards (31 CFR parts 900–904 (2002)), interest accrues on any and all civil monetary penalties owed and unpaid under the Order, from the date of the Order until paid in full. The rate of interest assessed respondent is the rate of the current value of funds to the U.S. Treasury on the date that the Order was entered. However, interest is waived on any portion paid within 30 days of the date of the Order. *See* 31 U.S.C.A. 3717 and 31 CFR 901.9.

The civil monetary penalty will be delinquent if not paid by the due date specified in the Order. If the penalty becomes delinquent, interest will continue to accrue on the balance remaining due and unpaid, and respondent will also be assessed both an administrative charge to cover the cost of processing and handling the delinquent claim, and a penalty charge of six percent per year. Although the penalty charge will be computed from the date that the civil penalty becomes delinquent, it will be assessed only on sums due and unpaid for over 90 days after that date. *See* 31 U.S.C.A. 3717 and 31 CFR 901.9.

The foregoing constitutes the initial written notice and demand to respondent in accordance with section 901.2(b) of the Federal Claims Collection Standards (31 CFR 901.2(b)).

## Recommended Decision and Order

*Before:* Honorable Walter J. Brudzinski, Administrative Law Judge, United States Coast Guard.

*Appearances:* For the Bureau of Industry and Security: Philip K. Ankel, Esq., Office of Chief Counsel, Bureau of Industry and Security.

*For the Respondent:* Dr. B. Khadjavi-Gostard, Esq., Dr. Veronika Hausmann, Esq., Khadjavi Hausmann Steinbruck, Brienner Strasse 10 (Arco-Palais).

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**Preliminary Statement**

On March 29, 2004, the Bureau of Industry and Security (''BIS'' or ''Agency'') filed a formal Complaint against Petrom GmbH International Trade, (''Petrom'' or ''Respondent'') charging thirteen (13) counts of violation of the Export Administration Act of 1979 (''EAA'') and the Export Administration Regulations (''EAR'' or ''Regulations'').[1] *See* 50 U.S.C. App. 2401–20 (1991), amended by Pub. L. 106–508, 114 Stat. 2360 (Supp. 2002); 15 CFR parts 730–74. The EAA and its underlying Regulations were created to establish a ''system of controlling exports by balancing national security, foreign policy and domestic supply needs with the interest of encouraging export to enhance * * * the economic well being'' of the United States. *See Times Publ'g Co.* v. *United States Dep't of Commerce,* 236 F.3d 1286, 1290 (22th Cir. 2001); *see also* 50 U.S.C. App. 2401–02.[2] The Charging Letter asserts that for the period of time from on or about March 1999 to on or about May 2000, Petrom engaged in unauthorized acts in violation of the Export Administration Regulations under 15 CFR 764.2, in that, they conspired to export items to Iran without U.S. government approval, solicited exports to Iran without U.S. government approval, and ordered parts and equipment with the knowledge that a violation was intended to occur. The March 29, 2004 Charging Letter alleges the following.

Charge 1 (15 CFR 764.2(d)–Conspiracy To Export Check Valves and Spare Parts to Iran Without the Required U.S. Government Authorization)

From on or about March 1999 to on or about May 2000, Petrom conspired and acted in concert with others, known and unknown, to bring about acts that constitute violations of the Regulations by arranging the export from the United States to Iran via Germany of items subject to the Regulations and the Iranian Transactions Regulations without the required U.S. Government authorizations. Pursuant to Section 746.7 of the Regulations, authorizations were required from the Office of Foreign Assets Control, U.S. Department of Treasury (''OFAC'') before the items could be exported to Iran. In furtherance of the conspiracy, Petrom and its co-conspirators devised and employed a scheme under which the U.S. exporter would send the items to Petrom in Germany, which would then forward the items to their ultimate destination in Iran. In so doing, Petrom committed one violation of Section 764.2(d) of the Regulations.

Charge 2 (15 CFR 764.2(c)–Soliciting an Export to Iran Without the Required U.S. Government Authorization)

On or about March 30, 1999, Petrom solicited a violation of the Regulations when it ordered check valves and spare parts from a U.S. company for export to Iran via Germany without the required U.S. Government authorization. Pursuant to Section 746.7 of the Regulations authorization from OFAC was required for the export of check valves and spare parts, items subject to the Regulations and the Iranian Transactions Regulations, from the United States to Iran. No OFAC authorization was obtained for the export. In so doing, Petrom committed one violation of Section 764.2(c) of the Regulations.

Charge 3 (15 CFR 764.2(d)–Ordering Check Valves and Spare Parts With Knowledge That a Violation of the Regulations Was Intended To Occur)

In connection with facts referenced in Charge 2, Petrom ordered check valves and spare parts with knowledge that a violation of the Regulations was intended to occur. At all times relevant hereto, Petrom knew that prior authorization was required from OFAC to export the check valves and spare parts, items subject to the Regulations and the Iranian Transactions Regulations, to Iran. Petrom ordered the check valves and spare parts knowing that they would be exported to Iran without the required U.S. Government authorization. In so doing, Petrom committed one violation of Section 764.2(e) of the Regulations.

Charge 4 (15 CFR 764.2(c)—Soliciting an Export to Iran Without the Required U.S. Government Authorization)

On or about July 8, 1999, Petrom solicited a violation of the Regulations when it ordered a [Pyrogent] Plus test kit from a U.S. company for export to Iran via Germany without the required U.S. Government authorization. Pursuant to Section 746.7 of the Regulations authorization from OFAC was required for the export of a [Pyrogent] Plus test kit, an item subject to the Regulations and the Iranian Transactions Regulations, from the United States to Iran. No OFAC authorization was obtained for the export. In so doing, Petrom committed one violation of Section 764.2(c) of the Regulations.

Charge 5 (15 CFR 764.2 (e)—Ordering [a Pyrogent Plus test kit] With Knowledge That a Violation of the Regulations Was Intended To Occur)

In connection with facts referenced in Charge 4, Petrom ordered a [Pyrogent] Plus test kit with knowledge that a violation of the Regulations was intended to occur. At all times relevant hereto, Petrom knew that prior authorization was required from OFAC to export a [Pyrogent] Plus Test Kit, an item subject to the Regulations and the Iranian Transactions Regulations, from the United States to Iran. Petrom ordered the [Pyrogent] Plus test kit knowing that they would be exported to Iran without the required U.S. Government authorization. In so doing, Petrom committed one violation of Section 764.2(e) of the Regulations.

Charge 6 (15 CFR 764.2(c)—Soliciting an Export to Iran Without the Required U.S. Government Authorization)

On or about September 14, 1999, Petrom solicited a violation of the Regulations when it ordered a freight forwarder in the United States to ship tire curing bladders from the United States to Germany. The ultimate destination of the tire curing bladders was Iran and such shipment was to occur without the required U.S. Government authorization. Pursuant to Section 746.7 of the Regulations authorization from OFAC was required for the export of the tire curing bladders, items subject to the Regulations and the Iranian Transactions Regulations, from the United States to Iran. No OFAC authorization was obtained for the intended export, which was detained prior to export by the Department of Commerce. In so doing, Petrom committed one violation of Section 764.2(c) of the Regulations.

Charge 7 (15 CFR 764.2(e)—Ordering Tire Curing Bladders With Knowledge That a Violation of the Regulations Was Intended To Occur)

In connection with facts referenced in Charge 6, Petrom ordered tire curing bladders to be shipped to Germany with knowledge that a violation of the Regulations was intended to occur as Iran was the intended ultimate destination of the bladders. At all times relevant hereto. Petrom knew that prior authorizaiton was required from OFAC to ship tire curing bladders, items subject to the Regulations and the Iranian Transactions Regulations, to Germany for further shipment to Iran. Petrom ordered the shipment of tire curing bladders to Germany knowing that Iran was the intended ultimate destination of the bladders and that the shipment would occur without the required U.S. Government authorization. In so doing, Petrom committed one violation of Section 764.2(e) of the Regulations.

[1] Due to the nature of this transaction, the items in question are also subject to the Iranian Transactions Regulations under the jurisdiction of the Department of Treasury's Office of Foreign Assets Control (OFAC).

[2] The EAA and all regulations under it expired on August 20, 2001. *See* 50 U.S.C. App. 2419. Three (3) days before its expiration, the President declared that the lapse of the EAA constitutes a national emergency. *See* Exec. Order. No. 13222, reprinted in 3 CFR at §§ 783–84, (2002). Exercising authority under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701–06 (2002), the President maintained the effectiveness of the EAA and its underlying regulations throughout the expiration period by issuing Exec. Order. No. 13222 (Aug. 17, 2001). The effectiveness of the export control laws and regulations were further extended by Notice issued by the President on August 14, 2002 and August 7, 2003. *See* Notice of August 14, 2002; Continuation of Emergency Regarding Export Control Regulations, reprinted in 3 CFR at 306 (2003) and 68 FR 47833, August 11, 2003. Courts have held that the continued operation and effectiveness of the EAA and its regulations through the issuance of Executive Orders by the President constitutes a valid exercise of authority. *See Wisconsin Project on Nuclear Arms Control* v. *United States Dep't of Commerce,* 317 F.3d 275, 278–79 (D.C. Cir. 2003).

Charge 8 (15 CFR 764.2(c)—Soliciting an Export to Iran Without the Required U.S. Government Authorization)

On or about September 1999, Petrom solicited a violation of the Regulations when it ordered tire curing bladders from a U.S. company for export to Iran via Germany without the required U.S. Government authorization. Pursuant to Section 746.7 of the Regulations authorization from OFAC was required for the export of tire curing bladders, items subject to the Regulations and the Iranian Transactions Regulations, from the United States to Iran. No OFAC authorization was obtained for the export, which was detained prior to export by the Department of Commerce. In so doing, Petrom committed one violation of Section 764.2(c) of the Regulations.

Charge 9 (15 CFR 764.2(e)—Ordering Tire Curing Bladders with Knowledge That a Violation of the Regulations Was Intended To Occur)

In connection with facts referenced in Charge 8, Petrom ordered tire curing bladders with knowledge that a violation of the Regulations was intended to occur. At all times relevant hereto, Petrom knew that prior authorization was required from OFAC to export tire curing bladders, items subject to the Regulations and the Iranian Transactions Regulations from the United States to Iran. Petrom ordered the bladders knowing that they would be exported to Iran without the required U.S. Government authorization. In so doing, Petrom committed one violation of Section 764.2(e) of the Regulations.

Change 10 (15 CFR 764.2(c)—Soliciting an Export to Iran Without the Required U.S. Government Authorization)

On or about August 10, 1999, Petrom solicited a violation of the Regulations when it ordered regulator valves and repair kit from a U.S. company for export to Iran via Germany without the required U.S. Government authorization. Pursuant to Section 746.7 of the Regulations authorization from OFAC was required for the export of regulator valves and repair it, items subject to the Regulations and the Iranian Transaction Regulations, from the United States to Iran. No OFAC authorization was obtained for the export, which was detained prior to export by the Department of Commerce. In so doing, Petrom committed one violation of Section 764.2(c) of the Regulations.

Charge 11 (15 CFR 764.2(e)—Ordering Regulator Valves and a Repair Kit With Knowledge That a Violation of the Regulations Was Intended To Occur)

In connection with facts referenced in Charge 10, Petrom ordered regulator valves and a repair kit with knowledge that a violation of the Regulations was intended to occur. At all times relevant hereto, Petrom knew that prior authorization was required from OFAC to export regulator valves and repair kit, items subject to the Regulations and the Iranian Transactions Regulations, from the United States to Iran. Petrom ordered the shipment knowing that the regulator valves and repair kit would be exported to Iran without the required U.S. Government authorization. In so doing, Petrom committed one violation of Section 764.2(e) of the Regulations.

Charge 12 (15 CFR 764.2(c)—Soliciting an Export to Iran Without the Required U.S. Government Authorization)

On or about June 18, 1999, Petrom solicited a violation of the Regulations when it order electrical equipment[3] from a U.S. company for export to Iran via Germany without the required U.S. Government authorization. Pursuant to Section 746.7 of the Regulations authorization from OFAC was required for the export of electrical equipment, items subject to the Regulations and the Iranian Transactions Regulations, from the United States to Iran. No OFAC authorization was obtained for the export, which was never shipped from the manufacturer. In so doing, Petrom committed one violation of section 764.2(c) of the Regulations.

Charge 13 (15 CFR 764.2(e)—Ordering Electrical Equipment With Knowledge That a Violation of the Regulations Was Intended To Occur)

In connection with facts referenced in Charge 12, Petrom ordered electrical equipment with knowledge that a violation of the Regulations was intended to occur. At all times relevant hereto, Petrom knew that prior authorization was required from OFAC to export electrical equipment, items subject to the Regulations and the Iranian Transactions Regulations, from the United States to Iran, Petrom ordered the equipment from a U.S. company knowing that the equipment would be exported to Iran without the required U.S. Government authorization. In so doing, Petrom committed one violation of Section 764.2(e) of the Regulations.

Following the grant of several extensions of time to file an Answer, on July 5, 2004, Petrom, through its attorney, Dr. B. Khadjavia-Gontard, filed a formal Answer denying ''any intention to reexport to Iran the subject goods.'' Petrom stated that the goods imported to Germany ''were not reexported to Iran'' and with regard to the Charges six (6) through nine (9), that a ''misunderstanding as to the destination of the shipment had been caused by a mistaken review of [] order reference numbers * * *'' In its Answer, Petrom did not formally demand a hearing and on July 27, 2004, this matter was assigned pursuant to 15 CFR 766.15 to the Honorable Peter A. Fitzpatrick, Administrative Law Judge (ALJ), Norfolk. BIS regulations provide that a written demand for hearing must be explicitly stated. *Id.* As in this case, Respondent's failure to formally demand a hearing is deemed a waiver of Respondent's right to a hearing and this Recommended Decision and Order is hereby issued on the basis of the submitted record.[4] *See id.* and § 766.6(c).

On August 18, 2004, an Order to File Briefs was issued directing the parties to file the necessary, ''Affidavits or declarations, depositions, admissions, answers to interrogatories and stipulations'' to supplement the record. In that Order, the parties were placed on notice that proceeding on the record ''does not relieve the parties from the necessity of proving the facts supporting their charges or defenses.'' (citation provided to § 766.15).

On September 7, 2004, Petrom filed a response, reasserting the defenses raised in their July 5, 2004 Answer and requested that ''Respondent should be informed by the Court about the facts presented to BIS'' in order to comply with the ALJ's August 18, 2004 Order to file briefs or documents. On September 8, 2004, the Honorable Peter A. Fitzpatrick issued an Order stating that the burden of proof in this administrative proceeding lies with the agency and that any submission regarding same must be served upon Respondent. Respondent was then given an opportunity to submit documentation in support of its defense following the receipt of Agency materials. On September 20, 2004, the parties were granted a thirty (30) day stay to file briefs following the parties' request to allow ''further [discussion of] the factual basis for Respondent's response and to discuss resolution of this matter.''

On October 20, 2004, the Agency filed its Memorandum and Submission of Evidence to Supplement the Record (Agency Brief). The Agency's Brief contained thirty-nine (39) exhibits. Several of the exhibits were translated from German to English by AB Si Translation Services, Inc., 8350 NW. 52nd Terrace, Suite 209, Miami, Florida 33166. Following receipt of the Agency's Brief, Respondent sought an additional extension of time in order to prepare its submission. Respondent's request for an additional extension of time was granted by Order dated November 4, 2004.

On November 24, 2004, Respondent filed its submission to supplement the record entitled, Respondent's Answer to the Memorandum and Submission of Evidence to Supplement the Record Submitted by the Bureau of Industry and Security (Respondent's Brief). At this point, Respondent's defense can

[3] In its Memorandum and Submission of Evidence to Supplement the Record, dated October 20, 2004, BIS refers to the Electrical Equipment identified in Charges 12 and 13 as ''Mercury Thermal Systems and [thermowells].''

[4] No witness testimony was received in this proceeding. The case Index on the official record provides the exclusive listing of documents received in this matter. A copy of the Index is provided as Attachment A.

generally be characterized as the failure by the Agency to show that Respondent either, exported or intended to export, or had knowledge that the items in question were to be exported to Iran and that Respondent ''does not accept and acknowledge the extraterritorial effect of the U.S. Iranian Transaction Regulations as claimed by the BIS.''

On December 28, 2004, this matter was reassigned by the Chief Administrative Law Judge to the undersigned Judge. On January 3, 2005, an Order to File Pre-decisional Briefs was issued to provide the parties with an opportunity to file any:

1. Exceptions to any ruling made by this Administrative Law Judge or to the admissibility of evidence proffered in this matter;

2. Proposed findings of fact and conclusions of law;

3. Supporting legal arguments for the exceptions and proposed findings and conclusions submitted; and

4. A proposed order.

On January 24, 2005, BIS filed its Memorandum of Proposed Findings of Fact and Conclusions of Law, which included a proposed monetary sanction in the amount of $143,000 and a denial of export privileges for twenty (20) years. Respondent did not file any proposed findings. Given that the parties have been provided an ample amount of time and opportunity to supplement the record and, in keeping with the procedures set forth in 15 CFR part 766, I find that this matter is now ripe for decision.

For the reasons that follow, I hereby find that the Bureau of Industry and Security has met its burden as shown in the written record by the preponderance of substantial, reliable, and probative evidence that Petrom GmbH International Trade violated the Export Administration Act and its supporting Regulations as alleged in the March 29, 2004 Charging Letter.

**Findings of Fact**

1. On May 6, 1995, the President of the United States signed Executive Order 12959 to prohibit certain transaction, including the export and reexport of certain items with respect to Iran (''Iranian Embargo''). Exhibit 29, Agency Brief, 60 FR 24757, May 9, 1995.[5]

2. Executive Order 12959 prohibits the export or reexport of virtually all U.S. commercial transactions with Iran, unless a license has been previously issued or the transaction is exempt by statute. Exhibit 2, Agency Brief.

3. The United States Department of Treasury, Office of Foreign Assets Control (OFAC) administers the Iranian Transactions Regulations (31 CFR Part 560) under the authority of the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. 1701 *et seq.*), the National Emergencies Act, (50 U.S.C. 1601 *et seq.*), and the International Security and Development Cooperation Act of 1985, (22 U.S.C. 2349aa–9). Exhibit 1 and 2, Agency Brief.

4. The OFAC is charged with administering the Iranian Embargo, which includes items subject to the Export Administration Regulation (''EAR''). The Bureau of Industry and Security also administers licensing requirements under the EAR for items that may be exported or reexported to Iran. Exhibit 2, Agency Brief, *see also* 15 CFR 746.7(a)(2).

5. The United States of America and the Federal Republic of Germany signed a mutual agreement regarding custom related activities and will end assistance to each respective Custom Agency in order to facilitate trade cooperation between nations. Exhibit 3 and 6, Agency Brief.

6. The German Customs Authority is named Zollkriminalamt or ''ZKA.'' In response is a request by the U.S. Customs Service, known presently as the Bureau of Immigration and Customs Enforcement (''ICE''), the ZKA provided assistance with regard to the activities of Petrom. The ZKA issued a report (''ZKA Report'') on March 21, 2000, which was translated by Heike Spelt and is provided as Exhibit 4 and 5, Agency's Brief.

*General Findings Reported Under the ZKA Report*[6]

7. Petrom GmbH International Trade is a company registered in the Commercial Registry of Muchen, Germany. Since 1997, Petrom's commercial address is Maria Theresia Str. 26, D–81675 Munchen.

8. Petrom's commercial objective is ''trade of any kind, especially import and export of industry products, raw materials and agriculture products.''

9. The sole proprietor is Majid Rashmanifar. His last name be spelled as ''Rahmani'' or ''Rahmanifar.'' The Respondent's Attorney indicates that Mr. Majid Rahmani-Far is the Chief Executive Officer of Petrom. *See* Respondent's request for extension of time, dated June 18, 2004.

10. Born April 28, 1961 in Teheran, Iran and is presently an Iranian citizen, Mr. Rashmanifar has further ventures in other companies, including one company named Petrom International Trade S.I., located in Madrid, Spain.

11. Petrom used an invoice numbering system with the following convention: '' 'client number, / ES (=Enquiry Sale) + consecutive numbers per client / RE 1 (if partial delivery then RE2. * * *' '' ''For example: 10121/ES–07 RE 1.''

12. A client list provided by the ZKA Report indicates the following pertinent information concerning Petrom's client identification numbers:

| Client number | Client name and place of business |
|---|---|
| 10816 ..... | Iran Tire Manufacturing Company, Teheran, Iran. |
| 11308 ..... | Kian Tire Manufacturing Co., Teheran, Iran. |
| 11602 ..... | Razzi Vaccine and Serum Inst., Teheran/Karaj, Iran. |
| 10821 ..... | Iran Aircraft Manufacturing Industries, Teheran, Iran. |
| 10332 ..... | Darou Pakhsh Co., Teheran, Iran. |
| 10817 ..... | Iran Research Organisation for Science and Technology, Teheran, Iran. |

Exhibit 5, Agency Brief.

13. The ZKA Report concerning Petrom's client numbering system that identifies Iran as an ultimate export destination was also corroborated and demonstrated by:

11602—Razzi Vaccine and Serum Inst.

a. In an undated export for 300 kg of Casamino Acid delivered to Razzi Vaccine and Serum Institute located at Karaj, Iran, the ZKA Report identified the export order number corresponding to Razzi Vaccine and Serum Institute as 11602. Exhibit 5, (ZKA Report), Agency Brief.

b. Under Invoice No. 3341/97, dated August 13, 1997, from Sunshine Textiles, Inc., to Petrom, it referenced ''YOUR ORDER P.O. 11602/ES–12.'' The order comprised of ''22 ITEMS LABORATORY CHEMICALS'' valued at ''USD 9021.95.'' Exhibit 35, Agency Brief.

The ZKA Report disclosed that ''SEVEN DAYS TRADE CO. LTD.,

[5] Unless noted, the citations provided hereunder reference the exhibit numbers associated with the Agency's Memorandum and Submission of Evidence to Supplement the Record (''Agency Brief'') and Respondent's reply to the Agency's Brief (''Respondent's Brief''). Several of the Agency's exhibits were translated from German to English as provided for by AB Si Translation Services, Inc., 8350 NW. 52nd Terrace, Suite 209, Miami, Florida 33166. To the extent provided the Agency's Proposed Findings of Facts and Conclusions of Law are accepted and incorporated herein. The Respondent did not submit any Proposed Findings of Facts and Conclusions of Law.

[6] Unless noted otherwise, all citations in this subsection pertain to Exhibit 4 (ZKA Report), Agency's Brief.

Teheran, Iran had asked PETROM in lieu of RAZZI VACCINE whether the chemical products could be delivered.'' In its communication with Seven Days Trade, Co., Ltd., Petrom referenced the invoice number ''B/1205/11602/ES–12/Q2.'' Exhibit 5, (ZKA Report), Agency Brief.

The ZKA Report identifies client no. 11602 as, Razzi Vaccine and Serum Inst., located in Teheran/Karaj, Iran. Exhibit 5, (ZKA Report), Agency Brief.

In further support, a Shippers Export Declaration (''SED'') form issued on August 23, 1997 for Sunshine Textiles, Inc., which referenced laboratory chemicals valued at $9021.00. The SED lists Razi Vaccine and Serum Inst., Teheran, Iran as the ultimate consignee with a port of unloading designated as Teheran, Iran. Exhibit 36, Agency Brief.

10816—Iran Tire Manufacturing Co.

c. On February 13, 1995, Petrom sent a facsimile to Sunshine Textiles, Inc. concerning an order from Antares where they ''mention that the goods are destined for Iran.'' The facsimile referenced ''10816/ES–20.'' Exhibit 37, Agency Brief.

The ZKA Report identified customer no. 10816 as the Iran Tire Manufacturing Co., located in Teheran, Iran. Exhibit 5 (ZKA Report), Agency Brief.

d. In an invoice dated January 19, 1993, from Penberthy, Inc. to Petrom for the export of hydraulic power equipment, it referenced a customer order no. 10816/ES–05/PP12. While the invoice showed that the export was to be shipped to Petrom in Munich, Germany, it also contained the words ''EXPORT IRAN'' on the form. Exhibit 38, Agency Brief. A second document entitled, Certificate of Origin was issued by Penberthy, Inc. that provided similar information containing the words ''Export Iran'' on the form. Exhibit 39, Agency Brief.

The ZKA Report identified customer no. 10816 as the Iran Tire Manufacturing Co., located in Teheran, Iran. Exhibit 5 (ZKA Report), Agency Brief.

10821—Iran Aircraft Manufacturing Industries

e. In an invoice dated March 3, 1995, from Sunshine Textiles, Inc. to Petrom, it referenced order number 10821/ES–02. The exported item was delivered to the Iran Aircraft Manufacturing Industries located in Isfahan, Iran.

In another undated export from Sunshine Textiles, Inc. to the Iran Aircraft Manufacturing Industries, the ZKA Report identifies the export order number as 10821/ES–06/RE 1. Exhibit 5 (ZKA Report), Agency Brief.

The ZKA Report identified customer no. 10821 as the Iran Aircraft Manufacturing Industries, located in Teheran, Iran. Exhibit 5 (ZKA Report), Agency Brief.

10332—Darou Pakhsh Co.

f. In an invoice dated May 7, 1996, for an export by Petrom to Darou Pakhsh Co., Teheran, Iran, it referenced order number ''10332/ES–29/RE1.'' Exhibit 5 (ZKA Report), Agency Brief.

In another invoice dated April 16, 1996, for an export by Petrom to Darou Pakhsh Co., Teheran, Iran, it referenced order number ''10332/ES–28/RE1.'' Exhibit 5 (ZKA Report), Agency Brief.

The ZKA Report identified client number 10332 as the Darou Pakhsh Co. located in Teheran, Iran. Exhibit 5, (ZKA Report), Agency Brief.

*Relationship Between Petrom and Sunshine Technology and Supplies, Inc.*

14. On May 6, 1999, Petrom entered into an agreement with Mr. Hadi Sadeli and Mrs. Maray Blanco (Mr. Saheli's wife) for the purpose of establishing a United States based company to purchase products made by U.S. companies for import to Europe. The company was named, Sunshine Technology and Supplies, Inc. (''Sunshine'').[7] Exhibit 25, Agency Brief.

15. Under the agreement, it was agreed that Sunshine's business address was to be the same as Mr. Saheli's residential address, 14230 SW., 45 Terrace, Miami, Florida 33175. Sunshine was not required to ''pay any rent whatsoever.'' Exhibit 24, 25, 26, Agency Brief.

16. Petrom was the ''actual owner'' of Sunshine and bore ''all costs of registration and other costs for running the company * * * as well as corporate and other taxes as well as respective legal fees * * *.'' Sunshine was created to ''exclusively carry out business activities of Petrom. Petrom shall provide the necessary info, instructions, payment etc. for such business activity.'' In addition, Mr. Saheli would receive monthly compensation from Petrom. Exhibit 25, Agency Brief.

*Solicitation of Exports to Iran*

Check Valves and Parts

17. In March of 1999, Petrom through Sunshine ordered ''600 PCS CHECK VALVES AND PARTS'' as indicated by Invoice No. 1161/99 for shipment from the United States to Germany. The invoice referenced ''Your order P.O. 18016/ES–99.'' The shipment, as indicated by a Certificate of Origin was made by ''United States Postal Service Air'' to Petron's address, Maria-Theresia Str. 26, Munich 81675 Germany. The reference number provided on the Certificate of Origin was 10816/ES–99/PP01. Exhibit 7 and 8, Agency Brief.

18. The client number code for 10816 is the Iran Tire Manufacturing Company located in Teheran, Iran. Exhibit 4 and 5 (ZKA Report), Agency Brief.

Pyrogent Test Kit

19. In August of 1999, Petrom, directed Sunshine to contact Bio Whittaker (''BW'') to order the following, ''Pyrogent Plus, Single Test Kit, 24 Single Test Vials Lysate, 1x1 ml Vial Endotoxin, Certificate of Analysis'' (''Pyrogent Test Kit''). Exhibit 9, Agency Brief. On or about August 16, 1999, BW shipped the Pyrogent Test Kit to Sunshine. Exhibit 11, Agency Brief. On the BW shipment form, ''10332/ES–40'' was hand written along with other notes. *Id.* On or about August 18, 1999, Sunshine shipped the Pyrogent Test Kit to Petrom, Munich, Germany. Exhibit 10, Agency Brief.

20. The client number code for 10332 is the Darou Pakhsh Co. located in Teheran, Iran. Exhibit 4 and 5 (ZKA Report), Agency Brief.

Tire Curing Bladders

21. In September of 1999, Petrom directly contacted Danzas AG (''Danzas''), a freight forwarding firm and requested a detailed offer for shipment of one (1) palette of tire curing bladders that would be shipped from ''Bryan, OH'' to Teheran via Germany. Exhibit 12, Agency Brief. In a following letter from Petrom to Danzas, it references ''Shipment ex Cleveland'' where Petrom states, ''Please instruct Danzas in Cleveland to contact Sunshine'' regarding the shipment. Exhibit 13, Agency Brief. Danzas has an office located in Cleveland, Ohio. Respondent's Answer, dated July 5, 2004.

22. In an e-mail dated September 21, 1999 from Michael Mittasch, Danzas GmbH, Inc. to Harry Walton, Airfreight Manager, Danzas, Cleveland, Mr. Mittash states ''please contact [Sunshine for] the following shmt * * * ready at Byron, Ohio for our customer Petrom, GmbH, Munich.'' He further states, ''Please note that shmt has to go to FRA not MUC, as we have to send it from there to THR, Iran'' Exhibit 15, Agency Brief.

23. The shipment of the curing bladders from Danzas' Cleveland office was never completed as the Danzas

[7] This company is distinguished from Sunshine Textiles, Inc., who also performed considerable activities with Petrom.

Cleveland office ''decided not to serve Petrom with this transport'' as it involved ''the embargo U.S. to IRAN.'' *Id.* The shipment was however, already in route to Cleveland when that decision was made. *Id.*

24. On September 30, 1999, a shipment of four (4) tire curing bladders was seized by special agents from the Office of Export Enforcement in Middleburg Heights, Ohio. The Report of Investigation states that the curing bladders had been shipped from a U.S. tire manufacturer as requested by Sunshine for the consignee, Petrom with an ultimate destination of Iran. Exhibit 17, Agency Brief.

25. By Invoice dated September 22, 1999, Sunshine notified Petrom concerning ''Your Order P.O. 11308/ES–82/EP–01'' for ''4 pcs Curing Bladders.'' Exhibit 16, Agency Brief.

26. In addition, in a letter dated November 4, 1999, Petrom sent confirmation to Danzas referencing, ''Shipment ex Cleveland.'' Petrom's letter provided, ''Our ref.: 11308/ES–82/TI–01.'' Exhibit 14, Agency Brief.

27. The client number code for 11308 is the Kian Tire Manufacturing Co. located in Teheran, Iran. Exhibit 4 and 5 (ZKA Report), Agency Brief.

28. By letter dated November 4, 1999 from Danzas to Petrom, Danzas stated that a ''misunderstanding'' had occurred ''regarding a shipment by Sunshine Technology & Supplies to Petrom GmbH International Trade.'' The letter concerned a shipment and its subsequent seizure, on or about September 30, 1999, of four (4) curing bladders by the Office of Export Enforcement. Danzas stated that ''[b]ecause of a similarity in internal reference numbers, we mistakenly believed that your shipment of tire bladders was destined to Iran.'' Respondent's Answer, dated July 5, 2004.

Regular Valves and Repair Kit

29. On August 11, 1999, Petrom contacted Sunshine directing them to send a purchase request, ''no. 10816/ES–117/ep–11'' to Copes-Vulcan, Inc. as represented by RME Associates, Inc., Lutz, Florida. Exhibit 18, Agency Brief.

30. Sunshine forwarded the purchase order requesting two (2) thermostatic regulating valves and other various parts. The request referenced purchase order no. 10816/ES–117/ep–11 and was billed as $11,147.06. Exhibit 19, Agency Brief.

31. Copes-Vulcan, Inc. sold the items in question to Sunshine as indicated by invoice signed on August 26, 1999. The billing invoice referenced Sunshine's purchase order no. 10816/ES–117/ep–11 and was billed at $11,147.00. Exhibit 20, Agency Brief.

32. By letter dated November 12, 1999, Sunshine notified Petrom regarding Invoice No. 4162/99 which referenced ''2 VALVES AND ONE SET REPAIR KIT'' in the amount of ''USD 11,147.06.'' Exhibit 21, Agency Brief.

33. On November 18, 1999, special agents from the Office of Export Enforcement seized the shipment in Hapeville, Georgia. The shipment was destined to Sunshine and was labeled ''P/O: 10816/ES–117/EP–11.'' Exhibit 22, Agency Brief.

34. The client number code for 10816 is the Iran Tire Manufacturing Company, located in Teheran, Iran. Exhibit 4 and 5 (ZKA Report), Agency Brief.

Mercury Thermal Systems and Thermowells

35. On September 25, 1997, Petrom contacted Sunshine Textiles, Inc. and inquired about ordering pen recorders, mercury thermal system and thermowells, and bourdon pressure elements. Petrom stated they initially tried to contact ''Tom at ABB'' and requested that Sunshine Textiles, Inc. inform ABB that ''we need the following for export South America—Brazil.'' Exhibit 23, Agency Brief.

It is noted that the ZKA Report stated that Sunshine Textiles, Inc. had previously listed Brazil, on or about August 30, 1997, as the ultimate destination for a Petrom export, which was later determined to be a reexport to Teheran, Iran via Germany. Exhibit 4, (ZKA Report), Agency Brief. It is further noted that Sunshine Textiles, Inc. employed a similar strategy in another order to Petrom, where it provided the end user as ''R.P.C. comercio Ltda, Rio de Janeiro/Brazil.'' According to the Airway bill dated April 30, 1996, the export was initially delivered to Germany, but was later forwarded on May 10, 1996 to Darou Parhsh in Iran. *Id.*

36. Although Petrom initially contacted Sunshine Textiles, Inc., it was Sunshine, who later issued a purchase order providing, ''Our Ref: 11308/ES–26/PP–01A'' and ''Your Ref.: Fax quotation dated Oct. 07, 1999.'' The purchase order was directed to ABB Instrumentation, Inc., Rochester, NY and ordered eighty (80) Mercury Thermal Systems (plus thermowells) and seventy (70) Bourdon pressure elements. Exhibit 26, Agency Brief.

37. On September 23, 1999, an order acknowledgment was printed by ABB Automation Inc., Warminster, PA for Sunshine detailing a shipment that contained, among other items, eighty (80) ''04A–WELL PER PRINT,'' seventy (70) ''BOURDON SPRING PRESSURE,'' and eighty (80) ''CONSTR. CARD–MERCURY SYSTEM.'' Exhibit 27, Agency Brief.

38. As referenced by the ABB order acknowledgment, it indicated ''REF., P.O. #11808/ES–26/PP01.'' On the last page of the order acknowledgment is a hand written correction, with an arrow and question mark pointing to the reference P.O. number. The handwritten number provided was 11308 versus the printed number, 11808. Exhibit 27, Agency Brief.

39. As referenced earlier by the agreement signed between Petrom and Sunshine (May 6, 1999), Mr. Saheli, who represented Petrom's direct interest in Sunshine, ''received an amount of USD 25,000 for relaying to ABB/Taylor, as down payment for order no. 11308/ES–26.'' This amount was paid to ABB/Taylor, Exhibit 25, Agency Brief.

40. The client number code for 11308 is the Kian Tire Manufacturing Co. located in Teheran, Iran. Exhibit 4 and 5 (ZKA Report), Agency Brief.

*Acting With Knowledge That a Violation Was Intended To Occur*

41. On June 15, 1992, prior to the issuance of the United States embargo on Iran, Petrom had contacted Sunshine Textiles, Inc. regarding a shipment destined for Iran. Petrom later requested that Sunshine Textiles, Inc. obtain export license applications from the International Trade Administration, U.S. Department of Commerce to export these materials to Iran. Exhibit 30 and 31, Agency Brief.

42. On August 5, 1992, Sunshine received a facsimile transmission from DIFCO Laboratories that provided excerpts from the Regulations governing exports to Iran. Exhibit 32, Agency Brief. In the facsimile, Sunshine was appraised of the license requirements concerning exports to Iran. DIFCO Laboratories later stated, ''We regret to inform you that due to current governmental restrictions, we cannot enter into any business proceedings with your country.'' Exhibit 33, Agency Brief.

43. On February 13, 1998, Petrom sent payment instructions for the Commerzbank Corp. to credit the Republic Bank of Miami for the designated beneficiary of Mr. Hadi Saheli in the amount of $73,937.00. The instructions stated, ''Intended use P.O. No. 10816/ES–78/PP01, 10816/ES–81/PP04, PP05, 11308/ES–58, Down Payment for 11308/ES–26.'' The country of purchase was listed as ''Iran.'' Exhibit 34, Agency Brief.

44. By letter dated February 15, 2000, Mr. Rahmanifar, on behalf of Petrom indicated ''that it is the expressed business policy of our company to also consider embargo regulations of other States.'' Exhibit 28, Agency Brief.

*Items Subject to the EAR*

45. By letter dated July 26, 2000, the Office of Export Enforcement (OEE) received a response from the Office of Strategic Trade and Foreign Policy Controls regarding the OEE's request for export classification for the following equipment:

> Ethyl cellulose for use as either an adhesive or a protective coating in tire manufacturing; tire curing bladders, electrical spare parts for the curing press used in tire manufacturing equipment, a two-inch CL 250 class iron threaded B1 regulator/W type ''R'' thermostat, and a strut tension relief and repair kit consisting of plugs, cages, pins, packing and gaskets, all for export to Iran between January 1, 1995 and February 15, 2000* * *

The Office of Strategic Trade and Foreign Policy Controls stated that ''all of the commodities are classified as EAR99.'' Exhibit 1, Agency Brief.

*Request for Office of Foreign Assets Control Licenses*

46. By letter dated January 14, 2000, the Office of Export Enforcement (OEE) received a response from the Office of Foreign Assets Control (OFAC) stating that a review of their files from ''August 1995 to the present'' revealed that no OFAC licenses had ever been issued to either:

a. Mary Blanco.
b. Mary Saheli.
c. Hadi Saheli.
d. Sunshine Technology Supply Inc.
e. Petrom GmbH.
f. Petrom International.
g. The Iran Tire Manufacturing Co.
h. Milano International Co.
i. Sunshine Textiles Inc.

OFAC further states that ''the above names were checked against the current list of OFAC Specially Designated Nationals (''SDN''). None of the names appear on the list.'' Exhibit 2, Agency Brief.

**Ultimate Findings of Fact and Conclusions of Law**

1. Petrom GmbH International Trade and the subject matter of this case are properly within the jurisdiction of the Bureau of Industry and Security in accordance with the Export Administration Act of 1979 (50 U.S.C. App. 2401–20) and the Export Administration Regulations (15 CFR parts 730–74).

2. The Bureau of Industry and Security established by a preponderance of the evidence that Petrom GmbH International Trade violated 15 CFR 764.2(d) by conspiring or acting in concert with others in a manner or for the purpose of bringing about or doing an act to export items subject to the EAR without U.S. Government authorization in violation of the EAA, or the EAR, or any order, license or authorization issued thereunder.

3. The Bureau of Industry and Security established by a preponderance of the evidence that Petrom GmbH International Trade violated 15 CFR 764.2(c) by soliciting in the unauthorized export of equipment and items subject to the Export Administration Regulations from the United States to the Islamic Republic of Iran.

4. The Bureau of Industry and Security established by a preponderance of the evidence that Petrom GmbH International Trade violated 15 CFR 764.2(e) by acting with knowledge that a violation of the EAA, the EAR or any order, license or authorization issued thereunder, has occurred, is about to occur, or is intended to occur by the unauthorized export of equipment and items subject to the Export Administration Regulations from the United States to the Islamic Republic of Iran.

5. Given the facts and circumstances of this matter, the Bureau of Industry and Security's proposed assessment of civil penalties for the denial of export privileges against Petrom GmbH International Trade for the period of twenty (20) years and a civil monetary penalty of $143,000 is justified and reasonable.

**Discussion**

The Export Administration Act and the supporting Export Administration Regulations provides broad and extensive authority for the control of exports from the United States. *See In the Matter of: Abdulamir Madhi,* et al. 68 FR 57406 (October 3, 2003); *see also* 50 U.S.C. App. 2402(2)(A), 2404(a)(1), 2405(a)(1), and 15 CFR 730.2. Additional authority, providing explicit export controls by regulations and Executive Orders apply specifically to exports to Iran and other restricted countries. In 1987, the President, through an Executive Order, invoked import sanctions against Iran, which in general, prohibited the export of any goods, technology or services from the United States to Iran without expressed authorization. *See* Exec. Order No. 12613, reprinted in 52 FR 41940 (Oct. 30, 1987); *see also* Exec. Order No. 12959, reprinted in 60 FR 24757 (May 6, 1995) (expanding sanctions imposed against Iran); Exec. Order No. 12957, reprinted in 60 FR 14615 (Mar. 15, 1995) (declaring actions and policies with respect to the Iranian Government to be a national emergency); *see also* 31 CFR 560.204, 560.501. Iran is listed under the EAR as a country having special export and embargo controls. *See* 15 CFR 746.7.

The burden in this Administrative Proceeding lies with the Bureau of Industry and Security to prove the charged violations by the preponderance of the evidence. *See In the Matter of: Abdulamir Madhi* et al., 68 FR 57406 (October 3, 2003). The preponderance of evidence standard is demonstrated by reliable, probative, and substantial evidence. *See Steadman* v. *S.E.C.*, 450 U.S. 91, 102 (1981). The Agency, in simple terms, must demonstrate ''that the existence of a fact is more probable than its nonexistence.'' *Concrete Pipe & Products* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993).

In this matter, Petrom is charged with thirteen (13) violations of the Export Administration Regulations occurring from, on or about, March 1999 to, on or about, May 2000. Briefly stated, the March 29, 2004 Charging Letter charges Petrom with one count of conspiracy under 15 CFR 764.2(d), six (6) counts of solicitation under 15 CFR 764.2(c), and six (6) counts of acting with knowledge that a violation of the Regulations would occur under 15 CFR 764.2(e).

*Petrom's Response*

At the onset, Petrom stated that it is ''a German limited company duly established and registered in accordance with German law.'' Petrom's position is that it has ''acted in accordance with the applicable German laws and regulations and had no knowledge and/or intention to violate any export regulations of other countries such as the United States of America, when performing its trade activities which to the understanding of [Petrom] have no binding force on [] its management as a German legal entity and/or German individuals.'' Petrom's Request for Extension of Time, dated April 7, 2004.

In its formal Answer, dated July 5, 2004, Petrom denied the allegations charged by BIS. It specifically addressed Charges six (6) through nine (9) (tire curing bladders) as a simple mistake made by a freight forward company because of the ''similarity in internal reference numbers.'' Petrom stated, ''Acting on this mistaken information, the Danzas office in Cleveland, Ohio notified the U.S. Government that the shipment was destined for Iran.'' Respondent's Answer, dated July 5,

2004. Petrom included a letter from Danzas, dated November 4, 1999, which was provided in response to a request from Petrom. The Danzas letter stated, this ''is to clarify a misunderstanding regarding a shipment by Sunshine Technology & Supplies to Petrom GmbH International Trade of four curing bladders, which we understand was seized and detained in Cleveland, Ohio * * *. Because of a similarity in internal reference numbers, we mistakenly believed that your shipment of tire bladders was destined for Iran.'' Danzas further provided, ''to the best of our knowledge, the four curing bladders are intended for use in Germany, not in Iran.''

With regard to the remaining charges, Petrom denied in its Answer any intent to reexport the items in question from Germany to Iran and that ''the mere fact that Petrom has done business in the past also with Iranian national is obviously not sufficient to prove such an intention.'' Categorically stated, Petrom denies that it intended to reexport the subject items to Iran and that none of the items were, in fact, reexported to Iran.

On November 24, 2004, Petrom filed its response to the Agency's Brief entitled, Respondent's Answer to the Memorandum and Submission of Evidence to Supplement this Record Submitted by the Bureau of Industry and Security (Respondent's Brief). Respondent's opposition was divided into three (3) main arguments; Applicable Export Controls, Evidentiary Submission by the BIS, and Extraterritorial effect of the Regulations.

*Applicable Export Controls*

Petrom states that it ''understands that during the time period in question * * * it has been a violation of the Regulations to export items subject to both the Iranian Transactions Regulations and the Regulations without a license * * * [and that items] intended specifically for transshipment to Iran are items subject to both the Iranian Transactions Regulations and the Regulations and were not allowed [to] be exported without an OFAC license.'' Petrom concludes that BIS failed to sufficiently prove ''the crucial question in these proceedings'' which is to demonstrate that Petrom had any intent ''to transship to Iran the items imported from the United States.''

*Evidentiary Submission by the BIS*

Responding to the Agency's Brief and Exhibits, Petrom states that the invoice numbering system detailed by the ZKA ''that forms the basis for the charges'' is not ''sufficient evidence to prove the intention of Respondent to transship the respective items from Germany to Iran. Even if the client number used in [a] transaction between Respondent and [a] U.S. export firm referred to an Iranian customer, this does not prove that the respective items imported from the United States to Germany were definitely destined to be transshipped afterwards from Germany to the respective Iranian client.''

Petrom argues that ''If a criminal offense does not refer to certain acts committed by the charted person, but only to the intention of such person to commit certain acts in the future, the evidence of such intention has to be clearly established. This requirement is not met by the mere reference to certain client numbers in the invoices made out by the U.S. export firm to Respondent.''

Regarding Charges 3, 5, 7, 9, 11, and 13 (knowledge that a violation was to occur), Petrom ''clearly denies to have had actual knowledge of the specific restrictions and limitations contained in the Regulations with regard to the reexport to Iran * * *.'' Petrom acknowledged that the United States ''announced certain restrictions for the export to Iran'' but it ''has not been aware * * * that the mere intention to transship goods imported from the U.S. to Germany at a future date to Iran had been sufficient to be charged under the Regulation.'' Petrom argues that it is common knowledge that certain military equipment and items were covered by the Regulations but that it had ''no knowledge that the items [in question] imported from the U.S. * * * [were also covered].''

*Extraterritorial Effect of the Regulations*

Petrom ''takes the view that Respondent, as a German company with seat and business establishment in Munich, only had to comply with the requirements of German and international law as far as export restrictions are concerned.'' ''As a German company acting from its German business establishment Respondent cannot be expected, by contrast, to be informed about regulations on foreign trade of third countries, like the U.S., when doing business with Iran.'' Petrom's overall legal position is that it ''does not accept and acknowledge the extraterritorial effect of the U.S. Iranian Transaction Regulations as claimed by the BIS * * *.''

*Applicable Laws and Regulations*

The Regulations provide that ''No person may engage in any conduct prohibited by or contrary to * * * any conduct required by, the EAA,* * *.'' 15 CFR 764.2(a). Specifically, as it pertains to this matter;

> No person may conspire or act in concert with one or more persons in any manner or for any purpose to bring about or to do any act that constitutes a violation of the EAA, the EAR, or any order, license or authorization issued thereunder. *Id.* at § 764.2(d).
>
> No person may solicit or attempt a violation of the EAA, the EAR, or any order, license or authorization issued thereunder. *Id.* at § 764.2(c).
>
> No person may order, buy, remove, conceal, store, use, sell, loan, dispose of, transfer, transport, finance, forward, or otherwise service, in whole or in part, any item exported from the United States, or that is otherwise subject to the EAR, with knowledge that a violation of the EAA, the EAR, or any order, license or authorization issued thereunder has occurred, is about to occur, or is intended to occur in connection with this item. *Id.* at 764.2(e).

The term ''Export means an actual shipment or transaction of items subject to the EAR from the United States * * *.'' *Id.* at § 734.2(b)(1). The term ''Reexport means an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country * * *.'' *Id.* at § 734.2(b)(4). The export or reexport of items subject to the EAR through another country for the purpose of transshipping the items to a new country is considered to be an export to that new country. *Id.* at § 734.2(b)6).

BIS has jurisdiction for all items ''subject to the EAR,'' which generally are listed on the Commerce Control List (CCL), but for certain items that are not so listed, the Regulations provide, ''for ease of reference and classification purposes, items subject to the EAR which are not listed on the CCL are designated as 'EAR99.' '' *Id.* at § 734.3(c). The items at issue in this matter are classified as ''EAR99,'' *see* Exhibit 1, Agency Brief, and are therefore, ''subject to the EAR'' pursuant to 15 CFR 734.3(c). In addition, the items in question are also subject to the Iranian Transactions Regulations administered by the OFAC and may not be exported without an OFAC license. 15 CFR 734.3(b)(1)(ii) and 746.7, and 31 CFR 560.204.

Given the response by Petrom, it is important to note that the rules provide that a person, whether or not they are complying with foreign laws or regulations ''is not relieved of the responsibility of complying with U.S. laws and regulations, including the EAR.'' *Id.* at § 734.12.

*Solicitation of an Unauthorized Export or Reexport*

In considering the record taken as a whole, BIS has proved by the preponderance of evidence that Petrom solicited unauthorized exports for equipment and items subject to the EAR from the United States to Iran via Germany in violation of 15 CFR 764.2(c). By mutual agreement between the United States of America and the Federal Republic of Germany, the German Customs Authority, the Zollkriminalamt (''ZKA''), provided pertinent, reliable, and credible evidence to establish that Petrom used a client identification numbering system in its orders, invoices, and correspondence. The client identification system was clearly demonstrated by Petrom's own use and business practice to associate its Iranian customers with unique identifiers. As shown by the ZKA Report, Petrom used the client identification system for shipments and orders that occurred prior to and during the present embargo against Iran. Some of the documents form the basis of the Charges presented, while others were provided for illustrative or other evidentiary purposes. For example, in certain facsimile transmissions, invoices, forms, or communications, Petrom would list Iran as the utimate destination and use the client identifiers as outlined by the AKA Report. *See* Exhibit 4, 36, 37, 39, Agency's Brief. Concerning the pertinent exports charged here, Petrom's continued use of the same client identifiers is evidenced by its own invoices, documents, and correspondence. All of which reliably indicate by the preponderance of the evidence that Petrom continued to order parts, equipment, and items, which were subject to the EAR for export to Iran.

The Agency submitted reliable, probative and substantial evidence, which in its entirety, demonstrate that Petrom solicited orders for:

1. Check valves and parts for client number 10816, which was identified by the ZKA Report as the Iran Tire Manufacturing Company, Teheran, Iran;

2. Pyrogent test kit for client number 10332, which was identified by the ZKA Report as the Darou Pakhsh Company, Teheran, Iran;

3. Tire curing bladders ordered directly by Petrom through a freight forwarder and indirectly through Sunshine for client number 11308, which was identified by the ZKA Report as the Kian Tire Manufacturing Company, Teheran, Iran;

4. Regulator valves and repair kit for client number 10816, which was identified by the ZKA Report as the Iran Tire Manufacturing Company, Teheran, Iran; and

5. Mercury thermal systems, thermowells, and other equipment for client number 11308, which was identified by the ZKA Report as the Kian Tire Manufacturing Company, Teheran, Iran.

Regarding Charges six (6) through nine (9) concerning the orders for the tire curing bladders, Petrom submits the November 4, 1999 letter by Danzas as a defense. The Danzas letter indicates that Danzas made a mistake regarding an order reference number where it mistakenly believed that the tire curing bladders were destined to Iran. Based on this mistaken belief, Danzas contacted local U.S. Government authorities. Upon review of the record taken as a whole, the Danzas letter, which was prompted by a request from Petrom does not comport with the evidence submitted by BIS. In Exhibit 12, Agency's Brief, a telefax sent by Petrom to Danzas, documents ''inquiry No. 11308/ES–82/T1–01,'' and states that the shipment of tire curing bladders will be made from Byron, Ohio, ''to Germany via air freight'' and ''Onward to: from Germany ''collect'' via Iran Air to Teheran.'' In addition, Sunshine sent an invoice to Petrom, dated September 22, 1999, for purchase order number 11308/ES–82/EP–01, which listed ''4 pcs Curing Bladders'' valued at $1851.04. The client identifier listed in both communications is the Kian Tire Manufacturing Company, located in Teheran, Iran. Exhibit 4 and 5 (ZKA Report), Agency Brief. Based on the above, the November 4, 1999 Danzas letter is outweighed by the evidence demonstrating that Petrom possessed the knowledge that the shipments were ordered for an Iranian client.

In addition, BIS charged Petrom with two separate violations of soliciting orders for tire curing bladders, Charges six (6) and eight (8). The first solicitation was a direct order from Petrom to the freight forwarding company, Danzas, AG. *See* Exhibit 12, Agency Brief. This order was labeled as ''inquiry No. 11308/ES–82/T1–01'' for ''1 palette'' of curing bladders. In a separate communication from Petrom to Danzas, Petrom instructs Danzas ''to contact Sunshine so that they can have the merchandise delivered to Cleveland.'' Exhibit 13, Agency Brief. The record does not show whether or not this communication ever occurred. However, Sunshine would send an invoice to Petrom referencing, ''4 pcs Curing Bladders'' for ''Your Order P.O. 11308/ES–82/EP–01.'' Exhibit 16, Agency Brief. The ''enquiry sale'' numbers (ES–82) are the same for both documents; however, the last part of the invoice numbers are different, T1–01 versus EP–01. Looking to the ZKA Report, no further definition is provided except to state that this section can indicate partial delivery by using the code ''RE.'' The record also does not indicate whether or not ''1 palette'' of curing bladders is equivalent to ''4 pcs Curing Bladders.'' Given the distinctions presented, the record demonstrates that Sunshine was solicited at some point to procure tire curing bladders in addition to Petrom's direct solicitation to Danzas.

The Regulations proscribing the acts charged apply to a ''person'' and provide separate and distinct sanctions for ''each violation.'' 15 CFR 764.2, 764.3. The Regulations therefore contemplate separate violations to allow for cumulative penalties. *See FAA* v. *M. Marshall Landy & Int'l Aircraft Leasing, Inc.*, 705 F.2d 624, 636 (2nd Cir. 1983). In this instance, each solicitation of the tire curing bladders required an additional act on the part of Petrom. The record supports the position that Petrom acted on at least two (2) occasions to solicit orders for tire curing bladders. The issue as to whether or not the solicitations were directed to the same order does not have to be reached. *See United States* v. *Technic Services, Inc.*, 314 F.3d 1031, 1046 (9th Cir. 2002) (holding that ''The test for multiplicity is whether each count 'requires proof of an additional fact which the other does not.' '') (quoting *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)). A person can be charged under the same regulation based on related conduct and may be sanctioned with multiple violations ''if the conduct underlying each violation involves a separate and distinct act.'' *Id. see also United States* v. *Vaughn*, 797 F.2d 1485 (9th Cir. 1986) and *United States* v. *Wiga*, 663 F.2d 1325 (9th Cir. 1981).

Based on the above, it is hereby held that Petrom committed two (2) solicitations regarding the order for tire curing bladders.

Petrom also raises the argument that the items in question were never actually reexported from Germany to Iran. While the record demonstrates that certain transactions did not occur due to the intervention by the Department of Commerce, the record provides that other transactions were in fact exported to Germany. The facts presented however, are that all of the items in question were ultimately destined for delivery to Iran. Under the Regulations, it is a violation to solicit or attempt a

violation of the EAA or EAR. The fact that a shipment never reached its final destination is not an element of the charged act. *See* 15 CFR 764.2(c).

Given all of the reliable and credible information presented, it is found that Petrom solicited exports, either directly or indirectly from U.S. companies for export to Germany, with an ultimate destination of Iran. All of which occurred without U.S. government authorization in violation of the EAA and EAR.

*Acting With Knowledge of a Violation*

One of Petrom's main arguments is that BIS has failed to demonstrate that Petrom possessed the intent to transship or reexport the items in question to Iran. In one of its responses, Petrom also refers to a ''criminal offense'' and states, ''evidence of such intention has to be clearly established.'' This proceeding however, is not criminal in nature and the evidentiary standards presented here are certainly different from those required in a criminal proceeding.

Here, Petrom is charged with acting with knowledge that a violation ''has occurred, is about to occur, or is intended to occur * * *.'' 15 CFR 764.2(e). From the previous discussion, it is clear that Petrom ordered the items in question for export to its clients located in Iran. Petrom's argument that the client or invoice numbering system cannot support the position that Petrom intended to transship or reexport the items in question to Iran fails on several points.

a. First, it was the German Customs Authority (''ZKA'') who compiled and identified the client information concerning Petrom's order numbering system. The ZKA compiled this information from Petrom's own records. The ZKA Report demonstrates Petrom's ongoing business practice and reasonably and reliably indicates that Pertom was soliciting exports from the Unites States with an ultimate destination of Iran without the required U.S. Government authorization in violation of the EAA and EAR. It is the customer identification number along with the compilation of documents, invoices, facsimiles, and letters that provide by a preponderance of evidence that Petrom ordered equipment and items from U.S. companies with the intent to transship or reexport the items to Iran without the required U.S. Government authorization. In one of many examples presented in the record, Petrom was shown to issue payment instruments to Commerzbank, in which Petrom provided purchase order numbers for payment. The client identifiers presented in the purchase order numbers follow the same format outlined in the ZKA Report. The ZKA Report designates the client identifiers in the payment instruction as Iranian customers. In further support of the record, Petrom provides in the payment instructions to Commerzbank that the country of purchase is ''Iran.'' Exhibit 34, Agency Brief.

b. Second, the formation of Sunshine Technology and Supplies, Inc. is nothing more than a corporate front established by Petrom to foster its ability to deal directly with U.S. companies. The record clearly demonstrates that Sunshine was exclusively owned, controlled, organized funded, and operated by Petrom.

In addition to the above, the record shows that Petrom possessed actual knowledge that a U.S. embargo was present against Iran. In a telefax issued prior to 1995, Petrom directed Sunshine Textile, Inc. to contact the International Trade Administration for the Department of Commerce to obtain export license applications to allow it to export to Iran. Exhibit 30 and 31, Agency Brief. Petrom's own policy statement issued by Mr. Rahmanifar is that Petrom will consider ''embargo regulations of other states.'' Exhibit 28, Agency Brief. Furthermore, in a 1992 transaction, Sunshine, who acted on behalf of Petrom, was given with a copy of the Regulations concerning certain export controls to Iran. In the facsimile sent from DIFCO Laboratories, Sunshine was appraised of the Regulations that required export licenses for Iran. *See* Exhibit 32, Agency Brief. DIFCO Laboratories would later inform Sunshine ''that due to current governmental restrictions, we cannot enter into any business proceedings with your country.'' Exhibit 33, Agency Brief.

Given the above, I find that Petrom was in possession of the knowledge that the United States had placed an embargo and other trade restrictions for exporting or reexporting items from the United States to Iran. It is hereby held that Petrom, with this knowledge, continued to order equipment and items without the required U.S. Government authorization knowing that a violation of the EAA, the EAR or any order, license or authorization issued thereunder would occur.

*Conspiracy or Acting in Concert*

Given that Petrom solicited the items in question for the period of time starting on or about March 1999, it is clear that Petrom conspired or acted in concert with others, mainly Sunshine Technology and Supplies, Inc. to export items subject to the EAR to Iran without U.S. Government authorization in violation of the EAA and EAR. Petrom developed a scheme to facilitate the ordering of equipment and items from U.S. companies, mainly through Sunshine Technology and Supplies, Inc., for export to Germany without the knowledge and or intent that it would reexport the items to Iran.

Further, Petrom's compliance with all German export laws does shield it from violating United States export laws. *See In the Matter of: Abdulamir Madhi,* et al, 68 FR 57406, (October 3, 2003); 15 CFR 734.12. In addition, without any expressed requirements to demonstrate knowledge or intent, the Regulations on their face can be treated on the basis of strict liability with regard to the imposition of civil penalties. *See In the matter of: Aluminum Company of America,* 64 FR 42641–02 (Aug. 5, 1999) (finding that ''liability and administrative sanctions are imposed on a strict liability basis once the Respondent commits the proscribed act''); *Iran Air* v. *Kugelman,* 996 F.2d 1253 (D.C. Cir. 1993) (reaffirming the Agency's position that knowledge is not an ''essential element of proof for the imposition of civil penalties''). ''Moreover, knowledge of the Act and Regulations properly may be impouted to a Respondent who, from abroad, was actively engaged in an effort to export an unlicensed controlled commodity from the United States.'' *In the Matter of Doron Rotler Individually a/d/a/ Ram Robotics Ltd., aka Ram Robotic Automation Manufacturing Systems Ltd.,* 58 FR 62095, 62099 n.16 (November 24, 1993).

Given all of the above, which demonstrates that Petrom solicited and acted with knowledge that a violation would occur and acted in concert with Sunshine and others, it is hereby held that Petrom conspired in a manner or purpose that was designed to bring about or commit an act in violation of the EAA or EAR in prohibition of 15 CFR 764.2(d).

**Basis of Sanction**

The Bureau of Industry and Security has authority to assess civil penalties and suspensions from practice, including the denial of export privileges before the Department of Commerce. *See* 15 CFR 764.3. Here, BIS recommends a twenty (20) year period of denial of export privileges and a civil monetary sanction of $143,000 against Petrom GmbH International Trade for its unlawful conduct in this matter. BIS argues that Petrom GmbH International Trade disregarded U.S. export laws and Regulations with the knowledge that a

major embargo exists between the United States and Iran.

The record shows that Petrom did not apply for any U.S. Government authorization to export the items from the United States to Iran. It instead chose to create and conspire with others, including Sunshine Technology and Supplies, Inc. in a scheme to order U.S. equipment and items for export to Germany with the knowledge or intent that these items would be reexported to Iran. BIS proposes the above civil penalty sanctions due to Petrom's ''severe disregard and contempt for U.S. export control laws.'' BIS argues that a twenty (20) year period of denial is also consistent with other cases of this nature. *See In the Matter of: Arian Transportvermittlungs Gmbh,* 69 FR 28120, (May 18, 2004) (assessing a ten (10) year denial period in connection with an Iranian transaction); *In the Matter of: Abdulamir Madhi,* et al, 68 FR 57406, (October 3, 2003) (assessing a twenty (20) year denial period in connection with an Iranian transaction); *In the Matter of: Jubal Damavand General Trading Co.,* 67 FR 32009, (May 13, 2002) (assessing a ten (10) year denial period in connection with an Iranian transaction).

Of particular note and by all appearances, the record demonstrates that Petrom sought to circumvent U.S. export control laws by setting up a front company in Sunshine Technologies and Supplies, Inc. in an effort to order U.S. origin equipment and parts for eventual export to Iran. While the burden rests with the Agency to prove the facts alleged, Petrom offered very little, if not any, countervailing evidence in its defense. Petrom could not challenge the ZKA Report which outlines Petrom's own business practice and methodology. It was shown that Petrom possessed knowledge of the U.S. embargo on Iran when it sought export license approvals prior to the incidents in question. The record also demonstrates that Sunshine was provided copies of the Regulations concerning the export of certain materials to Iran. The Agency contends that Petrom ''has not taken responsibility for its actions'' and ''cannot be trusted to comply with U.S. export control laws'' and, in particular, dealing with a country that this nation maintains an embargo against due to its support for international terrorism. *See also* 15 CFR 746.7 (stating ''Iran has been designated by the Secretary of State as a country that has repeatedly provided support for acts of international terrorism'').

Due to the severe nature of the violations and the veiled arguments raised by Petrom, I find that the Agency's proposed assessment is fair, reasonable, and justified.

**Recommended Order**

*Wherefore, it is hereby recommended* that the Under Secretary for Export Administration issue a *denial order* and *civil penalty assessment* as follows:

*First*, that a civil penalty of $143,000 is assessed against Petrom GmbH International Trade which shall be paid to the U.S. Department of Commerce within thirty (30) days from the date of entry of this Order.

*Second*, pursuant to the Debt Collection Act of 1982, as amended, 31 U.S.C. 3701–20E, the civil penalty owed under this Order accrues interest as provided and if payment is not made by the due date specified, Petrom will be assessed, in addition to the full amount of the civil penalty and interest, a penalty and administrative charge.

*Third*, that for a period of twenty (20) years from the date of this Order, Petrom GmbH International Trade, Maria-Theresa Strasse 26, Munich 81674, Germany and all of their successors or assigns, and when acting for or on behalf of Petrom, its officers, representatives, agents, and employees (''Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

*Fourth,* that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of a Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from a Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from a Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and that is owned, possessed or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by a Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

*Fifth,* that after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to a Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

*Sixth,* that this Order does not prohibit any reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S. origin technology.

*Seventh,* that the Charging Letter and this Order shall be made available to the public.

*Eighth,* that this Order shall be served on the Denied Persons and on BIS, and shall be published in the **Federal Register**.

This Recommended Decision and Order is being referred to the Under Secretary for review and final action by express mail as provided under 15 CFR 766.17(b)(2). Due to the short period of time for review by the Under Secretary, all papers filed with the Under Secretary in response to this Recommended Decision and Order must be sent by personal delivery, facsimile,

express mail, or other overnight carrier as provided in § 766.22(a). Submissions by the parties must be filed with the Under Secretary for Export Administration, Bureau of Industry and Security, U.S. Department of Commerce, Room H–3898, 14th Street and Constitution Avenue, NW., Washington, DC 20230, within twelve (12) days from the date of issuance of this Recommended Decision and Order. Thereafter, the parties have eight (8) days from receipt of any response(s) in which to submit replies.

Within thirty (30) days after receipt of this Recommended Decision and Order, the Under Secretary shall issue a written order, affirming, modifying or vacating the Recommended Decision and Order. *See* § 766.22(c). A copy of the Agency Regualtions for Review by the Under Secretary is attached.

Done and dated this 25th day of April 2005 in New York, New York.

**Walter J. Brudzinski,**

*Administrative Law Judge, U.S. Coast Guard.*

[FR Doc. 05–10983 Filed 6–3–05; 8:45 am]

**BILLING CODE 3510–33–M**

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–580–839]**

### Certain Polyester Staple Fiber from Korea: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce is conducting an administrative review of the antidumping duty order on certain polyester staple fiber from Korea. The period of review is May 1, 2003, through April 30, 2004. This review covers imports of certain polyester staple fiber from one producer/exporter. We have preliminarily found that sales of the subject merchandise have been made below normal value. If these preliminary results are adopted in our final results, we will instruct U.S. Customs and Border Protection to assess antidumping duties. Interested parties are invited to comment on these preliminary results. We will issue the final results not later than 120 days from the date of publication of this notice.

**EFFECTIVE DATE:** June 6, 2005.

**FOR FURTHER INFORMATION CONTACT:** Andrew McAllister or Yasmin Bordas, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone (202) 482–1174 and (202) 482–3813, respectively.

**SUPPLEMENTARY INFORMATION:**

#### Background

On May 25, 2000, the Department of Commerce (''Department'') published an antidumping duty order on certain polyester staple fiber (''PSF'') from Korea. (*See* 65 FR 33807). On May 3, 2004, the Department published a notice of ''Opportunity to Request Administrative Review'' of this order. (*See* 69 FR 24117). On May 28, 2004, Wellman, Inc.; Arteva Specialties, Inc. d/b/a KoSa; and DAK Fibers, LLC (collectively, ''the petitioners'')[1] requested administrative reviews of Huvis Corporation (''Huvis'') and Saehan Industries, Inc. (''Saehan''). On May 28, 2004, Huvis and Saehan made similar requests for administrative reviews. On June 30, 2004, the Department published a notice initiating the review for the aforementioned companies. (See 69 FR 39409). The period of review (''POR'') is May 1, 2003, through April 30, 2004.

On June 30, 2004, we issued antidumping questionnaires in this review. On September 27, 2004, Saehan withdrew its request for review. On September 28, 2004, the petitioners withdrew their request for administrative review of Saehan. *See* ''Partial Rescission'' section, below.

As a result of certain below–cost sales being disregarded in the previous administrative review, we instructed Huvis to respond to the cost questionnaire. We received a questionnaire response from Huvis on September 10, 2004.

In October 2004, December 2004, and February 2005, we issued supplemental questionnaires to Huvis. We received responses to these supplemental questionnaires in November 2004, January 2005, and March 2005.

#### Scope of the Order

For the purposes of this order, the product covered is PSF. PSF is defined as synthetic staple fibers, not carded, combed or otherwise processed for spinning, of polyesters measuring 3.3 decitex (3 denier, inclusive) or more in diameter. This merchandise is cut to lengths varying from one inch (25 mm) to five inches (127 mm). The merchandise subject to this order may be coated, usually with a silicon or other finish, or not coated. PSF is generally used as stuffing in sleeping bags, mattresses, ski jackets, comforters, cushions, pillows, and furniture. Merchandise of less than 3.3 decitex (less than 3 denier) currently classifiable in the *Harmonized Tariff Schedule of the United States* (''HTSUS'') at subheading 5503.20.00.20 is specifically excluded from this order. Also specifically excluded from this order are polyester staple fibers of 10 to 18 denier that are cut to lengths of 6 to 8 inches (fibers used in the manufacture of carpeting). In addition, low–melt PSF is excluded from this order. Low–melt PSF is defined as a bi–component fiber with an outer sheath that melts at a significantly lower temperature than its inner core.

The merchandise subject to this order is currently classifiable in the HTSUS at subheadings 5503.20.00.45 and 5503.20.00.65. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under order is dispositive.

#### Partial Rescission

As noted above, Saehan withdrew its request for review, and the petitioners also withdrew their request for review of Saehan. Because these withdrawals were timely filed and no other party requested a review of this company, pursuant to 19 CFR 351.213(d)(1), we are rescinding this review with respect to Saehan. We will instruct U.S. Customs and Border Protection (''CBP'') to liquidate any entries from this company during the POR and to assess antidumping duties at the rate in effect at the time of entry.

#### Revocation

The Department ''may revoke, in whole or in part'' an antidumping duty order upon completion of a review under section 751 of the Tariff Act of 1930 (''the Act''), as amended. While Congress has not specified the procedures that the Department must follow in revoking an order, the Department has developed a procedure for revocation that is described in 19 CFR 351.222. This regulation requires, *inter alia*, that a company requesting revocation must submit the following: (1) a certification that the company has sold the subject merchandise at not less than normal value (''NV'') in the current review period and that the company will not sell at less than NV in the future; (2) a certification that the company sold the subject merchandise in each of the three years forming the

[1] On March 11, 2005, the Department was informed that Arteva Specialties, Inc. d/b/a KoSa had changed its name to Invista S.a.r.l. Presently, the petitioners are Wellman, Inc.; Invista S.a.r.l.; and DAK Fibers.

basis of the request in commercial quantities; and, (3) an agreement to reinstatement of the order if the Department concludes that the company, subsequent to the revocation, sold subject merchandise at less than NV. *See* 19 CFR 351.222(e)(1).

Pursuant to 19 CFR 351.222(e)(1), Huvis requested revocation of the antidumping duty order as it pertains to Huvis. According to 19 CFR 351.222(b)(2), upon receipt of such a request, the Department may revoke an order, in part, if it concludes that (1) the company in question has sold subject merchandise at not less than NV for a period of at least three consecutive years; (2) the continued application of the antidumping duty order is not otherwise necessary to offset dumping; and (3) the company has agreed to its immediate reinstatement in the order if the Department concludes that the company, subsequent to the revocation, sold subject merchandise at less than NV.

We preliminarily find that the request from Huvis does not meet all of the criteria under 19 CFR 351.222. With regard to the criterion of 19 CFR 351.222(b)(2)(i), Huvis received a weighted average margin of 1.54 percent in the 2002–2003 Administrative Review, and thus has not sold subject merchandise at not less than NV for a period of three consecutive years. *See Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review*, 69 FR 61341 (October 18, 2004) (''*2002–2003 PSF Final*''), covering the period May 1, 2002, through April 30, 2003. Therefore, we preliminarily find that Huvis does not qualify for revocation of the order on PSF pursuant to 19 CFR 351.222(b)(2).

**Fair Value Comparisons**

To determine whether the respondent's sales of PSF to the United States were made at less than NV, we compared export price (''EP'') to NV, as described in the ''Export Price'' and ''Normal Value'' sections of this notice.

Pursuant to section 777A(d)(2) of the Act, we compared the EP of individual U.S. transactions to the weighted–average NV of the foreign like product, where there were sales made in the ordinary course of trade, as discussed in the ''Cost of Production Analysis'' section, below.

**Product Comparisons**

In accordance with section 771(16) of the Act, we considered all products produced and sold by the respondent in the home market covered by the description in the ''Scope of the Order'' section, above, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. In accordance with section 773(a)(1)(C)(ii) of the Act, in order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the respondent's volume of home market sales of the foreign like product to the volume of its U.S. sales of the subject merchandise. (For further details, *see* the ''Normal Value'' section, below.)

We compared U.S. sales to monthly weighted–average prices of contemporaneous sales made in the home market. Where there were no contemporaneous sales of identical merchandise in the home market, we compared sales made within the window period, which extends from three months prior to the POR until two months after the POR. Where there were no sales of identical merchandise in the home market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. Where there were no sales of identical or similar merchandise made in the ordinary course of trade in the home market to compare to U.S. sales, we compared U.S. sales to constructed value (''CV''). In making product comparisons, consistent with our final determination in the original investigation, we matched foreign like products based on the physical characteristics reported by the respondent in the following order: 1) composition; 2) type; 3) grade; 4) cross section; 5) finish; and 6) denier (*see Notice of Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From the Republic of Korea*, 65 FR 16880, 16881 (March 30, 2000)).

**Export Price**

For sales to the United States, we calculated EP, in accordance with section 772(a) of the Act, because the merchandise was sold prior to importation by the exporter or producer outside the United States to the first unaffiliated purchaser in the United States, and because constructed export price methodology was not otherwise warranted. We calculated EP based on the FOB, C&F, CIF, EDDP (ex–dock duty paid) FOB U.S. port, EDDP C&F, or EDDP CIF price to unaffiliated purchasers in the United States. Where appropriate, we made deductions, consistent with section 772(c)(2)(A) of the Act, for the following movement expenses: inland freight from the plant to port of exportation, foreign brokerage and handling, international freight, marine insurance, and U.S. customs duty.

We increased EP, where appropriate, for duty drawback in accordance with section 772(c)(1)(B) of the Act. Huvis provided documentation demonstrating that it received duty drawback under Korea's individual–rate system. In prior investigations and administrative reviews, the Department has examined Korea's individual–rate system and found that the government controls in place generally satisfy the Department's requirements for receiving a duty drawback adjustment (*i.e.*, that 1) the rebates received were directly linked to import duties paid on inputs used in the manufacture of the subject merchandise, and 2) there were sufficient imports to account for the rebates received). *See, e.g., Final Results of Antidumping Duty Administrative Review and Partial Termination of Administrative Review: Circular Welded Non–Alloy Steel Pipe From the Republic of Korea*, 62 FR 55574, 55577 (October 27, 1997). We examined the documentation submitted by Huvis in this administrative review and confirmed that it meets the Department's two–prong test for receiving a duty drawback adjustment. Accordingly, we are allowing the reported duty drawback adjustment on Huvis' U.S. sales.

**Normal Value**

*A. Selection of Comparison Market*

To determine whether there was a sufficient volume of sales of PSF in the home market to serve as a viable basis for calculating NV, we compared the respondent's home market sales of the foreign like product to its volume of U.S. sales of the subject merchandise, in accordance with section 773(a) of the Act. Pursuant to sections 773(a)(1)(B) and (C) of the Act, because the respondent's aggregate volume of home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined that the home market was viable for comparison.

*B. Level of Trade*

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate NV based on sales at the same level of trade (''LOT'') as the EP. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent). *See* 19 CFR 351.412(c)(2). Substantial differences in selling activities are a necessary, but not sufficient, condition

for determining that there is a difference in the stages of marketing. *Id.; see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon Steel Plate From South Africa*, 62 FR 61731, 61732 (November 19, 1997). In order to determine whether the comparison sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the ''chain of distribution''),[2] including selling functions,[3] class of customer (''customer category''), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying levels of trade for EP and comparison market sales (*i.e.*, NV based on either home market or third country prices)[4], we consider the starting prices before any adjustments. *See Micron Technology, Inc. v. United States, et. al.*, 243 F.3d 1301, 1314–1315 (Fed. Cir. 2001) (affirming this methodology).

When the Department is unable to match U.S. sales to sales of the foreign like product in the comparison market at the same LOT as the EP, the Department may compare the U.S. sale to sales at a different LOT in the comparison market. In comparing EP sales at a different LOT in the comparison market, where available data show that the difference in LOT affects price comparability, we make an LOT adjustment under section 773(a)(7)(A) of the Act.

Huvis reported that it made direct sales to distributors and end users in both the home market and in the United States. Huvis has reported a single channel of distribution and a single level of trade in each market, and has not requested an LOT adjustment. We examined the information reported by Huvis regarding its marketing process for making the reported home market and U.S. sales, including the type and level of selling activities performed, and customer categories. Specifically, we considered the extent to which sales process, freight services, warehouse/inventory maintenance, and warranty services varied with respect to the different customer categories (*i.e.*, distributors and end users) within each market and across the markets. Based on our analyses, we found a single level of trade in the United States, and a single, identical level of trade in the home market. Thus, it was unnecessary to make a LOT adjustment for Huvis in comparing EP and home market prices.

*C. Sales to Affiliated Customers*

Huvis made sales in the home market to an affiliated customer. To test whether these sales were made at arm's length, we compared the starting prices of sales to the affiliated customer to those of unaffiliated customers, net of all movement charges, direct and indirect selling expenses, discounts, and packing. Where the price to the affiliated party was, on average, within a range of 98 to 102 percent of the price of the same or comparable merchandise to the unaffiliated parties, we determined that the sales made to the affiliated party were at arm's length. *See Modification Concerning Affiliated Party Sales in the Comparison Market*, 67 FR 69186 (November 15, 2002). In accordance with the Department's practice, we only included in our margin analysis sales to an affiliated party that were made at arm's length.

*D. Cost of Production Analysis*

As discussed in the ''Background'' section above, there were reasonable grounds to believe or suspect that the respondent made sales of the subject merchandise in its comparison market at prices below the cost of production (''COP'') within the meaning of section 773(b) of the Act.

*1. Calculation of COP*

We calculated the COP on a product–specific basis, based on the sum of the respondent's costs of materials and fabrication for the foreign like product, plus amounts for selling, general and administrative (''SG&A'') expenses, including interest expenses, and the costs of all expenses incidental to placing the foreign like product packed and in a condition ready for shipment, in accordance with section 773(b)(3) of the Act.

We relied on COP information submitted in Huvis' cost questionnaire responses, except for the following adjustments. We adjusted Huvis' reported cost of manufacturing to account for purchases of modified terephthalic acid (''MTA'') and qualified terephthalic acid (''QTA'') from affiliated parties at non–arm's–length prices. We preliminarily find that MTA and QTA are interchangeable for the following reasons: 1) the production processes of MTA and QTA are essentially the same; 2) Huvis has stated it may, in certain instances, use a type of terephtalic acid (''TPA'') different from the one normally used in production of a particular chip without significant changes to the end product; and 3) Huvis' decision to use MTA or QTA in the production process is driven by plant proximity to the chemical supplier. Huvis did not provide market price information for QTA.[5] *See* Memorandum from Team to the File, ''*Preliminary Results Calculation Memorandum - Huvis Corporation*,'' dated May 31, 2005 (''*Huvis Calculation Memorandum*''), which is on file in the Central Records Unit (''CRU'') in room B–099 of the main Department building.

We also revised the sales, general, and administrative (''SG&A'') ratios for Huvis' affiliated suppliers. Consistent with the Department's normal practice, we included expenses that Huvis had improperly excluded from its calculation of the numerator of the SG&A ratios. *See* Huvis Calculation Memorandum.

In its net interest expense calculation, Huvis offset its interest expenses. For the preliminary results, we have excluded this offset because it is not related to interest income incurred on short–term investments of working capital. *See Huvis Calculation Memorandum*.

*2. Test of Home Market Prices*

On a product–specific basis, we compared the adjusted weighted–average COP figures for the POR to the home market sales of the foreign like product, as required under section 773(b) of the Act, to determine whether these sales were made at prices below the COP. The prices were exclusive of any applicable movement charges and indirect selling expenses. In determining whether to disregard home market sales made at prices less than

[2] The marketing process in the United States and comparison markets begins with the producer and extends to the sale to the final user or customer. The chain of distribution between the two may have many or few links, and the respondent's sales occur somewhere along this chain. In performing this evaluation, we considered the narrative responses of the respondent to properly determine where in the chain of distribution the sale appears to occur.

[3] Selling functions associated with a particular chain of distribution help us to evaluate the level(s) of trade in a particular market. For purposes of these preliminary results, we have organized the common selling functions into four major categories: sales process and marketing support, freight and delivery, inventory and warehousing, and quality assurance/warranty services.

[4] Where NV is based on CV, we determine the NV LOT based on the LOT of the sales from which we derive selling expenses, G&A expenses, and profit for CV, where possible.

[5] The petitioners submitted a market research study with suggested market prices for TPA. See Submission from Petitioners to the Department, ''*Market Research Study*,'' dated December 23, 2004. In this instance, the Department preliminarily finds that the information in the petitioners' market study is not supported by adequate sales documentation. Specifically, the price quotes do not distinguish between the different types of TPA used by Huvis in its production of PSF nor are they associated with actual sales transactions. In contrast, Huvis was able to support its reported market prices of MTA with invoices from the supplier. Therefore, for the preliminary results, we are relying on Huvis' reported market prices to calculate MTA and QTA. *See Huvis Calculation Memorandum*.

their COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether such sales were made (1) within an extended period of time in substantial quantities, and (2) at prices which permitted the recovery of all costs within a reasonable period of time.

*3. Results of COP Test*

Pursuant to section 773(b)(1), where less than 20 percent of the respondent's sales of a given product are at prices less than the COP, we do not disregard any below–cost sales of that product, because we determine that in such instances the below–cost sales were not made in ''substantial quantities.'' Where 20 percent or more of the respondent's sales of a given product are at prices less than the COP, we determine that the below–cost sales represent ''substantial quantities'' within an extended period of time, in accordance with section 773(b)(1)(A) of the Act. In such cases, we also determine whether such sales were made at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(1)(B) of the Act.

We found that, for certain specific products, more than 20 percent of the respondent's home market sales were at prices less than the COP and, thus, the below–cost sales were made within an extended period of time in substantial quantities. In addition, these sales were made at prices that did not permit the recovery of costs within a reasonable period of time. Therefore, we excluded these sales and used the remaining sales of the same product, as the basis for determining NV, in accordance with section 773(b)(1).

*E. Calculation of Normal Value Based on Home Market Prices*

We calculated NV based on the price to unaffiliated customers, and to an affiliated customer to which sales were made at arm's length. We made adjustments for differences in packing in accordance with sections 773(a)(6)(A) and 773(a)(6)(B)(i) of the Act. We also made adjustments, where appropriate, consistent with section 773(a)(6)(B)(ii) of the Act, for inland freight from the plant to the customer. In addition, we made adjustments for differences in circumstances of sale (''COS''), in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. We made COS adjustments, where appropriate, by deducting direct selling expenses incurred on home market sales (*i.e.*, credit expenses and bank charges) and adding U.S. direct selling expenses (*i.e.*, credit expenses and bank charges).

For some of its home market sales, Huvis reported that payments were made within an open account system, *i.e.*, periodic payments were made on outstanding account balances. For these open account sales, Huvis calculated the payment date using an average payment period for each customer. For two of Huvis' home market customers, we have adjusted the credit period for open account sales. We also recalculated credit expenses for home market sales that were incurred in U.S. dollars using Huvis' reported U.S. interest rate. *See Huvis Calculation Memorandum*.

**Preliminary Results of the Review**

We find that the following dumping margins exist for the period May 1, 2003, through April 30, 2004:

| Exporter/manufacturer | Weighted–average margin percentage |
|---|---|
| Huvis Corporation ..... | 5.87 |

Any interested party may request a hearing within 30 days of publication of this notice. Any hearing, if requested, will be held 42 days after the publication of this notice, or the first workday thereafter. Issues raised in the hearing will be limited to those raised in the case and rebuttal briefs. Interested parties may submit case briefs within 30 days of the date of publication of this notice. Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed not later than 35 days after the date of publication of this notice. Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument with an electronic version included.

The Department will issue the final results of this administrative review, including the results of its analysis of issues raised in any such written briefs or hearing, within 120 days of publication of these preliminary results.

**Assessment Rates and Cash Deposit Requirements**

Pursuant to 19 CFR 351.212(b), the Department calculates an assessment rate for each importer or customer of the subject merchandise. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of the final results of this review. Upon issuance of the final results of this administrative review, if any importer- or customer–specific assessment rates calculated in the final results are above *de minimis* (*i.e.*, at or above 0.5 percent), the Department will instruct CBP to assess antidumping duties on appropriate entries by applying the assessment rate to the entered quantity of the merchandise. For assessment purposes, we calculated importer- or customer–specific assessment rates for the subject merchandise by aggregating the dumping duties due for all U.S. sales to each importer or customer and dividing the amount by the total entered quantity of the sales to that importer or customer.

The following deposit requirements will be effective upon completion of the final results of this administrative review for all shipments of PSF from Korea entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) the cash deposit rate for the reviewed company will be the rate established in the final results of this administrative review (except no cash deposit will be required if its weighted–average margin is *de minimis, i.e.*, less than 0.5 percent); (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in the original less–than-fair–value investigation or a previous review, the cash deposit rate will continue to be the most recent rate published in the final determination or final results for which the manufacturer or exporter received an individual rate; (3) if the exporter is not a firm covered in this review, the previous review, or the original investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous reviews, the cash deposit rate will be 7.91 percent, the ''all others'' rate established in *Certain Polyester Staple Fiber from the Republic of Korea: Notice of Amended Final Determination and Amended Order Pursuant to Final Court Decision*, 68 FR 74552 (December 24, 2003).

**Notification to Importers**

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: May 31, 2005.

**Susan H. Kuhbach,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. E5–2877 Filed 6–3–05; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 053105E]**

### New England 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 New England Fishery Management Council (Council) will hold a three-day Council meeting on June 21–23, 2005, to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

**DATES:** The meeting will be held on Tuesday, Wednesday and Thursday, June 21–23, 2005 beginning at 8 a.m. each day.

**ADDRESSES:** The meeting will be held at the Eastland Park Hotel, 157 High Street, Portland, ME 04101; telephone: (207) 775–5411.

*Council address*: to the New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Howard, Executive Director, New England Fishery Management Council; (978) 465–0492.

**SUPPLEMENTARY INFORMATION:**

**Tuesday, June 21, 2005**

Following introductions, the Council will receive reports from the Council Chairman and Executive Director, the NMFS Regional Administrator, Northeast Fisheries Science Center and Mid-Atlantic Fishery Management Council liaisons, NOAA General Counsel and representatives of the U.S. Coast Guard, NMFS Enforcement and the Atlantic States Marine Fisheries Commission. There also will be an update on the New England Fleet Visioning Project. During the morning session, the Council will receive a briefing on a series of advisory panel meetings concerning development of an New England Fishery Management Council (NEFMC) Conservation and Management Policy. The policy, which the Council will consider and could approve, concerns issues related to capacity, use of input/output controls and resource allocation issues. The Magnuson-Stevens Act Reauthorization Committee will provide recommendations for Council approval concerning positions on changes to the Act. The rest of the day will be spent on proposed Amendment 1 to the Herring Fishery Management Plan (FMP). Members will review and consider management alternatives to be included in the associated Draft Supplemental Environmental Impact Statement, select preferred alternatives, and approve the document for public hearings.

**Wednesday, June 22, 2005**

During the Wednesday morning session, the Council will review issues identified at recent port meetings and related to fishery regulations and safety at sea. Follow up actions may be recommended. An open public comment period will be available for items not listed on the agenda, followed by a report from the chairman of the Transboundary Management Guidance Committee. That report will include a review of discussions about an alternative to the current harvest strategy for haddock. There also will be a report from the Scientific and Statistical Committee about an alternative model to assess groundfish stocks. The Council will then take initial action on Framework Adjustment 42 to the Northeast Multispecies FMP by formally identifying what measures will be analyzed and further considered in the adjustment. NOAA Fisheries scientists will report to the Council on invasive colonial tunicates now found on Georges Bank. At the end of the day final action on proposed Framework Adjustment 1 to the Spiny Dogfish FMP will be considered. Measures will address a modification to the plan that would allow multi-year specifications to be set for the fishery. At the end of the day the Council will discuss and possibly approve a motion to give sole management authority for spiny dogfish to the Mid-Atlantic Council and assume sole management authority for monkfish.

**Thursday, June 23, 2005**

The morning session will begin with a report from the Council's Research Steering Committee concerning their review of several cooperative research project final reports. There will be summary of the most recent activities currently underway and associated with development of essential fish habitat (EFH) Omnibus Amendment 2 as well as a review of the outcome of the NEFMC's Marine Protected Areas Education and Outreach Workshops. The last item on the agenda will address Framework Adjustment 18 to the Sea Scallop Fishery Management Plan. This will include a report on 2005 assessment updates and forecasts. There will be consideration of a recommendation for emergency action to end possible overfishing of the scallop resource and approval of comments on proposed sea turtle conservation measures.

Although other non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subjects of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided that 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 Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: May 31, 2005.

**Emily Menashes,**

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

[FR Doc. E5–2865 Filed 6–3–05; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

**[Docket No. 2005–P–063]**

### Grant of Interim Extension of the Term of U.S. Patent No. 4,591,585; Atamestane

**AGENCY:** United States Patent and Trademark Office.

**ACTION:** Notice of interim patent term extension.

**SUMMARY:** The United States Patent and Trademark Office has issued a certificate under 35 U.S.C. 156(d)(5) for a second one-year interim extension of the term of U.S. Patent No. 4,591,585.

**FOR FURTHER INFORMATION CONTACT:** Karin Ferriter by telephone at (571) 272–7744; by mail marked to her attention and addressed to the Commissioner for Patents, Mail Stop

Patent Ext., P.O. Box 1450, Alexandria, VA 22313–1450; by fax marked to her attention at (571) 273–7744; or by e-mail to *Karin.Ferriter@uspto.gov.*

**SUPPLEMENTARY INFORMATION:** Section 156 of Title 35, United States Code, generally provides that the term of a patent may be extended for a period of up to five years if the patent claims a product, or a method of making or using a product, that has been subject to certain defined regulatory review, and that the patent may be extended for interim periods of up to a year if the regulatory review is anticipated to extend beyond the expiration date of the patent.

On May 4, 2005, Intarcia Therapeutics, Inc., on behalf of patent owner Schering Aktiengesellschaft, timely filed an application under 35 U.S.C. 156(d)(5) for a second interim extension of the term of U.S. Patent No. 4,591,585. The patent claims the product atamestane. The application indicates that a New Drug Application for the human drug product atamestane has been filed and is currently undergoing regulatory review before the Food and Drug Administration for permission to market or use the product commercially.

Review of the application indicates that except for permission to market or use the product commercially, the subject patent would be eligible for an extension of the patent term under 35 U.S.C. 156, and that the patent should be extended for an additional period of one year as required by 35 U.S.C. 156(d)(5)(C). Since it is apparent that the regulatory review period will continue beyond the extended expiration date of the patent (June 18, 2005), interim extension of the patent term under 35 U.S.C. 156(d)(5) is appropriate.

An interim extension under 35 U.S.C. 156(d)(5) of the term of U.S. Patent No. 4,591,585 is granted for a period of one year from the expiration date of the patent, *i.e.*, until June 18, 2006.

Dated: May 26, 2005.

**Jon W. Dudas,**

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

[FR Doc. 05–11175 Filed 6–3–05; 8:45 am]

**BILLING CODE 3510–16–P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

**[Docket No. 2005–P–064]**

### Grant of Interim Extension of the Term of U.S. Patent No. 4,567,264; Ranolazine

**AGENCY:** United States Patent and Trademark Office.

**ACTION:** Notice of interim patent term extension.

**SUMMARY:** The United States Patent and Trademark Office has issued a certificate under 35 U.S.C. 156(d)(5) for a third one-year interim extension of the term of U.S. Patent No. 4,567,264.

**FOR FURTHER INFORMATION CONTACT:** Karin Ferriter by telephone at (571)272–7744; by mail marked to her attention and addressed to Mail Stop Patent Ext., Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450; by fax marked to her attention at (571)273–7744; or by e-mail to *Karin.Ferriter@uspto.gov*.

**SUPPLEMENTARY INFORMATION:** Section 156 of Title 35, United States Code, generally provides that the term of a patent may be extended for a period of up to five years if the patent claims a product, or a method of making or using a product, that has been subject to certain defined regulatory review, and that the patent may be extended for interim periods of up to a year if the regulatory review is anticipated to extend beyond the expiration date of the patent.

On March 25, 2005, patent owner Roche Palo Alto LLC, timely filed an application under 35 U.S.C. 156(d)(5) for a third interim extension of the term of U.S. Patent No. 4,567,264. The patent claims the active ingredient ranolazine (Ranexa™). The application indicates, and the Food and Drug Administration (FDA) has confirmed, that a New Drug Application for the human drug product ranolazine has been filed and is currently undergoing regulatory review before the FDA for permission to market or use the product commercially.

Review of the application indicates that, except for permission to market or use the product commercially, the subject patent would be eligible for an extension of the patent term under 35 U.S.C. 156, and that the patent should be extended for an additional period of one year as required by 35 U.S.C. 156(d)(5)(C). Since it is apparent that the regulatory review period will continue beyond the extended expiration date of the patent (May 18, 2005), the term of the patent will be extended under 35 U.S.C. 156(d)(5) for an additional year.

An interim extension under 35 U.S.C. 156(d)(5) of the term of U.S. Patent No. 4,567,264 is granted for an additional period of one year from the extended expiration date of the patent, *i.e.*, until May 18, 2006.

Dated: May 26, 2005.

**Jon W. Dudas,**

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

[FR Doc. 05–11176 Filed 6–3–05; 8:45 am]

**BILLING CODE 3510–16–P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

**[Docket No.: 2003–P–018]**

### Notice of Availability of and Request for Comments on Green Paper Concerning Restriction Practice

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Request for comments.

**SUMMARY:** The United States Patent and Trademark Office (USPTO) has established a 21st Century Strategic Plan to transform the USPTO into a quality focused, highly productive, responsive organization supporting a market-driven intellectual property system. As a part of this plan, the USPTO is conducting a study of its restriction practice. As part of this study, the Office requested public comments to help guide the study. After careful consideration of the public comments and an internal review, the USPTO has prepared a ''Green Paper'' describing and evaluating four options to reform restriction practice suggested by various members of the public. Prior to considering the desirability of drafting proposed legislation in a ''White Paper'' on reforming restriction practice, the USPTO is seeking public comment on the Green Paper.

**DATES:** *Comment Deadline Date:* To be ensured of consideration, written comments must be received on or before August 5, 2005. No public hearing will be held.

**ADDRESSES:** Comments should be sent by electronic mail message over the Internet addressed to: *unity.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 A.

Clarke. 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 A. Clarke, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy, by telephone at (571) 272–7735, 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 A. Clarke, or preferably via e-mail addressed to: *robert.clarke@uspto.gov*.

**SUPPLEMENTARY INFORMATION:** The USPTO established a 21st Century Strategic Plan to transform the USPTO into a more quality-focused, highly productive, responsive organization supporting a market-driven intellectual property system. As part of this plan, the USPTO stated it would conduct a study of the changes needed to implement a Patent Cooperation Treaty (PCT) style Unity of Invention standard in the United States. Prior to starting a detailed study, the USPTO published a notice seeking public comment on a number of issues to help guide the scope and content of a study on the adoption of a Unity of Invention standard in the United States. *See Request for Comments on the Study of the Changes Needed to Implement a Unity of Invention Standard in the United States*, 68 FR 27536 (May 20, 2003), 1271 *Off. Gaz. Pat. Office* 98 (June 17, 2003). In response to that notice, the USPTO received twenty-six (26) public comments. Those public comments were posted on the USPTO's Internet Web site.

The USPTO posted a notice summarizing the general nature of the comments received as well as the next steps in the study in November of 2004. *See Summary of Public Comments and the Restriction Reform Options to be Studied by the United States Patent and Trademark Office*, 1277 *Off. Gaz. Pat. Office* 94 (Dec. 16, 2003) (Notice). The Notice indicated that as a result of the comments received, the USPTO would conduct a detailed business-case analysis on four restriction reform options and prepare a revised timeline to complete the study. The USPTO also replaced the public comments and schedule to implement a PCT-style Unity of Invention standard with the Notice.

The USPTO study included a review of hundreds of applications under each of the studied options including how examination practices would be impacted. This study also included review of the workflow, pendency and overall ability of the USPTO to appropriately implement each of the standards. The interim results of the study are provided in the Green Paper for which we are requesting comment via this notice. The Green Paper is available on the USPTO's Internet Web site (*http://www.uspto.gov*).

Dated: May 27, 2005.

**Jon W. Dudas,**

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

[FR Doc. 05–11177 Filed 6–3–05; 8:45 am]

**BILLING CODE 3510–16–P**

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

### Denial of Commercial Availability Request under the United States-Caribbean Basin Trade Partnership Act (CBTPA)

June 1, 2005.

**AGENCY:** The Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Denial of the request alleging that certain coat weight fabrics of 100 percent carded camel hair, 100 percent carded cashmere, or a blend of carded cashmere and wool fibers cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA.

**SUMMARY:** On March 30, 2005 the Chairman of CITA received a petition from Neville Peterson, LLP, on behalf of S. Rothschild & Co., Inc. of New York, New York, alleging that certain coat weight fabrics of 100 percent carded camel hair, 100 percent carded cashmere, or a blend of carded cashmere and wool fibers, classified in subheading 5111.19.6020 of the Harmonized Tariff Schedule of the United States (HTSUS), cannot be supplied by the domestic industry in commercial quantities in a timely manner. The petition requested that outerwear articles of such fabrics be eligible for preferential treatment under the U.S. - Caribbean Basin Trade Partnership Act (CBTPA). CITA has determined that the subject fabrics can be supplied by the domestic industry in commercial quantities in a timely manner and, therefore, denies the request.

**FOR FURTHER INFORMATION CONTACT:** Janet E. Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

**SUPPLEMENTARY INFORMATION:**

**Authority:** Section 213(b)(2)(A)(v)(II) of the Caribbean Basin Economic Recovery Act, as added by Section 211(a) of the CBTPA; Section 6 of Executive Order No. 13191 of January 17, 2001; Presidential Proclamations 7351 of October 2, 2000.

**BACKGROUND:** The CBTPA provides for quota- and duty-free treatment for qualifying textile and apparel products. Such treatment is generally limited to products manufactured from yarns and fabrics formed in the United States or a beneficiary country. The CBTPA also provides for quota- and duty-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more beneficiary countries from fabric or yarn that is not formed in the United States, if it has been determined that such fabric or yarn cannot be supplied by the domestic industry in commercial quantities in a timely manner. In Executive Order No. 13191 (66 FR 7271), CITA has been delegated the authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA. On March 6, 2001, CITA published procedures that it will follow in considering requests (66 FR 13502).

On March 30, 2005 the Chairman of CITA received a petition from Neville Peterson, LLP, on behalf of S. Rothschild & Co., Inc. of New York, New York, alleging that certain coat weight fabrics of 100 percent carded camel hair, 100 percent carded cashmere, or a blend of carded cashmere

and wool fibers classified in HTSUS subheading 5111.19.6020, cannot be supplied by the domestic industry in commercial quantities in a timely manner. The petition requested that outerwear articles of such fabrics be eligible for preferential treatment under the U.S. - Caribbean Basin Trade Partnership Act (CBTPA).

On April 12, 2005, CITA published a **Federal Register** notice requesting public comments on the request, particularly with respect to whether these fabrics can be supplied by the domestic industry in commercial quantities in a timely manner. See Request for Public Comments on Commercial Availability Petition under the United States - Caribbean Basin Trade Partnership Act (CBTPA), 70 FR 19059 (April 12, 2005). On April 28, 2005, CITA and USTR offered to hold consultations with the House Ways and Means Committee and the Senate Finance Committee, but no consultations were requested. We also requested advice from the U.S. International Trade Commission and the relevant Industry Trade Advisory Committees.

Based on the information received by CITA, public comments, and the report from the International Trade Commission, CITA found that there is domestic capacity and ability to supply the subject fabrics in commercial quantities in a timely manner. In addition, CITA found there is domestic production of fabrics that appear substitutable for the subject fabrics for purposes of the intended use.

On the basis of currently available information and our review of this request, CITA has determined that there is domestic capacity to supply the subject fabrics in commercial quantities in a timely manner. The request from S. Rothschild & Co., Inc. is denied.

**D. Michael Hutchinson,**

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc.05–11173 Filed 6–3–05; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF EDUCATION

### Office of Elementary and Secondary Education, Overview Information, Impact Aid Discretionary Construction Program; Notice Inviting Applications for New Emergency Repair Awards for Fiscal Year (FY) 2005

*Catalogue of Federal Domestic Assistance (CFDA) Number:* 84.041C.

*Applications Available:* June 13, 2005.

*Deadline for Transmittal of Applications:* August 5, 2005.

*Deadline for Intergovernmental Review:* October 4, 2005.

*Eligible Applicants:* To be eligible for an emergency repair grant, a local educational agency (LEA) must enroll a high percentage (at least 40 percent) of federally connected children in average daily attendance (ADA) who reside on Indian lands or who have a parent on active duty in the U.S. uniformed services, have a school that enrolls a high percentage of one of these types of students, or be eligible for funding for heavily impacted LEAs under section 8003(b)(2) of the Elementary and Secondary Education Act of 1965 (Act), as amended by the No Child Left Behind Act of 2001 (NCLB). In making emergency grant awards, the Secretary must also consider the LEA's total assessed value of real property that may be taxed for school purposes, its use of available bonding capacity, and the nature and severity of the school facility emergency.

In this notice, the Secretary is soliciting only applications for emergency repair grants. We will not accept applications for modernization grants at this time. Applications for emergency repair grants are considered in two priority categories. Detailed information about the eligibility requirements for these two priorities is in 34 CFR 222.177 through 222.179.

Except as provided in 34 CFR 222.190, all eligible applications in the ''first priority'' emergency category must be funded before applications in the next priority can be funded. As prescribed in section 8007(b)(5)(A)(vi) of the Act and the implementing regulations in 34 CFR 222.189(b)(4), unfunded applications in any of the four priorities are retained for one year and considered along with the following fiscal year's pool of applicants. For each of the FY 2002, 2003, and 2004 competitions, the number of fundable ''first priority'' emergency repair applications exceeded the funds available. Approximately 20 unfunded ''first priority'' emergency repair applications submitted for FY 2004 will be reconsidered for FY 2005 funding, along with new emergency repair applications submitted in response to this notice.

The Secretary will not subject ''second priority'' emergency repair applications to the panel review process if the need for funds in the first priority and the number of eligible applications received greatly exceeds the available appropriation. Should funds remain available for modernization awards following this competition, the Secretary will announce a separate competition for modernization grant applications.

*Estimated Available Funds:* $26,290,000.

*Estimated Range of Awards:* $50,000–$5,000,000.

*Estimated Average Size of Awards:* $1,500,000.

*Estimated Number of Awards:* 18.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* We will determine each project period based on the project proposed and will specify this period in the grant award document.

### Full Text of Announcement

### I. Funding Opportunity Description

*Purpose of Program:* The Impact Aid Discretionary Construction Program provides grants to eligible Impact Aid school districts to assist in addressing their school facility emergency and modernization needs. The eligible Impact Aid school districts have a limited ability to raise revenues for capital improvements because they have large areas of Federal land within their boundaries. As a result, these districts find it difficult to respond when their school facilities are in need of emergency repairs or modernization.

*Program Authority:* 20 U.S.C. 7707(b).

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75 (except for 34 CFR 75.600 through 75.617), 77, 79, 80, 82, 84, 85, 86, 97, 98, and 99. (b) The regulations for this program in 34 CFR part 222.

### II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* $26,290,000.

*Estimated Range of Awards:* $50,000–$5,000,000.

*Estimated Average Size of Awards:* $1,500,000.

*Estimated Number of Awards:* 18.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* We will determine each project period based on the project proposed and will specify this period in the grant award document.

### III. Eligibility Information

1. *Eligible Emergency Repair Applicants:* To be eligible for an emergency repair grant, an LEA must enroll a high percentage (at least 40 percent) of federally connected children in ADA who reside on Indian lands or who have a parent on active duty in the

U.S. uniformed services, have a school that enrolls a high percentage of one of these types of students, or be eligible for funding for heavily impacted LEAs under section 8003(b)(2) of the Act. In making emergency grant awards, the Secretary must also consider the LEA's total assessed value of real property that may be taxed for school purposes, its use of available bonding capacity, and the nature and severity of the school facility emergency.

In this notice, the Secretary is soliciting only applications for emergency repair grants. We will not accept applications for modernization grants at this time. Applications for emergency repair grants are considered in two priority categories. Detailed information about the eligibility requirements for these two priorities is in 34 CFR 222.177 through 222.179.

Except as provided in 34 CFR 222.190, all eligible applications in the ''first priority'' emergency category must be funded before applications in the next priority can be funded. As prescribed in section 8007(b)(5)(A)(vi) of the Act and the implementing regulations in 34 CFR 222.189(b)(4), unfunded applications in any of the four priorities are retained for one year and considered along with the following fiscal year's pool of applicants. For each of the FY 2002, 2003, and 2004 competitions, the number of fundable ''first priority'' emergency repair applications exceeded the funds available. Approximately 20 unfunded ''first priority'' emergency repair applications submitted for FY 2004 will be reconsidered for FY 2005 funding, along with new emergency repair applications submitted in response to this notice.

The Secretary will not subject ''second priority'' emergency repair applications to the panel review process if the need for funds in the first priority and the number of eligible applications received greatly exceeds the available appropriation. Should funds remain available for modernization awards following this competition, the Secretary will announce a separate competition for modernization grant applications.

2. *Cost Sharing or Matching:* See 20 U.S.C. 7707(b) and 34 CFR 222.174 and 222.191 through 222.193. In reviewing proposed awards, the Secretary considers the funds available to the grantee from other sources, including local, State, and other Federal funds. Consistent with 34 CFR 222.192, applicants will be required to submit financial reports for FYs 2003, 2004, and 2005 showing closing balances for all school funds. If significant amounts are available at the close of FY 2005 that are not obligated for other purposes, those funds will be considered as available for the proposed emergency repair project, which may reduce or eliminate the award for an emergency grant.

Except for applicants with no practical capacity to issue bonds, as defined in 34 CFR 222.176, an eligible applicant's award amount may not be more than 50 percent of the total cost of an approved project and it may not exceed four million dollars during any four-year period. As outlined in 34 CFR 222.174, this program also involves supplement, not supplant funding provisions.

## IV. Application and Submission Information

1. *Address to Request Application Package:* Marilyn Hall, U.S. Department of Education, 400 Maryland Avenue, SW., room 3C153, Washington, DC 20202–6244. Telephone: (202) 260–3858. You can also download the FY 2005 application forms at: *http://www.ed.gov/programs/8007b/applicant.* An electronic application is available at: *http://e-grants.ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:*

a. *Content Restrictions:* The application narrative should provide concise information on the nature of the emergency condition, including detail of the facilities system(s) that require emergency repair and how they adversely affect the health, safety, and well-being of occupants, the scale of the project in relation to the size of the school facility, and cost estimates to address the conditions. This information should be succinct and well-organized. Applications should not include drawings, designs, or other extraneous documents regarding proposed projects, because reviewers will not consider them.

b. *Page Limit:* We have found that reviewers are able to conduct the highest-quality review when applications are concise and easy to read. We strongly recommend that applicants limit their response in each applicable narrative section to two pages.

c. *Other:* Other requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

3. *Submission Dates and Times:*

*Applications Available:* June 13, 2005.

*Deadline for Transmittal of Applications:* August 5, 2005.

Applications for grants under this competition may be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants system, or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or by mail or hand delivery, please refer to section IV. *6. Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

*Deadline for Intergovernmental Review:* October 4, 2005.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application packages for this program.

5. *Funding Restrictions:* We specify unallowable costs in 34 CFR 222.173. Grant recipients must, in accordance with Federal, State and local laws, use emergency grants for permissible construction activities at public elementary and secondary school facilities. The scope of a selected facilities project will be identified as part of the final grant award conditions. A grantee must also ensure that its construction expenditures under this program meet the requirements of 34 CFR 222.172 (allowable program activities) and 34 CFR 222.173 (prohibited activities). We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:*

Applications for grants under this competition may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

If you choose to submit your application to us electronically, you must use e-Application available through the Department's e-Grants system, accessible through the e-Grants portal page at: *http://e-grants.ed.gov.*

While completing your electronic application, you will be entering data

online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- Your participation in e-Application is voluntary.
- You must complete the electronic submission of your grant application by 4:30 p.m., Washington, DC time, on the application deadline date. The e-Application system will not accept an application for this competition after 4:30 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- The regular hours of operation of the e-Grants Web site are 6 a.m. Monday until 7 p.m. Wednesday; and 6 a.m. Thursday until midnight Saturday, Washington, DC time. Please note that the system is unavailable on Sundays, and between 7 p.m. on Wednesdays and 6 a.m. on Thursdays, Washington, DC time, for maintenance. Any modifications to these hours are posted on the e-Grants Web site.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.
- You must submit all documents electronically, including the Application for Discretionary Construction Program under Section 8007(b), and all necessary assurances and certifications.
- Any narrative sections of your application must be attached as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format.
- Your electronic application must comply with any page limit requirements described in this notice.
- Prior to submitting your electronic application, you may wish to print a copy of it for your records.
- After you electronically submit your application, you will receive an automatic acknowledgement that will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, mail a signed copy of the Application for Discretionary Construction Program under Section 8007(b) to the Impact Aid Program after following these steps:

(1) Print the Application for Discretionary Construction Program under Section 8007(b) from e-Application.

(2) The LEA's Authorized Representative must sign this form on the cover page and on all of the assurances pages. The local certifying official must sign the certification in an emergency application.

(3) Place the PR/Award number in the upper right hand corner of the hard copy cover page of the Application for Discretionary Construction Program under Section 8007(b).

(4) Mail the signed Application for Discretionary Construction Program under Section 8007(b) to the Impact Aid Program at the address listed under **FOR FURTHER INFORMATION CONTACT** elsewhere in this notice (see VII. Agency Contact).

- We may request that you provide us original signatures on other forms at a later date.

*Application Deadline Date Extension in Case of System Unavailability:* If you are prevented from electronically submitting your application on the application deadline date because the e-Application system is unavailable, we will grant you an extension of one business day in order to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2)(a) The e-Application system is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) The e-Application system is unavailable for any period of time between 3:30 p.m. and 4:30 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgement of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (*see* VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If the system is down and therefore the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application.

Extensions referred to in this section apply only to the unavailability of the Department's e-Application system. If the e-Application system is available, and, for any reason, you are unable to submit your application electronically or you do not receive an automatic acknowledgement of your submission, you may submit your application in paper format by mail or hand delivery in accordance with the instructions in this notice.

b. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Impact Aid Program at the address listed under **FOR FURTHER INFORMATION CONTACT** elsewhere in this notice (*see* VII. Agency Contact).

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark,

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service,

(3) A dated shipping label, invoice, or receipt from a commercial carrier, or

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark, or

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

**Note:** The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Impact Aid Program at the address listed under **FOR FURTHER INFORMATION CONTACT** elsewhere in this notice (see VII. Agency Contact). We will accept hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

## V. Application Review Information

1. *Selection Criteria:* Consistent with 34 CFR 75.209, the selection criteria for this program are based on the specific statutory program elements identified in 34 CFR 222.183 through 222.187 and are described in the following paragraphs.

The Secretary gives distinct weight to the listed selection criteria. The maximum score for each criterion is indicated in parentheses. Within each criterion, the Secretary evaluates each

factor equally, unless otherwise specified. The maximum score that an application may receive is 100 points.

(1) *Need for project/severity of the school facility problem to be addressed by the proposed project. (up to 30 points)*

(a) Justification that the proposed project will address a valid emergency; and consistency of the emergency description and the proposed project with the certifying local official's statement.

(b) Impact of the emergency condition on the health and safety of the building occupants or on program delivery (examples: the systems or areas of the facility involved, *e.g.*, HVAC, roof, floor, windows); the type of space affected, such as instructional, resource, food service, recreational, general support, or other areas; the percentage of building occupants affected by the emergency; and the importance of the facility or affected area to the instructional program.

(2) *Project Urgency. (up to 28 points)*

(a) Risk to occupants if the facility condition is not addressed; projected increased future costs; effect of the proposed project on the useful life of the facility or the need for major construction; or age and condition of the facility and date of last renovation of affected areas.

(b) The justification for rebuilding, if proposed.

(3) *Effects of Federal Presence. (up to 30 points total)*

(a) Amount of non-taxable Federal property in the applicant district (percentage of Federal property divided by 10); (up to 10 points)

(b) The number of federally connected children identified in sections 8003(a)(1)(A), (B), (C), and (D) of the Act in the LEA (percentage of identified children in LEA divided by 10); (up to 10 points)

(c) The number of federally connected children identified in sections 8003(a)(1)(A), (B), (C), and (D) of the Act in the school facility (percentage of identified children in school facility divided by 10); (up to 10 points)

(4) *Ability to respond or pay. (up to 12 points total)*

(a) The percentage an LEA has used of its bonding capacity. Four points will be distributed based on the LEA's quartile so that an LEA that has used 100 percent of its bonding capacity receives all four points and an LEA that has used less than 25 percent of its bond limit receives only one point. LEAs that do not have limits on bonded indebtedness established by their States will be evaluated by assuming that their bond limit is 10 percent of the assessed value of real property in the LEA. LEAs deemed to have no practical capacity to issue bonds will receive all four points. (up to 4 points)

(b) Assessed value of real property per student (applicant LEA's total assessed valuation of real property per pupil as a percentile ranking of all LEAs in the State. Four points will be distributed by providing all four points to LEAs in the poorest quartile and only one point to LEAs in the wealthiest quartile). (up to 4 points)

(c) Total tax rate for capital or school purposes (applicant LEA's tax rate for capital or school purposes as a percentile ranking of all LEAs in the State. If the State authorizes a tax rate for capital expenditures, then these data must be used; otherwise, data on the total tax rate for school purposes are used. Four points will be distributed by providing all four points to LEAs in the highest taxing quartile and only one point to LEAs in the lowest quartile). (up to 4 points)

2. *Review and Selection Process:* Upon receipt, Impact Aid program staff will screen all applications to identify any that should not be included in the panel review process. Applications that do not meet the eligibility standards or are incomplete or late will be rejected. Program staff will also calculate the objective scores for each application under criteria (3) and (4). Panel reviewers will assess the applications under criteria (1) and (2).

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118 and 34 CFR 222.195. In general, grantees must comply with applicable reporting requirements in 34 CFR parts 75 and 80. In addition, grantees will be required to provide periodic performance and financial reports, as specified in individual grant award conditions and 34 CFR 222.195.

4. *Performance Measures:* The Department has established the following performance measure for this program: an increasing percentage of LEAs receiving Impact Aid Construction funds will report that the overall condition of their school buildings is adequate. Data for this measure will be reported to the Department on Table 10 of the application for Impact Aid Section 8003 Basic Support Payments.

## VII. Agency Contact

**FOR FURTHER INFORMATION CONTACT:** Marilyn Hall, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, SW., room 3C153, Washington, DC 20202–6244. Telephone: (202) 260–3858 or by e-mail: *Impact.Aid@ed.gov*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

*Electronic Access to This Document:* You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/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/nara/index.html.*

Dated: June 1, 2005.

**Raymond Simon,**

*Assistant Secretary for Elementary and Secondary, Education.*

[FR Doc. 05–11190 Filed 6–3–05; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF ENERGY

**[Docket No. EA–303]**

## Application to Export Electric Energy; Saracen Merchant Energy LP

**AGENCY:** Office Electricity Delivery & Energy Reliability, DOE.

**ACTION:** Notice of application.

**SUMMARY:** Saracen Merchant Energy LP (Saracen) has applied for authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

**DATES:** Comments, protests or requests to intervene must be submitted on or before July 6, 2005.

**ADDRESSES:** Comments, protests or requests to intervene should be addressed as follows: Office Electricity Delivery & Energy Reliability (Mail Code OE–20), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (FAX 202–287–5736).

**FOR FURTHER INFORMATION CONTACT:** Steven Mintz (Program Office) 202–586–2793 or Michael Skinker (Program Attorney) 202–586–2793.

**SUPPLEMENTARY INFORMATION:** Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)).

On May 4, 2005, the Department of Energy (DOE) received an application from Saracen to transmit electric energy from the United States to Canada. Saracen is a Texas limited partnership with its principal place of business in Houston, TX. Saracen has requested an electricity export authorization with a 5-year term. Saracen does not own or control any transmission or distribution assets, nor does it have a franchised service area. The electric energy which Saracen proposes to export to Canada would be purchased from electric utilities and Federal power marketing agencies within the U.S.

Saracen proposes to arrange for the delivery of electric energy to Canada over the existing international transmission facilities owned by Basin Electric Power Cooperative, Bonneville Power Administration, Eastern Maine Electric Cooperative, International Transmission Company, Joint Owners of the Highgate Project, Long Sault, Inc., Maine Electric Power Company, Maine Public Service Company, Minnesota Power Inc., Minnkota Power Cooperative, New York Power Authority, Niagara Mohawk Power Corporation, Northern States Power, Vermont Electric Company, and Vermont Electric Transmission Company. The construction, operation, maintenance, and connection of each of the international transmission facilities to be utilized by Rainbow, as more fully described in the application, has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

*Procedural Matters:* Any person desiring to become a party to this proceeding or to be heard by filing comments or protests to this application should file a petition to intervene, comment or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the FERC's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE on or before the date listed above.

Comments on the Saracen application to export electric energy to Canada should be clearly marked with Docket EA–303. Additional copies are to be filed directly with Dede Russo, General Counsel, Saracen Energy Partners, LP, 2001 Hermann Drive, Suite 100, Houston, TX 77004 *and* Daniel E. Frank, Sutherland Asbill & Brennan LLP, 1275 Pennsylvania Avenue, NW., Washington, DC 20004–2415.

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969, and a determination is made by the DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above or by accessing the program's Home Page at *http://www.fe.doe.gov*. Upon reaching the Home page, select ''Electricity Regulation,'' and then ''Pending Proceedings'' from the options menus.

Issued in Washington, DC, on May 27, 2005.

**Anthony J. Como,**

*Senior Advisor to the Director for Regulatory Programs, Office of Electricity Delivery & Energy Reliability.*

[FR Doc. 05–11156 Filed 6–3–05; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket No. EG05–65–0000, et al.]**

## Alpena Power Generation, L.L.C., et al.; Electric Rate and Corporate Filings

May 26, 2005.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

### 1. Alpena Power Generation, L.L.C.

[Docket No. EG05–65–000]

Take notice that on May 5, 2005, Alpena Power Generation, L.L.C., (Alpena Generation) located at 310 North Second Avenue, Alpena, Michigan 49707, filed with the Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations. Alpena Generation states that it is a Michigan limited liability corporation located in the City of Alpena in Alpena County, Michigan, that owns and operates 30 diesel generators with an aggregate capacity rating of 54.6 mega-watts. Alpena Generation further states that all of the electric energy produced by the Facilities will be sole wholesale.

*Comment Date:* 5 p.m. on June 6, 2005.

### 2. Central Hudson Gas & Electric Corporation; Niagara Mohawk Power Corporation

[Docket Nos. ER97–1523–085, OA97–470–077, ER97–4234–075, and OA96–194–013]

Take notice that on May 23, 2005, Niagara Mohawk Power Corporation, (Niagara Mohawk) a National Grid Company, submitted a revision to its April 12, 2005 compliance filing in Docket Nos. ER97–1523–084, OA97–470–076, OA97–470–074, and OA96–194–012. Niagara Mohawk states that its revised compliance filing was submitted to correct certain errors in its original compliance filing.

*Comment Date:* 5 p.m. on June 13, 2005.

### 3. Midwest Independent Transmission System Operator, Inc., Midwest Independent Transmission System Operator, Inc., Midwest Independent Transmission System Operator, Inc., Ameren Services Co., et al.

[Docket Nos. ER05–6–024, EL04–135–026, EL02–111–044, and EL03–212–040]

Take notice that on May 23, 2005, the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and Midwest ISO Transmission Owners

(collectively Applicants) jointly submitted for filing revisions to Schedule 22 of the Midwest ISO Open Access Transmission and Energy Markets Tariff in compliance with the Commission's November 18, 2004 order in Docket Nos. ER05–6, EL04–135, EL02–111, and EL03–212, *Midwest Indep. Transmission Sys. Operator, Inc.* 109 FERC ¶ 61,168 (2004) to reflect recent revisions in the PJM Interconnection, L.L.C. (PJM) transmission owners lost revenues as shown for the first time in the PJM transmission owners' April 29, 2005 filing, in Docket Nos. ER05–6–21; EL04–135–023; EL02–111–041; and EL03–212–037.

Applicants state that copies of the filing were served on the parties on the official service list in the above-captioned proceeding.

*Comment Date:* 5 p.m. on June 6, 2005.

**4. Astoria Energy LLC**

[Docket No. ER01–3103–009]

Take notice that on May 23, 2005, Astoria Energy LLC (Astoria) submitted for filing a supplemental application pursuant to section 205 of the Federal Power Act for: (1) the triennial renewal of its market-based rate authority and (2) the acceptance of a modification to its sole rate schedule to comply with Order No. 652. Astoria requests an effective date of March 6, 2005.

*Comment Date:* 5 p.m. on June 13, 2005.

**5. Bridgeport Energy, LLC**

[Docket No. ER05–611–001]

Take notice that on May 20, 2005, Bridgeport Energy, LLC (Bridgeport) tendered for filing its responses to the April 20, 2005 deficiency letter from the Commission requesting additional information to assist in its decision on the cost-of-service agreement between Bridgeport and ISO–New England, Inc. (ISO–NE) filed February 18, 2005. Bridgeport states that the cost-of-service agreement compensates Bridgeport for the provision of reliability services to ISO-NE.

*Comment Date:* 5 p.m. on June 13, 2005.

**6. Southwest Power Pool, Inc.**

[Docket Nos. ER05–652–002, RT04–1–013, ER04–48–013, and ER05–109–002]

Take notice that on May 23, 2005, Southwest Power Pool, Inc. (SPP) submitted a compliance filing providing for revisions to its Open Access Transmission Tariff (OATT) pursuant to the Commission's order issued April 22, 2005, in *Southwest Power Pool, Inc., 111 FERC ¶ 61,118*. SPP requests an effective date of May 5, 2005.

SPP states that it has served a copy of its transmittal letter on each of its Members and Customers. SPP further states that a complete copy of this filing will be posted on the SPP Web site *http://www.spp.org*, and is also being served all affected state commissions.

*Comment Date:* 5 p.m. on June 13, 2005.

**7. Southwest Power Pool, Inc.**

[Docket No. ER05–666–002]

Take notice that on May 23, 2005, Southwest Power Pool, Inc. (SPP) submitted additional information pursuant to the Commission's deficiency letter issued April 21, 2005, in Docket No. ER05–666–000. Specificially, SPP submitted a response to several inquiries by the Commission regarding the proposed liability and indemnification provisions of SPP's March 1, 2005, filing in this proceeding.

SPP states that it has served a copy of this filing upon each of the parties to this proceeding.

*Comment Date:* 5 p.m. on June 13, 2005.

**8. Aquila, Inc.**

[Docket Nos. ER05–999–000, ER05–1000–000, ER05–1001–000, ER05–1002–000, ER05–1003–000, ER05–1004–000, ER05–1005–000, ER05–1006–000, ER05–1007–000, and ER05–1008–000]

Take notice that on May 23, 2005, Aquila, Inc. (Aquila), filed with the Commission, pursuant to section 205 of the Federal Power Act, 16 U.S.C. 824d, and part 35 of the Commission's regulations, 18 CFR part 35, Incremental Energy Agreements with the Cities of Ashland, Attica, Greensburg, Hoisington, Kingman, Lincoln, Osborne, Pratt, Stockton, and Washington, Kansas. Aquila requests an effective date of June 1, 2005.

*Comment Date:* 5 p.m. on June 13, 2005.

**9. PJM Interconnection, L.L.C.**

[Docket No. ER05–1010–001]

Take notice that on May 25, 2005, PJM Interconnection, L.L.C. (PJM) submitted an amendment to its May 23, 2005, filing in Docket No. ER05–1010–000 by submitting an unexecuted substitute interconnection service agreement among PJM, Neptune Regional Transmission System, L.L.C. and Jersey Central Power & Light Company a FirstEnergy company. PJM requests an effective date of May 20, 2005.

PJM states that copies of this filing were served upon the parties to the agreements and the state regulatory commissions within the PJM region.

*Comment Date:* 5 p.m. on June 3, 2005.

**10. Public Service Company of New Mexico**

[Docket No. ER05–1015–000]

Take notice that on April 28, 2005, the Public Service Company of New Mexico (PNM) tendered for filing a Notice of Cancellation of Supplement No. 1 (Service Schedule A) to the Interconnection Agreement of July 19, 1966, between El Paso Electric Company and PNM (PNM Rate Schedule FERC No. 9). Included in the filing are revised sheets to PNM's Rate Schedule FERC No. 9 to reflect the cancellation of Service Schedule A of the Interconnection Agreement. PNM requests an effective date of June 30, 2005.

PNM states that copies of the filing have been served on El Paso Electric Company, the New Mexico Public Regulation Commission, and the New Mexico Attorney General. PNM also states that copies of the filing are available for public inspection at PNM's offices in Albuquerque, New Mexico.

*Comment Date:* 5 p.m. on June 1, 2005.

**Standard Paragraph**

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (19 CFR 385.211 and 385.214) on or before 5 p.m. eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling

link to long on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protests to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available to 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 TYY, call (202) 502–8659.

**Linda Mitry,**

*Deputy Secretary.*

[FR Doc. E5–2869 Filed 6–3–05; 8:45 am]

BILLING CODE 6717–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[OPP–2005–0152; FRL–7717–9]**

## The Association of American Pesticide Control Officials (AAPCO)/ State FIFRA Issues Research and Evaluation Group (SFIREG); Notice of Public Meeting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Association of American Pesticide Control Officials (AAPCO)/ State FIFRA Issues Research and Evaluation Group (SFIREG) will hold a 2–day meeting, beginning on June 27, 2005, and ending June 28, 2005. This notice announces the location and times for the meeting and sets forth the tentative agenda topics.

**DATES:** The meeting will be held on Monday, June 27, 2005, from 8:30 a.m. to 5 p.m.; and on Tuesday, June 28, 2005, from 8:30 a.m. to noon.

**ADDRESSES:** The meeting will be held at the Doubletree Hotel, 300 Army Navy Drive, Arlington, VA.

**FOR FURTHER INFORMATION CONTACT:** Georgia A. McDuffie, Field and External Affairs Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–0195; fax number: (703) 308–1850; e-mail address: *mcduffie.georgia@epa.gov*, or Philip H. Gray, SFIREG Executive Secretary, P.O. Box 1249, Hardwick, VT 05843–1249; telephone number: (802) 472–6956; fax number: (802) 472–6957; e-mail address: *aapco@plainfield.bypass.com*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are interested in the SFIREG information exchange relationship with EPA regarding important issues related to human health, environmental exposure to pesticides, and insight into EPA's decision-making process. All interested parties are invited and encouraged to attend the meetings and participate as appropriate. Potentially affected entities may include, but are not limited to:

Those persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the persons listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How Can I Get Copies of this Document and Other Related Information?*

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPP–2005–0152. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to 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. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket ID number.

### II. Tentative Agenda

1. OPP measures process.
2. National Worker Protection Standard (WPS) Assessment Report.
3. OPP report on the Pesticide Safety Education Program (PSEP) Review Report.
4. Pesticide container recycling.
5. Mosquito misters.
6. Grant guidance and funding.
7. Label review comments from SFIREG.
8. Section 18 process: Developing efficiencies in the process with national emergencies.
9. Section 18: Resistance management challenges.
10. Worker exposure: How risk is determined drift and volatilization: Secondary exposure.
11. Consumer labeling initiative.
12. Fumigant cluster.
13. Plant Incorporated Protectants (PIPs): Revisions to position paper.
14. Office of Pesticide Programs and Office of Enforcement and Compliance Assurance reports.
15. E-Labeling.

### List of Subjects

Environmental protection.

Dated: May 26, 2005.

**Jay Ellenberger,**

*Director, Field and External Affairs Division, Office of Pesticide Programs.*

[FR Doc. 05–11164 Filed 6–3–05; 8:45 am]

BILLING CODE 6560–50–S

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7921–4]**
**[E–Docket ID No. Ord–2005–0021]**

## Workshop to Peer Review Proposed Indicators for the U.S. EPA's 2006 Report on the Environment

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of peer-review workshop and public comment period.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is announcing that ERG, an EPA contractor for external scientific peer review, will convene a panel of experts and organize and conduct an independent external peer-review workshop to review the Proposed Indicators for the U.S. EPA's 2006 Report on the Environment (hereafter, Proposed Indicators—EPA ROE 2006). EPA is also announcing a 45-day public review and comment period on the Proposed Indicators—EPA ROE 2006. This public comment period and the public peer-review workshop are separate processes and will provide an opportunity for all stakeholders to weigh in on the primary contents of the draft 2006 Report on the Environment (EPA ROE 2006) at an early stage. The selection of the Proposed Indicators—EPA ROE 2006 was coordinated across EPA and with other agencies. The draft text and accompanying information for each indicator were prepared by EPA Program and Regional Offices, the Office of Research and Development (ORD), the Office of Environmental Information (OEI), and the Office of Policy Economics and Innovation (OPEI). In preparing the EPA ROE 2006, EPA will consider ERG's report of the comments and recommendations from the expert peer-review workshop and any public comments EPA receives in accordance with today's notice.

**DATES:** ERG will hold the three-day peer-review workshop from July 27–29, 2005. The workshop will begin at 8 a.m. for registration and end at approximately 5 p.m., eastern daylight time. Members of the public may attend the peer-review workshop as observers. Interested parties will also have an opportunity to make brief oral statements at the commencement of the meeting each day.

The 45-day public comment period begins June 6, 2005, and ends July 21, 2005. Technical comments should be in writing and must be received by EPA by July 21, 2005.

**ADDRESSES:** The external peer-review workshop will be held in the Sphinx Room, Almas Temple, 1315 K Street, NW., Washington, DC 20005. To attend the workshop, register by July 21, 2005 at the following Web site: *http://www2.ergweb.com/projects/conferences/roe/register-roe.htm*. Interested parties can also register for the workshop by contacting ERG, 110 Hartwell Avenue, Lexington, MA 02421; telephone: 781–674–7374 or toll-free 800–803–2833 (between 9 a.m. and 5:30 p.m. EDT); facsimile: 781–674–2906; or e-mail: *meetings@erg.com*. Please include your full address and contact information. Space is limited, and reservations will be accepted on a first-come, first-served basis. Workshop attendees who wish to make oral statements at the workshop should notify ERG at the time of your initial contact that you would like to register to make a public comment. The workshop agenda is also available at the above-mentioned Web site.

The Proposed Indicators—EPA ROE 2006 are available primarily via the Internet at: *http://www.epa.gov/ROEindicators*. EPA's peer-review charge is also available at this Web site. Each of the proposed indicators can be downloaded separately from this Web site in the PDF format. A limited number of electronic copies on compact disc (CD) are available from the National Center for Environmental Assessment's Technical Information Staff, NCEA–W; telephone: 202–564–3261; facsimile: 202–565–0050. If you are requesting a CD, please provide your name, your mailing address, and the document title, ''Proposed Indicators—EPA ROE 2006.''

Public comments may be submitted electronically via EPA's E-Docket, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions for submission of public comments as provided in the section of this notice entitled **SUPPLEMENTARY INFORMATION**. ERG will provide copies of the public comments received by July 15, 2005, to the panel of experts prior to the peer-review workshop.

**FOR FURTHER INFORMATION CONTACT:** For information on the peer review workshop, contact: Conference Registration, ERG, 110 Hartwell Avenue, Lexington, MA 02421; telephone: 781–674–7374 or toll-free at 800–803–2833 between 9 a.m. and 5:30 p.m. EDT; facsimile: 781–674–2906; or e-mail: *meetings@erg.com*. Questions regarding registration and logistics should be directed to ERG.

For information on the public comment period, contact the OEI Docket; telephone: 202–566–1752; facsimile: 202–566–1753; or e-mail: *ORD.Docket@epa.gov*.

If you have technical questions about the Proposed Indicators—EPA ROE 2006, contact: Julie Damon, National Center for Environmental Assessment (8601D), U.S. EPA, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone: 202–564–3404; facsimile: 202–565–0065; or e-mail: *damon.julie@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

**About the Report on the Environment and the Proposed Indicators—EPA ROE 2006**

In June 2003, EPA published its first national Draft Report on the Environment, using available indicators and data to answer questions pertaining to national environmental and human health conditions. At that time, EPA released two companion documents—one for readers with a general interest in the environment (Draft Report on the Environment Public Report) and another for more technical readers (Draft Report on the Environment Technical Document). These draft documents utilized indicators to describe the then current environmental conditions, trends, and data gaps.

Shortly after the release of the 2003 draft documents, EPA announced that it planned to release the next Report on the Environment in 2006. Activities related to the development of EPA's 2006 ROE have been ongoing since release of the 2003 draft documents. As in 2003, EPA anticipates the 2006 ROE will include the release of two paper documents—one for readers with a general interest in the environment (a Public Report) and another for more technical readers (a Technical Document). EPA also intends to make the information in the 2006 ROE available as an interactive, searchable Web site—the ''e-ROE.'' The Technical Document is expected to provide the scientific foundation for the more general Public Report and the e-ROE. EPA plans to use the Technical Document to present and discuss indicators and data that are currently available to answer the questions posed in the ROE 2006.

The peer-review workshop on the proposed indicators we are announcing today precedes the production of the draft EPA ROE 2006 Technical Document. EPA has asked for this peer review to obtain expert opinion on whether the indicators proposed to be included in the EPA ROE 2006 Technical Document are supported by data that are technically sound, meet the established indicator definition and criteria, and help answer the questions posed in the ROE 2006. As noted above, EPA has issued a peer-review charge, which describes the areas of inquiry on which we have asked comment from external experts. EPA encourages the public to submit comments on the same areas of inquiry. In addition, EPA welcomes comments on any other aspect of the proposed indicators that the public would like to share with the Agency. After ERG provides EPA with a report of the peer-review workshop,

EPA will consider ERG's report and the public comments. Any resulting revisions to the proposed indicators or any changes to the list of proposed indicators will be discussed within EPA and with our federal agency partners. The external review draft of the EPA ROE 2006 Technical Document is expected in spring/summer 2006.

**How to Submit Comments to EPA's E-Docket**

EPA has established an official public docket for information pertaining to the Proposed Indicators—EPA ROE 2006, Docket ID No. ORD–2005–0021. The official public docket is the collection of materials, excluding Confidential Business Information (CBI) or other information for which disclosure is restricted by statute, that is available for public viewing at the Office of Environmental Information (OEI) Docket in the Headquarters EPA Docket Center, EPA West Building, 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 Public Reading Room is 202–566–1744, and the telephone number for the OEI Docket is 202–566–1752; facsimile: 202–566–1753; or e-mail: *ORD.Docket@epa.gov*.

An electronic version of the official public docket is available through EPA's electronic public docket and comment system, E-Docket. You may use E-Docket at *http://www.epa.gov/edocket/* to submit or view public comments, to access the index of the contents of the official public docket, and to view those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

Certain types of information will not be placed in E-Docket. Information claimed as CBI and other information for which disclosure is restricted by statute are not included in the official public docket and also will not be available for public viewing in E-Docket. Copyrighted material will not be placed in E-Docket, but will be referenced there and available as printed material in the official public docket.

If you intend to submit comments to EPA, please note that it is EPA policy to make comments available for public viewing just as they are received at the EPA Docket Center or in E-Docket. This policy applies to information submitted electronically or in paper form, except where restricted by copyright, CBI, or statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment placed in EPA's electronic public docket; the entire printed comment, including the copyrighted material, will be available in the official public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to E-Docket. Physical objects will be photographed, where practical, and the photograph will be placed in E-Docket along with a brief description written by the docket staff.

You may submit comments electronically, by mail, by facsimile, or by hand delivery/courier. To ensure proper receipt by EPA, include the appropriate docket identification number with your submission. Please adhere to the specified submitting period; public comments received past the closing date will be marked ''late'' and may only be considered if time permits.

If you submit public comments electronically, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include these contact details on the outside of any submitted disk or CD–ROM, and in any cover letter accompanying the disk or CD–ROM. This ensures that you can be identified as the person submitting the comment and allows EPA to contact you in case the Agency cannot read your submission due to technical difficulties, or needs further information on the substance of your comment. EPA will not edit your comment, and any identifying or contact information provided in the body of the comment will be included as part of the comment placed in the official public docket and made available in E-Docket. If EPA cannot read what you submit due to technical difficulties and cannot contact you for clarification, it may delay or preclude EPA's consideration of your comments.

Electronic submission of comments via E-Docket is the preferred method for receiving comments. To access EPA's electronic public docket from the EPA Internet Home Page, select ''Information Sources,'' ''Dockets,'' and ''EPA Dockets.'' Once in the system, select ''search,'' and key in Docket ID No. ORD–2005–0021. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact details unless you provide it in the body of your comment.

Comments may be sent by electronic mail (e-mail) to *ORD.Docket@epa.gov*, Attention Docket ID No. ORD–2005–0021. In contrast to EPA's electronic public docket, EPA's e-mail system is *not* an ''anonymous access'' system. If you send an e-mail directly to the docket without going through EPA's E-Docket, EPA's e-mail system automatically captures your e-mail address, and it becomes part of the information in the official public docket and is made available in E-Docket.

You may submit comments on a disk or CD–ROM mailed to the OEI Docket mailing address. Files will be accepted in WordPerfect, Word, or PDF file format. Avoid the use of special characters and any form of encryption. If you provide comments in writing, please submit one unbound original with pages numbered consecutively, and three copies. For attachments, provide an index, number pages consecutively with the main text, and submit an unbound original and three copies.

Dated: May 31, 2005.

**Peter W. Preuss,**

*Director, National Center for Environmental Assessment.*

[FR Doc. 05–11162 Filed 6–3–05; 8:45 am]

BILLING CODE 6560–50–P

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## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7921–3]**

## Science Advisory Board Staff Office; Notification of an Upcoming Teleconference of the Perfluorooctanoic Acid Risk Assessment (PFOA) Review Panel of the EPA Science Advisory Board (SAB)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The EPA Science Advisory Board (SAB) Staff Office announces a public teleconference of the SAB Perfluorooctanoic Acid Risk Assessment (PFOA) Review Panel.

**DATES:** July 6, 2005, 2 p.m. to 5 p.m.

**ADDRESSES:** The public teleconference will take place via telephone only.

**FOR FURTHER INFORMATION CONTACT:** Members of the public who wish to obtain the call-in number and access code to participate in the teleconference may contact Dr. Sue Shallal, EPA Science Advisory Board Staff (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone/voice mail: (202) 343–9977 or via e-mail at *shallal.suhair@epa.gov*. The technical contact in EPA's Office of Pollution

Prevention and Toxics (OPPT) is Dr. Jennifer Seed who can be reached at *seed.jennifer@epa.gov* or 202–564–7634.

**SUPPLEMENTARY INFORMATION:**

*Background:* EPA's Office of Pollution Prevention and Toxics (OPPT) had requested that the SAB peer review the Agency's Draft Perfluorooctanoic Acid (PFOA) Risk Assessment. Background on this SAB review was provided in previous **Federal Register** notices published on March 29, 2004 (69 FR 16249–50); and January 12, 2005 (70 FR 2157–58). EPA's Draft PFOA risk assessment and related background information on PFOA may be found at: *http://www.epa.gov/opptintr/pfoa/index.htm.* The purpose of this upcoming teleconference is for the SAB Review Panel to finalize its draft review report. A meeting agenda and the draft SAB review report will be posted on the SAB Web site *(http://www.epa.gov/sab/)* prior to the meeting.

*Procedures for Providing Public Comment:* It is the policy of the EPA SAB Staff Office to accept written public comments of any length for the SAB Panel's consideration, and to accommodate oral public comments whenever possible. The EPA SAB Staff Office expects that public statements presented at this meeting will not be repetitive of previously submitted oral or written statements to this Panel. Requests to provide oral comments must be in writing (e-mail, fax or mail) and received by Dr. Shallal no later than five business days prior to the teleconference or meeting in order to reserve time on the meeting agenda. For teleconferences, opportunities for oral comment will usually be limited to no more than three minutes per speaker or organization and no more than fifteen minutes total. Written comments should be received in the SAB Staff Office at least five business days prior to the meeting date so that the comments may be made available to the committee for their consideration. Comments should be supplied to the DFO at the address/contact information noted above in the following formats: one hard copy with original signature and one electronic copy via e-mail (acceptable file format: Adobe Acrobat, WordPerfect, Word, or Rich Text files (in IBM–PC/Windows 98/2000 format).

Dated: March 31, 2005.

**Vanessa T. Vu,**

*Director, EPA Science Advisory Board Staff Office.*

[FR Doc. 05–11163 Filed 6–3–05; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7921–2]**

### Forty-Third Street Bay Drum Superfund Site; Notice of Settlement

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of settlement.

**SUMMARY:** Under section 122(h)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Environmental Protection Agency (EPA) has entered into an Agreement for Recovery of Past Cost (Agreement) at the Forty-Third Street Bay Drum Superfund Site (Site) located in Tampa, Hillsborough County, Florida, with Specialty Chemical, Florida Department of Transportation, and Cicconne-D-Amico, Inc. EPA will consider public comments on the Agreement until July 6, 2005. EPA may withdraw from or modify the Agreement should such comments disclose facts or considerations which indicate the Agreement is inappropriate, improper, or inadequate. Copies of the Agreement are available from: Ms. Paula V. Batchelor, U.S. Environmental Protection Agency, Region 4, Superfund Enforcement & Information Management Branch, Waste Management Division, 61 Forsyth Street, SW., Atlanta, Georgia 30303, (404) 562–8887, *Batchelor.Paula@epa.gov*.

Written comments may be submitted to Ms. Batchelor at the above address within 30 days of the date of publication.

Dated: April 18, 2005.

**Rosalind H. Brown,**

*Chief, Superfund Enforcement & Information Management Branch, Waste Management Division.*

[FR Doc. 05–11161 Filed 6–3–05; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL HOUSING FINANCE BOARD

### Sunshine Act Meeting Notice; Announcing a Partially Open Meeting of the Board of Directors

**TIME AND DATE:** The open meeting of the Board of Directors is scheduled to begin at 10 a.m. on Wednesday, June 8, 2005. The closed portion of the meeting will follow immediately the open portion of the meeting.

**PLACE:** Board Room, Second Floor, Federal Housing Finance Board, 1777 F Street, NW., Washington, DC 20006.

**STATUS:** The first portion of the meeting will be open to the public. The final portion of the meeting will be closed to the public.

**MATTERS TO BE CONSIDERED AT THE OPEN PORTION OF THE MEETING:** *Capital Plan Amendment for the Federal Home Loan Bank of New York.* Consideration of several technical amendments to the New York Bank capital plan.

*Capital Plan Amendment for the Federal Home Loan Bank of Seattle.* Consideration of an amendment to the Seattle Bank capital plan to adjust the stock purchase requirement.

**MATTER TO BE CONSIDERED AT THE CLOSED PORTION OF THE MEETING:** *Periodic Update of Examination Program Development and Supervisory Findings.*

**FOR FURTHER INFORMATION CONTACT:** Shelia Willis, Paralegal Specialist, Office of General Counsel, at 202–408–2876 or *williss@fhfb.gov.*

Dated: June 1, 2005.

By the Federal Housing Finance Board.

**John P. Kennedy,**

*General Counsel.*

[FR Doc. 05–11293 Filed 6–2–05; 2:21 pm]

**BILLING CODE 6725–01–P**

## FEDERAL RESERVE SYSTEM

### Federal Open Market Committee; Domestic Policy Directive of May 3, 2005

In accordance with § 271.25 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on March 22, 2005.[1]

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. To further its long-run objectives, the Committee in the immediate future seeks conditions in reserve markets consistent with increasing the federal funds rate to an average of around 3 percent.

The vote encompassed approval of the paragraph below for inclusion in the statement to be released shortly after the meeting:

''The Committee perceives that, with appropriate monetary policy action, the upside and downside risks to the attainment of both sustainable growth

[1] Copies of the Minutes of the Federal Open Market Committee Meeting on May 3, 2005, which includes the domestic policy directive issued at the meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, DC 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

and price stability should be kept roughly equal. With underlying inflation expected to be contained, the Committee believes that policy accommodation can be removed at a pace that is likely to be measured. Nonetheless, the Committee will respond to changes in economic prospects as needed to fulfill its obligation to maintain price stability.''

By order of the Federal Open Market Committee, May 26, 2005.

**Vincent R. Reinhart,**

*Secretary, Federal Open Market Committee.*

[FR Doc. 05–11130 Filed 6–3–05; 8:45 am]

BILLING CODE 6210–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[Program Announcement AA082]**

### National Foundation for the Centers for Disease Control and Prevention, Inc.; Notice of Intent To Fund Single Eligibility Award

**A. Purpose**

The purpose of this grant is to provide funding for the administrative expenses of the NFCDC. An illustrative, non-exhaustive list of administrative expenses includes administrative personnel salaries, benefits, and expenses; administrative travel; administrative equipment; office supplies; utilities, such as water, electricity, and gas; printing; postage; communications; and rent.

**Authority:** Section 399G of the Public Health Service Act, [42 U.S.C. 280e–11], as amended; Section 201 of Public Law 102–531 (1992)

The Catalog of Federal Domestic Assistance number for this program is 93.283.

**B. Eligible Applicant**

Assistance will be provided only to National Foundation for the Centers for Disease Control and Prevention, Inc. (NFCDC). No other applications are solicited.

**C. Funding**

Approximately $500,000 is available in FY 2005 to fund this award. It is expected that the award will begin on or before August 15, 2005, and will be made for a 12-month budget period within a project period of up to five years. Funding estimates may change.

**D. Where To Obtain Additional Information**

For general comments or questions about this announcement, contact: Technical Information Management Section, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, telephone: 770–488–2700.

For technical questions about this program, contact: Michelle Wilson, MSW, Project Officer, Centers for Disease Control and Prevention (CDC), 1600 Clifton Road NE., Mailstop D–28, Atlanta, GA 30333, telephone: 404–639–5947, e-mail: *MWilson2@cdc.gov.*

Dated: May 31, 2005.

**William P. Nichols,**

*Director, Procurement and Grants Office, Centers for Disease Control and Prevention.*

[FR Doc. 05–11155 Filed 6–3–05; 8:45 am]

BILLING CODE 4163–18–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Office of Global Health Cooperative Agreement for: Global Capacity through International Non-Governmental Organization (NGO) Partnership

*Announcement Type:* New.

*Funding Opportunity Number:* PA AA123.

*Catalog of Federal Domestic Assistance Number:* 93.067.

*Key Dates: Application Deadline:* July 6, 2005.

**I. Funding Opportunity Description**

**Authority:** Section 301 and 307 of the Public Health Service Act, [42 U.S.C. Sections 241 and 242(l)], as amended.

*Background:* The Centers for Disease Control and Prevention (CDC)'s global programs are an essential component of promoting health and preventing disease in the United States and abroad, including ensuring rapid detection and response to emerging health threats. CDC cannot accomplish these efforts alone and therefore seeks to further its work and interests through partnerships with other organizations. The Office of Global Health seeks to collaborate with an international Non-Governmental Organization (NGO) in a public-private partnership. Working with a NGO with a strong international presence will leverage existing resources to achieve health goals. CDC's knowledge and abilities as a scientific organization can be effectively joined with an international NGO that has demonstrated ability to effectively implement public health interventions in many different countries. This international NGO's experience in community-based interventions in a variety of health topic areas will enable public health science to be readily disseminated into the field. The intent of this announcement is to enhance collaboration through building a public-private partnership, and to create impact in health protection and promotion goals.

This partnership will focus in two areas: Global Disease Detection (GDD) and a selection of the United Nations Millennium Development Goals (MDG). The goal of the GDD initiative is to develop national and international capacity to better detect and respond to infectious disease outbreaks of potential worldwide importance, whether natural or intentional. CDC is working to recognize infectious disease outbreaks faster, improve the ability to control and prevent outbreaks, and to detect emerging microbial threats. Through this cooperative agreement CDC intends to work with an international NGO partner to pilot a program to increase disease detection and surveillance in non-traditional or resource poor settings. The goal of this pilot is to build disease response and detection capacity in an international NGO at the local level through communities, organizations, and the Ministry of Health (MOH).

The Millennium Development Goals (MDG) are a framework of eight goals, 18 targets, and 48 measures that were developed by experts from the United Nations (UN), the International Monetary Fund (IMF), the World Bank, and the Organization for Economic Cooperation and Development (OECD). These goals were unanimously adopted by the member states of the UN in September 2000 to focus on outcomes that promote human development as the key to sustaining social and economic progress. Several of these goals target areas of focus for the CDC including maternal mortality, environmental health, and early childhood health and development. Although the MDGs are visionary in nature, projects supported through this cooperative agreement have the potential for being antecedent steps toward attaining these goals through increased service provision, learning capacity, and demonstrated competence. The MDGs are eight goals that outline areas of action, 18 targets that further define this involvement, and 48 indicators that provide measurable benchmarks for interventions. See the following UN

Web site (*http://www.un.org/millenniumgoals*).

*Purpose:* The purpose of this announcement is to create an inter-institutional relationship between the Centers for Disease Control and Prevention (CDC) and an international Non-Governmental Organization (NGO) that will serve as a bridge between CDC's public health science and the selected grantee's community-based programming in several functional areas in multiple countries. This cooperative agreement will leverage resources and utilize different knowledge and perspective between these two distinctive types of organizations. This announcement will also provide a flexible mechanism for synergistic activities.

This cooperative agreement will leverage capacity in distinct areas of: Global Disease Detection (GDD), Perinatal and Maternal Mortality Reduction, Safe Water Systems (SWS)/Environmental Health Practices, and Early Childhood Health and Development. This collaboration will promote innovative solutions in a global partnership with extensive diversity, resources, and experience. Initial funding is provided at this time for Global Disease Detection and Maternal and Perinatal Mortality Reduction activities. Other activities mentioned may be included, pending the availability of supplemental funds in the future.

Initial collaboration and activities will be in support of the following goals:

*Global Disease Detection (GDD):* This cooperative agreement is in support of CDC's Global Disease Detection program and its goals of increasing global capacity to prepare for, detect and verify, respond to, and recover from naturally occurring and deliberate threats to health. This will occur through objectives of strengthening sustainable capacity in areas of epidemiology, laboratory, outbreak response, disease monitoring, communications, and management.

Other projects in this announcement are in support of several Millennium Development Goals (MDG) including:

*Perinatal and Maternal Mortality Reduction:*

*Millennium Development Goal 5:* Improve maternal health.

*Target 6:* Reduce by three quarters, between 1990 and 2015, the maternal mortality ratio.

*Indicator 16:* Maternal mortality ratio (United Nations Children's Fund—World Health Organization (UNICEF–WHO)).

*Indicator 17:* Proportion of births attended by skilled health personnel (UNICEF–WHO).

*Safe Water Systems (SWS)/Environmental Health Practice:*

*Target 10:* Halve, by 2015, the proportion of people without sustainable access to safe drinking water and sanitation.

*Indicator 30:* Proportion of population with sustainable access to an improved water source, urban and rural (UNICEF–WHO).

*Indicator 31:* Proportion of population with access to improved sanitation, urban and rural (UNICEF–WHO).

*Early Childhood Health and Development:*

*Millennium Development Goal 4:* Reduce Child Mortality.

*Target 5:* Reduce by two thirds, between 1990 and 2015, the under-five mortality rate.

*Indicator 13:* Under-five mortality rate (UNICEF–WHO).

This announcement is only for non-research activities supported by CDC/ATSDR. If research is proposed, the application will not be reviewed. For the definition of research, please see the CDC Web site at the following Internet address: *http://www.cdc.gov/od/ads/opspoll1.htm.*

*Activities:* Awardee activities for this program are as follows:

*General:* The CDC and the selected grantee will work together to develop a long-term relationship, with logistical and multi-sectoral outreach and education. This collaboration will establish a clear understanding and protocols in areas of this undertaking. The grantee must have the ability to work with multiple local country offices to link and integrate projects in an international setting and liaison with the CDC. Project findings in one country may be translated and implemented in other settings; therefore the partnering organization must have a worldwide network that includes a resident staff presence in at least 60 countries worldwide.

The selected grantee in collaboration with the CDC will work to determine appropriate sites for project implementation. The grantee will explore the strategic interests of the country offices and their on-the-ground staff, in order to identify the best possible sites for collaboration. Once collaboration is established the grantee will move from technical assistance to leadership and collaboration with sound programming. The grantee will also devote the necessary resources and time to monitor and evaluate the impact on the health system and the health of the communities targeted. It is also expected that the grantee will liaison with other CDC in-country programs in order to avoid duplication and to identify areas for collaboration.

This cooperative agreement will function under the guidance of a technical advisory group. As this agreement will cover a variety of activities, the selected grantee must nominate a single point of contact for all communication and information with CDC in order to streamline the development and implementation of this collaboration.

*Initial Funding is provided for the following activities:*

*Global Disease Detection (GDD):* One focus of this announcement will be to create emerging/reemerging disease detection capacity in a major international Non-Governmental Organization (NGO) that has resident staff in sixty or more countries.

In general, CDC expectations of the Global Disease Detection (GDD) program are to: recognize infectious disease outbreaks faster, improve the ability to control and prevent outbreaks, detect emerging microbial threats, and to work with global partners. CDC will develop a partnership with the chosen grantee to increase disease detection and surveillance in non-traditional or resource poor settings. With CDC assistance, the grantee will develop preparedness, recognition, and response standards and protocols for emerging/re-emerging diseases. Although final pilot project sites will be determined in collaboration with CDC advisors, initial pilot project areas may include Vietnam and India. Therefore, applicants must have a demonstrated capacity in Vietnam and India in health and disease prevention.

Activities conducted under this cooperative agreement include but are not limited to:

- Assess current disease detection capacity and public health infrastructure in pilot locations and plan resource appropriate interventions.
- Develop and improve local early warning systems.
- Enhance collaboration with multinational organizations and their partners.
- Create evidence-based tools/practices for emerging/reemerging diseases that can be realistically implemented in resource poor communities.
- Provide standardized GDD criteria for grantee response to disease outbreaks.
- Identify areas where coordinated detection and response can occur.
- Improve syndromic surveillance capabilities at a local level.

• Assess and utilize, if applicable, existing information technology tools and evidence-based best practices to track infectious disease outbreaks and their epidemiology.

• Provide approaches that can be simultaneously coordinated with ongoing surveillance initiatives—*e.g.* WHO's Global Outbreak Alert Response Network (GOARN).

• Utilize/apply geographic information system (GIS) based approaches to outbreak detection.

• Provide realistic ''threshold'' based approaches for cluster detection and signal generation for outbreaks.

• Develop plans to implement sustainable collaborations between community animal-health workers or veterinary scientists and public health agencies involved in human disease outbreak surveillance program(s).

• Outline roles of automated laboratory systems/Web-based reporting in disease outbreak surveillance programs.

• Identify ways to strengthen local and national laboratory capacity.

• Develop information on sources of infection, symptoms, prevention techniques, and cross-species dangers.

• Collect, analyze, and interpret data.

• Identify appropriate communication media and messages.

• Develop long-term plans to move beyond the initial implementation phase and develop and disseminate interventions to other countries.

• Pilot a community-based intervention in the area of emerging disease surveillance and detection within a grantee country office. Funds will be provided for materials, training, and a workshop in this area. It is envisaged that this pilot will occur in Vietnam or India in response to concerns regarding avian influenza, or other possible emerging/reemerging diseases.

*Perinatal and Maternal Mortality Reduction:* This cooperative agreement will also focus on perinatal and maternal mortality reduction. The focus will be on ensuring quality emergency obstetrics care for women, creating strong referral systems in community-based health services, improving community-based reproductive health programs, and working with communities to address key barriers that prevent women from receiving health services related to maternal health. CDC's Division of Reproductive Health (DRH) and the Global AIDS Program (GAP) will use this cooperative agreement to further collaboration with grantees and to streamline their ability to implement international projects. The CDC envisages perinatal and maternal mortality reduction collaboration to initially begin in the countries of: Afghanistan, Tajikistan, Ethiopia, and Tanzania, as well as other countries in sub-Saharan Africa. Although final project sites will be determined in collaboration between the selected grantee and CDC advisors, applicants must have a demonstrated capacity in Afghanistan, Tajikistan, Ethiopia, Tanzania, and sub-Saharan Africa in this capacity.

Activities conducted under this cooperative agreement include but are not limited to:

• Develop, implement, and evaluate community-based approaches, including but not limited to capacity building, empowerment and other participatory approaches that promote maternal and child health.

• Implement a participatory model of community mobilization; examine the capacity of the existing infrastructure to respond to reproductive health needs; and address issues identified by communities (*e.g.*, assessing the need for maternity waiting homes for the at-risk patient).

• Implement maternal and infant health community surveillance systems.

• Survey and evaluate special populations, *e.g.*, adolescents, refugees and HIV-infected population.

• Analyze and define the parameters of reproductive health programs.

• Review quality of care provided in maternal child health clinics (*e.g.*, clinic management, patient flow analysis).

• Expand and improve Prevention of Mother to Child HIV Transmission (PMTCT) services.

**Note:** Other activities may be included in this cooperative agreement in the future, pending the availability of funds. Although funding may not be available at this time, the selected grantee should have the capacity and intent to engage in these future activities. Funding may be provided in a supplemental manner for the following activities. Following federal protocols this would be limited to a total for all supplemental activities of twenty-five percent of the total base amount per annum.

*Safe Water Systems (SWS)/ Environmental Health Practice:*

The safe water systems/environmental health practice component of this announcement will work on several small discrete projects determined in cooperation by the CDC and the selected grantee. Projects will focus on working to develop the capacity to detect and monitor emerging diseases as well as bacterial, foodborne, and waterborne illnesses. Collaboration will also include the implementation of point-of-use interventions including Safe Water System (SWS) approaches and SWS trainings in both routine and emergency situations. The grantee may expand these activities to include partnering with other organizations in hand hygiene and SWS design.

The selected grantee will also conduct environmental health practice projects. These projects may include providing the technical assistance and expertise needed to develop sustainable environmental health programs to ensure the identification and control of environmental conditions contributing to disease. The Community Environmental Health Assessment (CEHA) is one such process that builds environmental health risk monitoring and develops local environmental health capacity. Although final project sites will be determined in collaboration between the selected grantee and CDC advisors, initial environmental health practice project sites may focus on Latin America.

Therefore, applicants must have a demonstrated capacity in environmental work in Latin America.

Activities conducted under this area of the cooperative agreement include but are not limited to:

• Strengthen collaboration between epidemiology, laboratory, and environmental health services to monitor environmental and health risks.

• Identify and strengthen local and national laboratory capacity.

• Develop strategies to promote and strengthen community participation in community-based environmental health and general health assessments.

• Develop local environmental health risk monitoring systems.

• Strengthen health surveillance activities at the primary level in communities.

• Collect, organize, analyze, and interpret health and environmental data.

*Early Childhood Health and Development:* This cooperative agreement will also seek to improve the health and development of orphaned and vulnerable preschool-aged children through interventions provided at a locally organized and managed daycare center that can be replicated in other communities and sustained through community resources. In areas of the world heavily impacted by the HIV/AIDS epidemic, young children are often part of families in which one or both parents have died. Preschool aged children are particularly vulnerable to the lack of adequate physical, cognitive, and socioemotional nurturing. With a loss of parents, and a breakdown of household structures, many communities have resorted to forming daycare centers, run by widows or adolescent orphans. If properly staffed

and resourced, these centers can provide much for attending young children including nutrition, developmental stimulation, and emotional support. Such nutrition, development, and emotional support can have a large impact in the overall health of the child and may impact childhood mortality rates. Integrated with the socio-emotional development of the child are several health interventions including: nutrition, health assessment, deworming (anti-helmentics), and other basic health interventions. The goal of this project will be to determine whether community daycare centers can provide interventions and services that promote the health and development of young children in resource-poor settings in a cost-effective and sustainable manner. Although final project sites will be determined in collaboration between the selected grantee and CDC advisors, an initial project site may include Kenya. Therefore, applicants must have a demonstrated capacity in Kenya, in education and child development.

Activities conducted under this cooperative agreement include but are not limited to:

- Assess and evaluate the developmental and health status of pre-school aged children in HIV/AIDS impacted households in a pilot community.
- Evaluate whether developmental and health parameters of orphaned and vulnerable children improve with participation in a community daycare center.
- Establish a minimum package of interventions in a community daycare center, that includes health, cognitive, and socioemotional development interventions.
- Determine whether effective interventions for improving early childhood development and health can be modified to be delivered by minimally trained individuals and can utilize available local materials.
- Identify appropriate local partners.
- Conduct evaluation and monitoring of projects, including a cost-benefit analysis.

In a cooperative agreement, CDC staff is substantially involved in the program activities, above and beyond routine grant monitoring.

CDC Activities for this cooperative agreement include, but are not limited to:

- Determining project site locations and length of implementation.
- Assessing current disease detection capacity and public health infrastructure in pilot locations and planning resource appropriate interventions.
- Creating evidence-based tools/practices for emerging/reemerging diseases.
- Developing plans to implement sustainable collaborations in human disease outbreak surveillance program(s).
- Identifying ways to strengthen local and national laboratory capacity.
- Piloting a Global Disease Detection community-based intervention within a grantee country.
- Collaborating on, developing, implementing, training for, and integrating perinatal and maternal mortality surveillance systems at the local level.
- Training and implementation assistance on Safe Water System (SWS) approaches.
- Collaboration in conducting Community Environmental Health Assessments (CEHA), and determining appropriate next steps.
- Establishing a minimum package of early childhood health and development interventions in a community daycare center.

## II. Award Information

*Type of Award:* Cooperative Agreement. CDC involvement in this program is listed in the Activities Section above.

*Fiscal Year Funds:* 2005.

*Approximate Total Funding:* $100,000.

$50,000 for Global Disease Detection and $50,000 for Perinatal and Maternal Mortality Reduction.

*Approximate Number of Awards:* One.

*Approximate Average Award:* $100,000: $50,000 for Global Disease Detection Activities and $50,000 for Perinatal and Maternal Mortality Reduction Activities. (This amount is for the first budget period and includes direct and indirect costs).

*Floor of Award Range:* None.

*Ceiling of Award Range:* $50,000 for Global Disease Detection and $50,000 for Perinatal and Maternal Mortality Reduction Activities (For the first 12 month budget period).

*Anticipated Award Date:* August 1, 2005.

*Budget Period Length:* 12 months.

*Project Period Length:* Five years.

Throughout the project period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the Federal Government.

## III. Eligibility Information

### *III.1. Eligible applicants*

- Applications may be submitted by public and private nonprofit and for profit organizations, and by governments and their agencies, such as: Public nonprofit organizations; private nonprofit organizations; for profit organizations; small, minority, women-owned businesses; universities; colleges; research institutions; hospitals; community-based organizations; and faith-based organizations that possess the experience and ability to select and manage these projects.

### *III.2. Cost Sharing or Matching*

Matching funds are not required for this program.

### *III.3. Other*

If you request a funding amount greater than the ceiling of the award range, your application will be considered non-responsive, and will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

*Special Requirements:* Eligible applicants must have a history of experience and collaboration in the following areas: Global Disease Detection (GDD), Perinatal and Maternal Mortality Reduction, Safe Water Systems (SWS)/Environmental Health Practice, and Early Childhood Health and Development.

Applicants must also follow the necessary procurement and grants and reporting guidelines established by CDC. In addition, eligible applicants will be a legal entity with approval to work, and memoranda of understanding (MOUs) with Ministries of Health (MOH) in: Vietnam, Afghanistan, Ethiopia, Tajikistan, Tanzania, Kenya, and India. Initial areas of collaboration include these countries and therefore the grantee must have ten years of experience and legal authority to work in these countries. For environmental health practice projects, the grantee must also demonstrate environmental capacity in Latin America through evidence and history of related environmental projects.

CDC seeks to expand its global capacity through an NGO partnership in an organization that has a strong international presence. Project findings in one country may be translated and implemented in other settings; therefore the partnering organization must have a worldwide network that includes resident staff presence in at least 60 countries worldwide.

Eligible grantees must also have demonstrated experience working at a community-based level in a resource challenged environment including experience in settings of extreme poverty and working with disenfranchised individuals. Eligible entities must also possess surveillance capacity with permanent staff on the ground, including capacity at the local, district, and national level.

In addition for project specific portions, eligible entities must:

*Global Disease Detection (GDD):* In addition to previously discussed areas, the selected partnering organization must demonstrate proficiency in the following areas:

- In-depth knowledge of the domestic situation in the selected countries including but not limited to experience in: Education, health, and development.
- A broad international knowledge base with global experience in areas such as: Health, HIV/AIDS, Emergency Humanitarian Assistance, and Education.
- Ability to work with local partners on areas of Information, Education, and Communication (IEC) as well as Behavioural Change Communication (BCC).
- Ability to identify and implement projects within established infrastructure, thus avoiding the creation of a vertical program.
- Capacity to carefully assess public health infrastructure challenges such as the availability of personnel involved in field epidemiology and public health laboratory functioning.

*Perinatal and Maternal Mortality Reduction:* In addition to previously discussed areas, the selected partnering organization must demonstrate proficiency in the following areas:

- Experience operating from a community to health facility, rather than a facility to community approach so that the local community and its needs and concerns are incorporated from the inception of the project.
- Experience in both community organization and health promotion in reducing maternal and perinatal mortality and promoting women and newborn health.

*Safe Water Systems (SWS)/ Environmental Health Practice:* In addition to previously discussed areas, the selected partnering organization must demonstrate proficiency in the following areas:

- Capacity to detect and monitor emerging diseases as well as bacterial, foodborne, and waterborne illnesses in settings of extreme poverty with disenfranchised individuals.
- Demonstrated experience with SWS in both routine and emergency situations.
- Familiarity with the SWS and training other organizations and individuals in hand hygiene and SWS.
- Familiarity in designing and implementing SWS.
- Pre-existing agreements to operate in this area with necessary local, and regional authorities.
- Experience in strengthening local/ regional/national environmental health service infrastructure.
- Experience in environmental risk monitoring, and community involvement, including building local environmental health capacity.

*Early Childhood Health and Development:* In addition to previously discussed areas, the selected partnering organization must demonstrate proficiency in the following areas:

- Capacity in educational and health programming including experience in working in settings of extreme poverty and working with disenfranchised individuals.
- Experience working with community-level organizations to address educational, health and developmental needs.
- Capacity in addressing the impact of HIV/AIDS on education programs.
- Training local caregivers and other organizations in education, health, and development.
- Evaluation and monitoring capacity in education, health and development.

If your application is incomplete or non-responsive to the special requirements listed in this section, it will not be entered into the review process. You will be notified that your application did not meet submission requirements.

- Late applications will be considered non-responsive. See section ''IV.3. Submission Dates and Times'' for more information on deadlines.
- **Note:** Title 2 of the United States Code Section 1611 states that an organization described in Section 501(c)(4) of the Internal Revenue Code that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

## IV. Application and Submission Information

### *IV.1. Address To Request Application Package*

To apply for this funding opportunity use application form PHS 5161–1.

*Electronic Submission:* CDC strongly encourages you to submit your application electronically by utilizing the forms and instructions posted for this announcement on *http://www.Grants.gov*, the official Federal agency wide E-grant Web site. Only applicants who apply online are permitted to forego paper copy submission of all application forms.

*Paper Submission:* Application forms and instructions are available on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm.*

If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO–TIM) staff at: 770–488–2700. Application forms can be mailed to you.

### IV.2. Content and Form of Submission

Application

*Electronic Submission:* You may submit your application electronically at: *http://www.grants.gov.* Applications completed online through Grants.gov are considered formally submitted when the applicant organization's Authorizing Official electronically submits the application to *http://www.grants.gov.* Electronic applications will be considered as having met the deadline if the application has been submitted electronically by the applicant organization's Authorizing Official to Grants.gov on or before the deadline date and time.

It is strongly recommended that you submit your grant application using Microsoft Office products (e.g., Microsoft Word, Microsoft Excel, etc.). If you do not have access to Microsoft Office products, you may submit a PDF file. Directions for creating PDF files can be found on the Grants.gov Web site. Use of file formats other than Microsoft Office or PDF may result in your file being unreadable by our staff.

CDC recommends that you submit your application to Grants.gov early enough to resolve any unanticipated difficulties prior to the deadline. You may also submit a back-up paper submission of your application. Any such paper submission must be received in accordance with the requirements for timely submission detailed in Section IV.3. of the grant announcement. The paper submission must be clearly marked: ''BACK-UP FOR ELECTRONIC SUBMISSION.'' The paper submission must conform with all requirements for non-electronic submissions. If both electronic and back-up paper submissions are received by the deadline, the electronic version will be considered the official submission.

*Paper Submission:* If you plan to submit your application by hard copy, submit the original and two hard copies of your application by mail or express delivery service. Refer to section IV.6. Other Submission Requirements for submission address.

You must submit a project narrative with your application forms. The narrative must be submitted in the following format:

- Maximum number of pages: 30. If your narrative exceeds the page limit, only the first pages which are within the page limit will be reviewed.
- Font size: 12 point unreduced.
- Double spaced.
- Paper size: 8.5 by 11 inches.
- Page margin size: One inch.
- Printed only on one side of page.
- Held together only by rubber bands or metal clips; not bound in any other way.

Your narrative should address activities to be conducted over the entire project period, and must include the following items in the order listed.

For Global Disease Detection and Perinatal and Maternal Mortality Reduction please provide a Plan, Methods, Objectives, Timeline, Participating Staff, Performance Measures, and a Budget Justification. This budget justification should be for the first year only and include direct as well as indirect costs. The budget justification will not be counted in the stated page limit.

For Safe Water System (SWS)/ Environmental Health Practice and Early Childhood Health and Development Activities, please provide a brief general description (one page per activity) that responds to the activities outlined, in the case that funding is provided in the future. Please also include evidence of appropriate eligible entity criteria.

For all subject areas, please provide a description of your demonstrated international capacity. Additionally, please describe your minimum ten years of experience in Kenya, Tanzania, Tajikistan, Afghanistan, Ethiopia, Vietnam, and India. Please mention your appropriate evidence and capacity in environmental projects in Latin America. Emphasis should be placed on your international network, including a description on your resident staff in a minimum of sixty countries worldwide.

Additional information may be included in the application appendices. The appendices will not be counted toward the narrative page limit. This additional information includes: Memoranda of Understanding (MOUs) with Ministries of Health, Curriculum Vitaes, Resumes, Organizational Charts, Letters of Support, and additional reporting requirement information.

You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711.

For more information, see the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcommt.htm.* If your application form does not have a DUNS number field, please write your DUNS number at the top of the first page of your application, and/or include your DUNS number in your application cover letter.

Additional requirements that may require you to submit additional documentation with your application are listed in section ''VI.2. Administrative and National Policy Requirements.''

*IV.3. Submission Dates and Times*

*Application Deadline Date:* July 6, 2005.

*Explanation of Deadlines:* Applications must be received in the CDC Procurement and Grants Office by 4 p.m. Eastern Time on the deadline date. If you submit your application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery by the closing date and time. If CDC receives your submission after closing due to: (1) Carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carriers guarantee. If the documentation verifies a carrier problem, CDC will consider the submission as having been received by the deadline.

This announcement is the definitive guide on application content, submission address, and deadline. It supersedes information provided in the application instructions. If your submission does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that you did not meet the submission requirements.

*Electronic Submission:* If you submit your application electronically with Grants.gov, your application will be electronically time/date stamped which will serve as receipt of submission. In turn, you will receive an e-mail notice of receipt when CDC receives the application. All electronic applications must be submitted by 4 p.m. eastern time on the application due date.

*Paper Submission:* CDC will not notify you upon receipt of your paper submission. If you have a question about the receipt of your application, first contact your courier. If you still have a question, contact the PGO–TIM staff at: 770–488–2700. Before calling, please wait two to three days after the submission deadline. This will allow time for submissions to be processed and logged.

*IV.4. Intergovernmental Review of Applications*

Executive Order 12372 does not apply to this program.

*IV.5. Funding restrictions*

Restrictions, which must be taken into account while writing your budget, are as follows:

- Funds may not be used for research.

*International Funding Restrictions:*

- Funds may be spent for reasonable program purposes, including personnel, travel, supplies, and services. Equipment may be purchased if deemed necessary to accomplish program objectives, however, prior approval by CDC officials must be requested in writing.
- The costs that are generally allowable in grants to domestic organizations are allowable to foreign institutions and international organizations, with the following exception: With the exception of the American University, Beirut and the World Health Organization, Indirect Costs will not be paid (either directly or through sub-award) to organizations located outside the territorial limits of the United States or to international organizations regardless of their location.
- The applicant may contract with other organizations under this program; however the applicant must perform a substantial portion of the activities (including program management and operations, and delivery of prevention services for which funds are required.)
- All requests for funds contained in the budget, shall be stated in U.S. dollars. Once an award is made, CDC will not compensate foreign grantees for currency exchange fluctuations through the issuance of supplemental awards.
- You must obtain annual audit of these CDC funds (program-specific audit) by a U.S.-based audit firm with international branches and current licensure/authority in-country, and in

accordance with International Accounting Standards or equivalent standard(s) approved in writing by CDC.

• A fiscal Recipient Capability Assessment may be required, prior to or post award, in order to review the applicant's business management and fiscal capabilities regarding the handling of U.S. Federal funds.

*HIV Programs (GAP) language that may also be applicable:*

• Funds received from this announcement will not be used for the purchase of antiretroviral drugs for treatment of established HIV infection (with the exception of nevirapine in Prevention of Mother-to-Child Transmission (PMTCT) cases and with prior written approval), occupational exposures, and non-occupational exposures and will not be used for the purchase of machines and reagents to conduct the necessary laboratory monitoring for patient care.

• No funds appropriated under this act shall be used to carry out any program of distributing sterile needles or syringes for the hypodermic injection of any illegal drug.

Prostitution and Related Activities

The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons.

Any entity that receives, directly or indirectly, U.S. Government funds in connection with this document (''recipient'') cannot use such U.S. Government funds to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides. A recipient that is otherwise eligible to receive funds in connection with this document to prevent, treat, or monitor HIV/AIDS shall not be required to endorse or utilize a multisectoral approach to combating HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the recipient has a religious or moral objection. Any information provided by recipients about the use of condoms as part of projects or activities that are funded in connection with this document shall be medically accurate and shall include the public health benefits and failure rates of such use.

In addition, any recipient must have a policy explicitly opposing prostitution and sex trafficking. The preceding sentence shall not apply to any ''exempt organizations'' (defined as the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency), but does apply to any non-governmental, non-exempt organization entity receiving U.S. Government funds from an exempt organization in connection with this document.

The following definition applies for purposes of this clause:

• Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

All recipients must insert provisions implementing the applicable parts of this section, ''Prostitution and Related Activities,'' in all subagreements under this award. These provisions must be express terms and conditions of the subagreement, must acknowledge that compliance with this section, ''Prostitution and Related Activities,'' is a prerequisite to receipt and expenditure of U.S. Government funds in connection with this document, and must acknowledge that any violation of the provisions shall be grounds for unilateral termination of the agreement prior to the end of its term. Recipients must agree that HHS may, at any reasonable time, inspect the documents and materials maintained or prepared by the recipient in the usual course of its operations that relate to the organization's compliance with this section, ''Prostitution and Related Activities.''

All prime recipients receiving U.S. Government funds (''prime recipients'') in connection with this document must certify compliance (pending OMB clearance) prior to actual receipt of such funds in a written statement referencing this document (*e.g.*, ''[Prime recipient's name] certifies compliance with the section, 'Prostitution and Related Activities.' '') addressed to the agency's grants officer. Such certifications by prime recipients are prerequisites to the payment of any U.S. Government funds in connection with this document.

Recipients' compliance with this section, ''Prostitution and Related Activities,'' is an express term and condition of receiving U.S. Government funds in connection with this document, and any violation of it shall be grounds for unilateral termination by HHS of the agreement with HHS in connection with this document prior to the end of its term. The recipient shall refund to HHS the entire amount furnished in connection with this document in the event it is determined by HHS that the recipient has not complied with this section, ''Prostitution and Related Activities.''

Other

If you are requesting indirect costs in your budget, you must include a copy of your indirect cost rate agreement. If your indirect cost rate is a provisional rate, the agreement should be less than 12 months of age.

Guidance for completing your budget can be found on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

**IV.6. Other Submission Requirements**

*Application Submission Address*

*Electronic Submission:* CDC strongly encourages applicants to submit electronically at: *http://www.Grants.gov.* You will be able to download a copy of the application package from *http://www.Grants.gov,* complete it offline, and then upload and submit the application via the Grants.gov site. E-mail submissions will not be accepted. If you are having technical difficulties in Grants.gov they can be reached by E-mail at *support@grants.gov* or by phone at 1–800–518–4726 (1–800–518–GRANTS). The Customer Support Center is open from 7 a.m. to 9 p.m. eastern time, Monday through Friday.

*Paper Submission:* If you chose to submit a paper application, submit the original and two hard copies of your application by mail or express delivery service to:

You may submit your application electronically at: *http://www.grants.gov,* OR submit the original and two hard copies of your application by mail or express delivery service to: Technical Information Management–PA #AA123, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

**V. Application Review Information**

*V.1. Criteria*

Applicants are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the performance goals stated in the ''Purpose'' section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be

submitted with the application and will be an element of evaluation.

*Evaluation Criteria:* The budget although not scored, will be reviewed. Questions to be considered include: Is the itemized budget for conducting the project, along with the justification, reasonable, and consistent with the stated objectives and planned program objectives?

Your application will be evaluated against the following criteria.

*Global Disease Detection and Perinatal and Maternal Mortality Reduction Plan* (35 Points): Is the plan adequate to carry out the proposed objectives?

Does the plan cover all necessary components?

How complete and comprehensive is the plan for the entire project period?

Does this plan include quantitative process and outcome measures?

Does the plan maintain adequate surveillance, monitoring, evaluation and data collection and analysis components?

*Overall Methods* (20 points): Are the proposed methods feasible? To what extent will they accomplish the program goals?

*Overall Reach and Capacity* (20 points): Eligible applicants will be a legal entity with approval to work and memoranda of understanding (MOUs) with Ministries of Health (MOH) in: Vietnam, Afghanistan, Ethiopia, Tajikistan, Tanzania, Kenya, and India. Initial areas of collaboration include these countries and therefore the grantee must have ten years of experience and legal authority to work in these countries.

Does the applicant have demonstrated capacity in the listed countries?

Does the applicant have MOUs and a minimum of ten years of experience in the listed countries?

Does the eligible entity have experience of working in environmental health practice in Latin America?

Does the applicant have programmatic capacity in all areas?

Does the applicant have demonstrated ability to implement public health interventions internationally in resource-poor and non-traditional settings?

Does the applicant have experience working with disenfranchised populations?

Does the applicant have worldwide reach and partnership for the dissemination of information, *i.e.*, a resident staff presence in at least sixty countries?

Does the applicant have sufficient community-based knowledge and practice?

Does the applicant have the ability/capacity to work with local on the ground staff to establish programs?

*Overall Personnel* (15 points): Do the staff members have the appropriate experience?

Are the staff roles clearly defined?

As described, will the staff be sufficient to accomplish the program goals?

*Safe Water Systems (SWS)/Environmental Health Practice/Early Childhood Health and Development Plan* (10 Points): Is the plan adequate to carry out the proposed objectives?

Does the plan cover all necessary components?

How complete and comprehensive is the plan for the entire project period?

Does this plan include quantitative process and outcome measures?

Does the plan maintain adequate surveillance, monitoring, evaluation and data collection and analysis components?

*V.2. Review and Selection Process*

Applications will be reviewed for completeness by the Procurement and Grants Office (PGO) staff, and for responsiveness by an objective review panel. Incomplete applications and applications that are non-responsive to the eligibility criteria will not advance through the review process. Applicants will be notified that their application did not meet submission requirements.

An objective review panel will evaluate complete and responsive applications according to the criteria listed in the ''V.1. Criteria'' section above. The review will occur by CDC Employees from outside the Office of Global Health. Applications will be funded in order by score and rank determined by the review panel.

*V.3. Anticipated Announcement and Award Dates*

August 1, 2005.

## VI. Award Administration Information

*VI.1. Award Notices*

Successful applicants will receive a Notice of Award (NoA) from the CDC Procurement and Grants Office. The NoA shall be the only binding, authorizing document between the recipient and CDC. The NoA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review by mail.

*VI.2. Administrative and National Policy Requirements*

Successful applicants must comply with the administrative requirements outlined in 45 CFR Part 74 as Appropriate. For more information on the Code of Federal Regulations, see the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

An additional Certifications form from the PHS5161–1 application needs to be included in your Grants.gov electronic submission only. Refer to *http://www.cdc.gov/od/pgo/funding/PHS5161–1Certificates.pdf.* Once the form is filled out attach it to your Grants.gov submission as Other Attachments Form.

The following additional requirements apply to this project:

- AR–4 HIV/AIDS Confidentiality Provisions.
- AR–5 HIV Program Review Panel Requirements.
- AR–6 Patient Care.
- AR–10 Smoke-Free Workplace Requirements.
- AR–12 Lobbying Restrictions.
- AR–13 Prohibition on Use of CDC Funds for Certain Gun Control Activities.
- AR–14 Accounting System Requirements.
- AR–15 Proof of Non-Profit Status.

Additional information on these requirements can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm.*

*VI.3. Reporting Requirements*

You must provide CDC with an original, plus two hard copies of the following reports:

1. Interim progress report, due no less than 90 days before the end of the budget period. The progress report will serve as your non-competing continuation application, and must contain the following elements:

a. Current Budget Period Activities Objectives.

b. Current Budget Period Financial Progress.

c. New Budget Period Program Proposed Activity Objectives.

d. Budget.

e. Measures of Effectiveness.

f. Additional Requested Information.

2. Financial status report and annual progress report, no more than 90 days after the end of the budget period.

3. Final financial and performance reports, no more than 90 days after the end of the project period.

These reports must be mailed to the Grants Management or Contract

Specialist listed in the ''Agency Contacts'' section of this announcement.

**VII. Agency Contacts**

We encourage inquiries concerning this announcement.

For general questions, contact: Technical Information Management Section, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341. Telephone: 770–488–2700.

For program technical assistance, contact: Aaron Rak, MA, Centers for Disease Control and Prevention, 1600 Clifton Road, MS D–58, Atlanta, Georgia 30333. Telephone: (404) 498.4486. E-mail: *arak@cdc.gov.* Patricia Riley, CNM MPH Project Officer, Office of Global Health, Centers for Disease Control and Prevention, 1600 Clifton Road, MS D–69, Atlanta, Georgia 30333. Telephone: (404) 639.1492. E-mail: *PRiley@cdc.gov.*

For financial, grants management, or budget assistance, contact: Steward Nichols, Grants Management Specialist, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341. Telephone: 770–488–2788. E-mail: *shn8@cdc.gov.*

**VIII. Other Information**

This and other CDC funding opportunity announcements can be found on the CDC Web site, Internet address: *http://www.cdc.gov.* Click on ''Funding'' then ''Grants and Cooperative Agreements.''

Dated: May 31, 2005.

**William P. Nichols,**

*Director, Procurement and Grants Office, Centers for Disease Control and Prevention.*

[FR Doc. 05–11152 Filed 6–3–05; 8:45 am]

BILLING CODE 4163–18–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Disease, Disability, and Injury Prevention and Control Special Emphasis Panel: Occupational Health and Safety Research; NIOSH Exploratory/Developmental Grant Program, and NIOSH Support Conferences and Scientific Meetings, Program Announcements 04–038, 04–030, and 05–005

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting:

*Name:* Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Occupational Health and Safety Research; NIOSH Exploratory/Developmental Grant Program, and NIOSH Support Conferences and Scientific Meetings, Program Announcements 04–038, 04–030, and 05–005.

*Times and Dates:* 1 p.m.–5 p.m., June 30, 2005 (Closed).

*Place:* Teleconference—Centers for Disease Control and Prevention/ National Institute for Occupational Safety and Health, 24 Executive Park Drive, NE., Room 1419, Atlanta, GA 30329, Telephone (404) 498–2556.

*Status:* The meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

*Matters to be Discussed:* The meeting will include the review, discussion, and evaluation of applications received in response to Occupational Health and Safety Research; NIOSH Exploratory/ Developmental Grant Program, and NIOSH Support Conferences and Scientific Meetings, Program Announcements 04–038, 04–030, and 05–005.

*Contact Person for More Information:* Pam Wilkerson, MPA, Scientific Review Administrator, National Institute for Occupational Safety and Health, CDC, 24 Executive Park Drive, NE., MS E–74, Atlanta, GA 30329, Telephone (404) 498–2556.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: May 27, 2005.

**Alvin Hall,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. 05–11158 Filed 6–3–05; 8:45 am]

BILLING CODE 4163–18–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Oak Ridge Y–12 Plant

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Department of Health and Human Services gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees at the Y–12 Plant, also known as the Oak Ridge Y–12 Plant, in Oak Ridge, Tennessee, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

*Facility:* Y–12 Plant.

*Location:* Oak Ridge, Tennessee.

*Job Titles and/or Job Duties:* All steamfitters, pipefitters, and plumbers.

*Period of Employment:* October, 1944 through December, 1957.

**FOR FURTHER INFORMATION CONTACT:** Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV*.

Dated: May 27, 2005.

**James D. Seligman,**

*Associate Director for Program Services, Centers for Disease Control and Prevention.*

[FR Doc. 05–11154 Filed 6–3–05; 8:45 am]

BILLING CODE 4163–19–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention Y–12 Plant—Tennessee Eastman Corporation

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Department of Health and Human Services gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees at the Y–12 Plant, also known as the Y–12 Plant—Tennessee Eastman Corporation, in Oak Ridge, Tennessee, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

*Facility:* Y–12 Plant—Tennessee Eastman Corporation.

*Location:* Oak Ridge, Tennessee.

*Job Titles and/or Job Duties:* All Tennessee Eastman Corporation employees that conducted laboratory equipment cleaning work.

*Period of Employment:* From 1943 through 1947.

**FOR FURTHER INFORMATION CONTACT:** Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV*.

Dated: May 25, 2005.

**James D. Seligman,**

*Associate Director for Program Services, Centers for Disease Control and Prevention.*

[FR Doc. 05–11153 Filed 6–3–05; 8:45 am]

**BILLING CODE 4163–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* OCSE–157 Child Support Enforcement Program Annual Data Report.

*OMB No.:* 0970–0177.

*Description:* The information obtained from this form will be used to report Child Support Enforcement activities to the Congress as required by law, to complete incentive measure and performance indicators utilized in the program, and to assist the Office of Child Support Enforcement in monitoring and evaluating State Child Support programs.

*Respondents:* The 50 States, the Territories and the Virgin Islands.

*Annual Burden Estimates:*

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| OCSE–157 | 54 | 1 | 7.0 | 378.0 |

*Estimated Total Annual Burden Hours:* 378.0

*Additional Information:*

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *grjohnson@acf.hhs.gov*.

*OMB Comment:*

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, e-mail address: *Katherine_T._Astrich@omb.eop.gov*.

Dated: May 30, 2005.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 05–11193 Filed 6–3–05; 8:45 am]

**BILLING CODE 4184–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* Evaluation of the Community Healthy Marriage Initiative.

*OMB No.:* New collection.

*Description:* The U.S. Department of Health and Human Services, Administration for Children and Families (ACF), is assisting states and local partners in improving child and family well-being by launching Community Healthy Marriage Initiatives (CHMIs) in several communities. Currently, several states are implementing CHMI demonstrations with support under section 1115 child support demonstration waivers. These projects are designed to promote child support enforcement objectives, including increasing parental responsibility and the financial well-being of children. Our project objective is to assess the effectiveness of community interventions designed to support healthy marriages by examining the way the projects operate and by evaluating the community impacts of these interventions on marital, child well-being and child support outcomes among low-income families. A unique feature of our study is the focus on evaluation of community-level approaches to encourage community changes in norms that increase support for healthy marriages.

All CHMI sites will receive an implementation evaluation that describes the nature of the community activities and their evolution over time. Primary data for the implementation evaluation will come from observations, interviews and records. This request is for semi-structured interviews and focus groups for the implementation evaluation.

In addition, an impact evaluation will take place in selected sites and will be integrated with the implementation evaluation. At a later date, comments will be sought on information collection for the impact evaluation. This evaluation will use detailed data collection through surveys to focus on the changes in marital, child well-being, and child support outcomes among low-income families in the community that result from CHMI activities. We will assess the impact of healthy marriage initiatives by comparing outcomes in the CHMI communities with similar outcomes in comparison communities that are well-matched to the project sites.

*Respondents:* Lead Project Staff, Service Provider Organization Staff, Key Community and Civic Stakeholders.

*Annual Burden Estimates:*

| Interview/respondent | Number of respondents | Average number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| CHMI Administrative Interviews | 160—25 one-on-one interviews plus 3 group interviews with 5 individuals per group (25 + 15) = 40 respondents per site. 40 respondents × 20 sites = 800 respondents/5 years = 160 respondents per year. | 2 visits, on average | 1 | 320 |
| CHMI Focus Groups | 80—20 focus group participants × 20 sites = 400 participants. 400 participants/5 years = 80 participants per year. | 1 | 1.5 | 120 |
| Total Respondent Burden | | | | 440 |

*Additional Information:*

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *grjohnson@acf.hhs.gov*.

*OMB Comment:*

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, e-mail address: *Katherine_T._Astrich@omb.eop.gov*.

Dated: May 27, 2005.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 05–11194 Filed 6–3–05; 8:45 am]

BILLING CODE 4184–01–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* Child Care and Development Fund Tribal Plan (Form ACF–118–A).

*OMB No.:* 0970–0198.

*Description:* The Child Care and Development Fund (CCDF) Tribal Plan serves as the agreement between the applicant (Indian Tribes, tribal consortia and tribal organizations) and the Federal government that describes how tribal applicants will operate CCDF Block Grant programs. The Tribal Plan provides assurances that the CCDF funds will be administered in conformance with legislative requirements. Federal regulations at 49 CFR parts 98 and 99 and other applicable instructions or guidelines issued by the Administration for Children and Families (ACF). Tribes must submit a new CCDF Tribal plan every two years in accordance with 45 CFR 98.17.

*Respondents:* Tribal CCDF Programs (265 in total).

*Annual Burden Estimates:*

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| CCDF Tribal Plan | 265 | 1 | 17.5 | 4,637.5 |
| CCDF Tribal Plan Amendments | 265 | 1 | 1.5 | 397.5 |

Estimated Total Annual Burden Hours: 5,035

**Note:** CCDF Tribal Plans are submitted biannually. This collection burden has been calculated to reflect an annual burden.

*Additional Information:*

Copies of the proposed collection may be obtained by writing to The Administration for Children and Families, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *grjohnson@acf.hhs.gov.*

*OMB Comment:*

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, e-mail address: *Katherine_T._Astrick@omb.eop.gov.*

Dated: May 31, 2005.

**Robert Sargis,**

*Reports Clearance Officer.*

[FR Doc. 05–11195 Filed 6–3–05; 8:45 am]

BILLING CODE 4184–01–M

## DEPARTMENT OF HEALTH & HUMAN SERVICES

### Administration for Children and Families

### Administration on Children, Youth and Families, Children's Bureau

*Funding Opportunity Title:* Model Development or Replication to Implement the CAPTA Requirement to Identify and Serve Substance Exposed Newborns.

*Announcement Type:* Initial.

*Funding Opportunity Number:* HHS–2005–ACF–ACYF–CB–0050.

*CFDA Number:* 93.551.

*Due Date for Applications:* Application is due August 5, 2005.

*Executive Summary:* The purpose of this funding opportunity is to provide financial support to develop or replicate and test a model of policies and procedures that implement the new provisions of the Child Abuse Prevention and Treatment Act (CAPTA) regarding substance exposed newborns. Applicants may choose to develop new models, replicate existing models or replicate key components of existing models of policies and procedures for identifying and serving families with children prenatally exposed to illegal drugs, and to test the effectiveness of the model in other settings. The projects funded under this priority area will incorporate features and components that hold promise for contributing to an expansion of the knowledge base about the development of effective policies and procedures for states and communities to use in identifying and providing services to these children and their families.

**I. Funding Opportunity Description**

Model Development or Replication to Implement the CAPTA Requirement to Identify and Serve Substance Exposed Newborns.

The purpose of this funding opportunity is to provide financial support to develop or replicate and test a model of policies and procedures that implement the new provisions of the Child Abuse Prevention and Treatment Act (CAPTA) regarding substance exposed newborns. Applicants may choose to develop new models, replicate existing models or replicate key components of existing models of policies and procedures for identifying and serving families with children prenatally exposed to illegal drugs, and to test the effectiveness of the model in other settings. The projects funded under this priority area will incorporate features and components that hold promise for contributing to an expansion of the knowledge base about the development of effective policies and procedures for states and communities to use in identifying and providing services to these children and their families.

*Priority Area:*

*Model Development or Replication To Implement the CAPTA Requirement To Identify and Serve Substance Exposed Newborns*

The purpose of this funding opportunity is to provide financial support to develop or replicate and test a model of policies and procedures that implement the new provisions of the Child Abuse Prevention and Treatment Act (CAPTA) regarding substance exposed newborns. Applicants may choose to develop new models, replicate existing models or replicate key components of existing models of policies and procedures for identifying and serving families with children prenatally exposed to illegal drugs, and to test the effectiveness of the model in other settings. The projects funded under this priority area will incorporate features and components that hold promise for contributing to an expansion of the knowledge base about the development of effective policies and procedures for states and communities to use in identifying and providing services to these children and their families.

*Background Information:* State and local child welfare agencies, hospitals and other health care facilities, substance abuse treatment and other community-based agencies have been serving families with children prenatally exposed to illegal drugs for many years. In addition, the Child Abuse Prevention and Treatment Act (CAPTA), recently reauthorized under the Keeping Children and Families Safe Act of 2003, established new legislative responsibilities regarding prenatally exposed infants.

Under the new CAPTA requirement, States must have in place:

''(ii) Policies and procedures (including appropriate referrals to child protection service systems and for other appropriate services) to address the needs of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure, including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition in such infants, except that such notification shall not be construed to:

(I) Establish a definition under Federal law of what constitutes child abuse; or

(II) Require prosecution for any illegal action;

(iii) The development of a plan of safe care for the infant born and identified as being affected by illegal substance abuse or withdrawal symptoms (106(b)(2)(A)(ii)(I) and (II) and (b)(2)(A)(iii))''.

Although there is a considerable body of knowledge regarding the impact of illegal drug use by pregnant women on their newborn children and a growing body of research on the benefits of early identification and appropriate service provision for children prenatally exposed to illegal drugs, information about successful policies and procedures for identifying and serving this population has only recently become available. Currently, both the National Center on Substance Abuse and Child Welfare and the Abandoned Infants Assistance Resource Center are undertaking efforts to identify State policies, practices, programs and related challenges in implementing the new CAPTA requirements.

The National Center on Substance Abuse and Child Welfare, a joint project of the Substance Abuse and Mental Health Services Administration's Center for Substance Abuse Treatment (SAMHSA/CSAT) and the Administration for Children and Families' Children's Bureau (ACF/CB), is conducting a task to collect information on State policies and practices and exemplary programs for working with families identified with substance exposed newborns. In addition, the Abandoned Infants Assistance Resource Center, is conducting a complementary project to examine policies and practices, identify promising practices and examine the impact of the new CAPTA legislation. (For information on the work of these two organizations, go to *http://www.ncsacw.samhsa.gov/* and *http://aia.berkeley.edu/*.) It is anticipated that both studies will identify examples of strong approaches, promising practices, and model policies and procedures that could be considered for replication under this grant program. However, other models may be developed or selected for replication.

Applications for grants under this priority area must explain why a new model is being developed, or, if a replication, why that model was chosen. The model and its key components must be described in detail. Applicants must propose to develop or replicate a policy and procedural model that is useful, effective, and positive in its approach to identifying these newborns and working with other relevant systems in establishing a safe care plan for children.

*Need/Rationale:* CAPTA was reauthorized in June 2003 as part of the Keeping Children and Families Safe Act of 2003. A number of new requirements were added for State Child Protective Services (CPS) agencies including the requirement that States have policies and procedures in place for the referral to CPS of substance exposed newborns and the development of a plan of safe care for these children. This new requirement is especially significant, given that it has been estimated that more than 50% of child welfare cases have parental substance abuse as a contributing factor. In recent years,

some States have implemented procedures to deal with substance exposed newborns. In some States, the identification of a substance exposed newborn has required an automatic referral to CPS, while in other States, women giving birth to substance exposed newborns may have been subject to prosecution. Responses to the complex problems of substance exposed newborns have varied greatly from State to State from a minimal response to a punitive response. A comprehensive approach to addressing these issues should include developing appropriate mechanisms to identify the substance exposed newborns, ensuring the safety of the child, engaging parents in treatment, and fostering collaboration among child welfare, substance abuse, health care and other relevant community supports.

It is anticipated that the projects funded under this priority area will contribute to the body of knowledge regarding the development of effective State and local policies and procedures that ensure: (1) Appropriate and productive collaborations among child welfare, substance abuse and the health care communities, and other relevant community agencies, and (2) identification, early assessment and intervention for children and families. Models to be developed or replicated should be consistent with the new CAPTA requirements that call for policies and procedures that ensure notification of child protective services and the establishment of a plan of safe care to address the needs of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from pre-natal drug exposure. Model policies and procedures should also provide parents and other caregivers with treatment interventions and case management that ensure proper infant care. Special attention should be given to the development of effective policies and procedures to improve the ability of States to meet the Child and Family Services Reviews (CFSR) safety and well-being indicators and outcomes related to child maltreatment. The legislation requires that health care personnel notify CPS in the event of a substance exposed birth. Therefore, special attention should also be given to effective collaboration among multiple child serving agencies and organizations.

A unique feature of this priority area is that the first year of these projects is to be used for planning and developing the collaborative relationship among relevant agencies and programs. The projects are to be implemented and evaluated and findings are to be disseminated during the second and third years. The final report at the end of the third year must include a written product describing the model, the policies, and the evaluation of the project. At the end of the third year, there is potential for an additional two years of funding for the purposes of further dissemination and implementation of the project in other jurisdictions.

As a part of their proposal, applicants are required to describe their strategy for a 12-month planning phase for the development of the model or the replication of the existing model or the selected components, and their strategy for a 24-month implementation and evaluation phase. Applicants are not expected to describe their strategy for possible years four and five of funding for dissemination and implementation.

*Legislative Authority*

The Promoting Safe and Stable Families Program (Section 430, Title IV–B, subpart 2, of the Social Security Act) (42 U.S.C. 629a).

The Child Abuse Prevention and Treatment Act Section 105(b)(5) (42 U.S.C. 5106).

Public Law 100–505, the Abandoned Infants Act of 1988 as amended by the Keeping Children and Families Safe Act of 2003 (Pub. L. 108–36).

Projects funded under this announcement will be expected to:

1. Have the project fully functioning within 90 days following the notification of the grant award.

2. Participate if the Children's Bureau chooses to do a national evaluation or a technical assistance contract that relates to this funding announcement.

3. Submit all performance indicator data, program and financial reports in a timely manner, in recommended format (to be provided), and submit the final report on disk or electronically using a standard word-processing program.

4. Submit a copy of the final report, the evaluation report, and any program products to the National Clearinghouse on Child Abuse and Neglect Information, 330 C Street, SW., Washington, DC 20447, within 90 days of project end date. This is in addition to the standard requirement that the final program and evaluation report must also be submitted to the Grants Management Specialist and the Federal Project Officer.

5. Allocate sufficient funds in the budget to:

(a) Provide for the project director, the evaluator and other key partners to attend an annual 3-day grantees' meeting in Washington, DC.

(b) Provide for the project director, the evaluator and other key partners to attend an early kickoff meeting for grantees funded under this priority area to be held within the first three months of the project (first year only) in Washington, DC; and

(c) Provide for 10–15 percent of the proposed budget to project evaluation.

## II. Award Information

*Funding Instrument Type:* Grant.

*Anticipated Total Priority Area Funding:* $600,000.

*Anticipated Number of Awards:* 0 to 4.

*Ceiling on Amount of Individual Awards:* $250,000 per budget period.

*Average Projected Award Amount:* $150,000.

*Length of Project Periods:* 60-month project with five 12-month budget periods; Other.

*Explanation of Other:* In the FIRST budget period, the maximum Federal share of each project is not to exceed $150,000. In each SUBSEQUENT budget period, the maximum Federal share of each project is not to exceed $250,000. The projects awarded will be for a project period of 60 months. The initial grant award will be for a 12-month budget period. The award of continuation beyond each 12-month budget period will be subject to the availability of funds, satisfactory progress on the part of the grantee, and a determination that continued funding would be in the best interest of the government.

## III. Eligibility Information

*1. Eligible Applicants*

State governments,

County governments,

City or township governments,

Special district governments,

State controlled institutions of higher education,

Native American tribal governments (Federally recognized),

Native American tribal organizations (other than Federally recognized tribal governments),

Nonprofits having a 501(c)(3) status with the IRS, other than institutions of higher education,

Private institutions of higher education,

For-profit organization other than small businesses,

Small businesses.

*Additional Information on Eligibility:*

If the applicant is not the State/county child welfare/CPS agency, they should demonstrate a strong existing collaboration with the State/county child welfare/CPS agency that has the

authority/responsibility for developing and implementing the relevant policies, procedures and plans.

Non-profit and for-profit applicants should be hospitals serving the target population.

Applications should demonstrate strong collaboration between the relevant child welfare/CPS, substance abuse and health care organizations.

Collaborative and interdisciplinary efforts are acceptable, but applications should identify a primary applicant responsible for administering the grant.

Fatherhood organizations that are otherwise eligible to apply are eligible to apply.

*2. Cost Sharing/Matching*

Yes.

Matching/Cost-Sharing

Grantees must provide at least 10 percent of the total approved cost of the project. The total approved cost of the project is the sum of the ACF share and the non-Federal share. The non-Federal share may be met by cash or in-kind contributions, although applicants are encouraged to meet their match requirements through cash contributions. Therefore, a project requesting $150,000 in Federal funds (based on an award of $150,000 per budget period) must provide a match of at least $16,667 (10 percent of the total approved project costs). Grantees will be held accountable for commitments of non-Federal resources even if over the amount of the required match. Failure to provide the amount will result in disallowance of Federal dollars.

Cost-sharing will not be used as a preference and/or evaluation criterion in the review of applications.

*3. Other*

All applicants must have a Dun & Bradstreet number. On June 27, 2003 the Office of Management and Budget published in the **Federal Register** a new Federal policy applicable to all Federal grant applicants. The policy requires Federal grant applicants to provide a Dun & Bradstreet Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements on or after October 1, 2003. The DUNS number will be required whether an applicant is submitting a paper application or using the government-wide electronic portal (*http://www.Grants.gov*). A DUNS number will be required for every application for a new award or renewal/continuation of an award, including applications or plans under formula, entitlement and block grant programs, submitted on or after October 1, 2003.

Please ensure that your organization has a DUNS number. You may acquire a DUNS number at no cost by calling the dedicated toll-free DUNS number request line on 1–866–705–5711 or you may request a number on-line at *http://www.dnb.com.*

Non-profit organizations applying for funding are required to submit proof of their non-profit status.

Proof of non-profit status is any one of the following:

- A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code.
- A copy of a currently valid IRS tax exemption certificate.
- A statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earning accrue to any private shareholders or individuals.
- A certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status.
- Any of the items in the subparagraphs immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

When applying electronically we strongly suggest you attach your proof of non-profit status with your electronic application.

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

Disqualification Factors

Applications that exceed the ceiling amount will be considered non-responsive and will not be considered for funding under this announcement.

Any application that fails to satisfy the deadline requirements referenced in Section IV.3 will be considered non-responsive and will not be considered for funding under this announcement.

## IV. Application and Submission Information

*1. Address To Request Application Package*

ACYF Operations Center, c/o The Dixon Group, Inc. ATTN: Children's Bureau, 118 Q St., NE., Washington, DC 20002–2132.

*2. Content and Form of Application Submission*

Each application must contain the following items in the order listed:

Application for Federal Assistance (Standard Form 424). Follow the instructions below and those that accompany the form.

In Item 5 of Form 424, put DUNS number in ''Organizational DUNS:'' box.

In Item 5 of Form 424, include name, phone number, and, if available, email and fax numbers of the contact person.

In Item 8 of Form 424, check 'New.'

In Item 10 of Form 424, clearly identify the Catalog of Federal Domestic Assistance (CFDA) program title and number for the program for which funds are being requested as stated in this funding opportunity announcement.

In Item 11 of Form 424, identify the single funding opportunity the application addresses.

In Item 12 of Form 424, identify the specific geographic area to be served.

In Item 14 of Form 424, identify Congressional districts of both the applicant and project.

Budget Information Non-Construction Programs (Form 424A) and Budget Justification.

Follow the instructions provided here and those in Section V. Application Review Information. Note that Federal funds provided to States and services or other resources purchased with Federal funds may not be used to match project grants.

*Certifications/Assurances.* Applicants requesting financial assistance for non-construction projects must file the Standard Form 424B, ''Assurances: Non-Construction Programs.'' Applicants must sign and return the Standard Form 424B with their applications. Applicants must provide a certification regarding lobbying when applying for an award in excess of $100,000. Applicants must sign and return the certification with their applications.

Applicants must disclose lobbying activities on the Standard Form LLL when applying for an award in excess of $100,000. Applicants who have used non-Federal funds for lobbying activities in connection with receiving assistance under this announcement shall complete a disclosure form to report lobbying. Applicants must sign and return the disclosure form, if applicable, with their applications.

Applicants must make the appropriate certification regarding environmental

tobacco smoke. By signing and submitting the application, the applicant is providing the certification and need not mail back the certification with the applications.

If applicable, applicants must include a completed SPOC certification (Single Point of Contact) with the date of the SPOC contact entered in line 16, page 1 of the Form 424.

In implementing their projects, grantees are expected to comply with all applicable administrative regulations regarding extent or types of costs. Applicable DHHS regulations can be found in 45 CFR Part 74 or 92.

*Project Abstract/Summary (one-page maximum, double spaced).* Clearly mark this page with the applicant name as shown on item 5 of the Form 424, identify the competitive grant funding opportunity and the title of the proposed project as shown in item 11 and the service area as shown in item 12 of the Form 424. The summary description should not exceed 300 words.

Care should be taken to produce an abstract/summary that accurately and concisely reflects the proposed project. It should describe the objectives of the project, the approach to be used and the results or benefits expected.

*Project Description for Evaluation.* Applicants should organize their project description in this sequence: (1) Objectives and Need for Assistance; (2) Approach; (3) Organizational Profiles; (4) Budget and Budget Justification.

*Match.* Provide a letter of commitment verifying the actual amount of the non-Federal share of project costs (see Section III.2).

*Indirect cost rate agreement.* If claiming indirect costs, provide documentation that applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

*Letters of agreement and memoranda of understanding.* If applicable, include a letter of commitment or Memorandum of Understanding from each partner and/or sub-contractor describing their role, detailing specific tasks to be performed, and expressing commitment to participate if the proposed project is funded.

General Content and Form Information

The application limit is 75 pages total including all forms and attachments. Pages over this page limit will be removed from the application and will not be reviewed.

The Children's Bureau strongly prefers that the entire application (including all forms, assurances, and letters of commitment) be sent in one package.

To be considered for funding, each application must be submitted with the Standard Federal Forms (provided at the end of this announcement or through the electronic links provided) and following the guidance provided. The application must be signed by an individual authorized to act for the applicant agency and to assume responsibility for the obligations imposed by the terms and conditions of the grant award.

To be considered for funding, each applicant must submit one signed original and two additional copies of the application, including all forms and attachments, to the Application Receipt Point specified in the section titled Deadline at the beginning of the announcement. The original copy of the application must have original signatures.

The application must be typed, double spaced, printed on only one side, with at least ½ inch margins on each side and 1 inch at the top and bottom, using standard 12 Point fonts (such as Times New Roman or Courier). Pages must be numbered.

All copies of an application must be submitted in a single package, and a separate package must be submitted for each funding opportunity. The package must be clearly labeled for the specific funding opportunity that it is addressing.

Because each application will be duplicated, do not use or include separate covers, binders, clips, tabs, plastic inserts, maps, brochures, or any other items that cannot be processed easily on a photocopy machine with an automatic feed. Do not bind, clip, staple, or fasten in any way *separate subsections* of the application, including supporting documentation; however, each *complete* copy must be stapled securely in the upper left corner. Applicants are advised that the copies of the application submitted, not the original, will be reproduced by the Federal government for review.

*Tips for Preparing a Competitive Application.* It is essential that applicants read the entire announcement package carefully before preparing an application and include all of the required application forms and attachments. The application must reflect a thorough understanding of the purpose and objectives of the applicable legislation. Reviewers expect applicants to understand the goals of the legislation and the Children's Bureau's interest in each topic. A ''responsive application'' is one that addresses all of the evaluation criteria in ways that demonstrate this understanding. Applications that are considered to be ''unresponsive'' generally receive very low scores and are rarely funded.

The Children's Bureau's Web site (*http://www.acf.dhhs.gov/programs/cb*) provides a wide range of information and links to other relevant websites. Before you begin preparing an application, we suggest that you learn more about the mission and programs of the Children's Bureau by exploring the Web site.

*Organizing Your Application.* The specific evaluation criteria in Section V of this funding announcement will be used to review and evaluate each application. The applicant should address each of these specific evaluation criteria in the project description. Applicants should organize their project description in this sequence: (1) Objectives and Need for Assistance; (2) Approach; (3) Organizational Profiles; (4) Budget and Budget Justification; and should use the same headings as these criteria, so that reviewers can readily find information that directly addresses each of the specific review criteria.

*Project Evaluation Plan.* Project evaluations are very important. If you do not have the in-house capacity to conduct an objective, comprehensive evaluation of the project, then the Children's Bureau advises that you propose contracting with a third-party evaluator specializing in social science or evaluation, or a university or college, to conduct the evaluation. A skilled evaluator can assist you in designing a data collection strategy that is appropriate for the evaluation of your proposed project. Additional assistance may be found in a document titled ''Program Manager's Guide to Evaluation.'' A copy of this document can be accessed at: *http://www.acf.hhs.gov/programs/opre/other_resrch/pm_guide_eval/reports/pmguide/pmguide_toc.html.*

*Logic Model.* A logic model is a tool that presents the conceptual framework for a proposed project and explains the linkages among program elements. While there are many versions of the logic model, they generally summarize the logical connections among the needs that are the focus of the project, project goals and objectives, the target population, project inputs (resources), the proposed activities/processes/outputs directed toward the target population, the expected short- and long-term outcomes the initiative is designed to achieve, and the evaluation plan for measuring the extent to which proposed processes and outcomes actually occur. Information on the development of logic models is

available on the Internet at: *http://www.uwex.edu/ces/pdande/* or *http://www.extension.iastate.edu/cyfar/capbuilding/outcome/outcome_logicmdir.html.*

*Use of Human Subjects.* If your evaluation plan includes gathering data from or about clients, there are specific procedures that must be followed in order to protect their privacy and ensure the confidentiality of the information about them. Applicants planning to gather such data are asked to describe their plans regarding an Institutional Review Board (IRB) review. If applicable, applicants must include a completed Form 310, Protection of Human Subjects. For more information about use of human subjects and IRB's you can visit these Web sites: *http://www.hhs.gov/ohrp/irb/irb_chapter2.htm#d2* and *http://www.hhs.gov/ohrp/humansubjects/guidance/ictips.htm*

You may submit your application to us in either electronic or paper format. To submit an application electronically, please use the *http://www.Grants.gov/Apply* site. If you use Grants.gov, you will be able to download a copy of the application package, complete it off-line, and then upload and submit the application via the Grants.gov site. ACF will not accept grant applications via e-mail or facsimile transmission.

Please note the following if you plan to submit your application electronically via Grants.gov

- Electronic submission is voluntary but strongly encouraged.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.
- We recommend you visit Grants.gov at least 30 days prior to filing your application to fully understand the process and requirements. We encourage applicants who submit electronically to submit well before the closing date and time so that if difficulties are encountered an applicant can still send in a hard copy overnight. If you encounter difficulties, please contact the Grants.gov Help Desk at 1–800–518–4276 to report the problem and obtain assistance with the system.
- To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the SF 424 and all necessary assurances and certifications.
- Your application must comply with any page limitation requirements described in this program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Administration for Children and Families will retrieve your application from Grants.gov.
- We may request that you provide original signatures on forms at a later date.
- You may access the electronic application for this program on *www.Grants.gov*
- You must search for the downloadable application package by the CFDA number.

Applicants that are submitting their application in paper format should submit an original and two copies of the complete application. The original and each of the two copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative, have original signatures, and be submitted unbound.

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *www.acf.hhs.gov/programs/ofs/forms.htm.*

*Standard Forms and Certifications:*

The project description should include all the information requirements described in the specific evaluation criteria outlined in the program announcement under Section V Application Review Information. In addition to the project description, the applicant needs to complete all the standard forms required for making applications for awards under this announcement.

Applicants seeking financial assistance under this announcement must file the Standard Form (SF) 424, Application for Federal Assistance; SF–424A, Budget Information—Non-Construction Programs; SF–424B, Assurances—Non-Construction Programs. The forms may be reproduced for use in submitting applications. Applicants must sign and return the standard forms with their application

Applicants must furnish prior to award an executed copy of the Standard Form LLL, Certification Regarding Lobbying, when applying for an award in excess of $100,000. Applicants who have used non-Federal funds for lobbying activities in connection with receiving assistance under this announcement shall complete a disclosure form, if applicable, with their applications (approved by the Office of Management and Budget under control number 0348–0046). Applicants must sign and return the certification with their application

Applicants must also understand they will be held accountable for the smoking prohibition included within P.L. 103–227, Title XII Environmental Tobacco Smoke (also known as the PRO–KIDS Act of 1994). A copy of the **Federal Register** notice which implements the smoking prohibition is included with this form. By signing and submitting the application, applicants are providing the certification and need not mail back the certification with the application

Applicants must make the appropriate certification of their compliance with all Federal statutes relating to nondiscrimination. By signing and submitting the applications, applicants are providing the certification and need not mail back the certification form. Complete the standard forms and the associated certifications and assurances based on the instructions on the forms. The forms and certifications may be found at: *http://www.acf.hhs.gov/programs/ofs/forms.htm*

Applicants have the option of omitting from the application copies (not the original) specific salary rates or amounts for individuals specified in the application budget and Social Security Numbers, if otherwise required for individuals. The copies may include summary salary information

Those organizations required to provide proof of non-profit status, please refer to Section III.3.

Please see Section V.1 for instructions on preparing the full project description.

*3. Submission Dates and Times*

Application is due August 5, 2005.

*Explanation of Due Dates:*

The closing time and date for receipt of applications is referenced above. Applications received after 4:30 p.m. eastern time on the closing date will be classified as late.

*Deadline:* Applications shall be considered as meeting an announced deadline if they are received on or before the deadline time and date referenced in Section IV.6. Applicants

are responsible for ensuring applications are mailed or submitted electronically well in advance of the application due date.

Applications hand carried by applicants, applicant couriers, other representatives of the applicant, or by overnight/express mail couriers shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., eastern time, at the address referenced in Section IV.6., between Monday and Friday (excluding Federal holidays).

ACF cannot accommodate transmission of applications by facsimile. Therefore, applications transmitted to ACF by fax will not be accepted regardless of date or time of submission and time of receipt.

*Late Applications:* Applications that do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

Any application received after 4:30 p.m. eastern time on the deadline date will not be considered for competition.

Applicants using express/overnight mail services should allow two working days prior to the deadline date for receipt of applications. Applicants are cautioned that express/overnight mail services do not always deliver as agreed.

*Extension of deadlines:* ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, etc.) occur, or when there are widespread disruptions of mail service, or in other rare cases. A determination to extend or waive deadline requirements rests with the Chief Grants Management Officer.

Receipt acknowledgement for application packages will not be provided to applicants who submit their package via mail, courier services, or by hand delivery. However, applicants will receive an electronic acknowledgement for applications that are submitted via *http://www.Grants.gov*.

*Checklist:*

You may use the checklist below as a guide when preparing your application package.

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Project Abstract | See Sections IV.2 and V. | Found in Sections IV.2 and V | By application due date. |
| Project Description | See Sections IV.2 and V. | Found in Sections IV.2 and V | By application due date. |
| Budget Narrative/Justification | See Sections IV.2 and V. | Found in Sections IV.2 and V | By application due date. |
| SF424 | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm*. | By application due date. |
| SF–LLL Certification Regarding Lobbying | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm*. | By date of award. |
| Certification Regarding Environmental Tobacco Smoke. | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm*. | By date of award. |
| Assurances | See Section IV.2 | Found in Section IV | By date of award. |
| SF424A | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm*. | By application due date. |
| SF424B | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm*. | By application due date. |
| Proof of Non-Profit Status | See Section III.3 | Found in Section III.3 | By date of award. |
| Indirect Cost rate Agreement, if applicable. | See Section IV | Format described in IV | By application due date |
| Letters of commitment from partner organizations, if applicable. | See Section IV | Format described in IV | By application due date. |
| Non-Federal Commitment Letter | See Section III.2 | See Section III.2 | By date of award. |

*Additional Forms:*

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

| What to submit | Required content | Location | When to submit |
|---|---|---|---|
| Survey for Private, Non-Profit Grant Applicants. | See form | May be found on *http://www.acf.hhs.gov/programs/ofs/forms.htm*. | By application due date |

*4. Intergovernmental Review*

State Single Point of Contact (SPOC)

This program is covered under Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' and 45 CFR Part 100, ''Intergovernmental Review of Department of Health and Human Services Programs and Activities.'' Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of October 1, 2004, the following jurisdictions have elected to participate in the Executive Order process: Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New York, North Dakota, Rhode Island, South Carolina, Texas, Utah, West Virginia, Wisconsin, American Samoa, Guam, North Mariana Islands, Puerto Rico, and Virgin Islands. As these jurisdictions have elected to participate in the Executive Order process, they have established SPOCs. Applicants from participating jurisdictions should contact their SPOC, as soon as possible, to alert them of prospective applications and receive instructions. Applicants must submit all required materials, if any, to the SPOC and indicate the date

of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2).

A SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards. SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations which may trigger the ''accommodate or explain'' rule.

When comments are submitted directly to ACF, they should be addressed to the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade SW., 4th floor, Washington, DC 20447.

Although the remaining jurisdictions have chosen not to participate in the process, entities that meet the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, etc. does not have a SPOC. Therefore, applicants from these jurisdictions, or for projects administered by Federally-recognized Indian Tribes, need take no action in regard to E.O. 12372.

The official list, including addresses, of the jurisdictions elected to participate in E.O. 12372 can be found on the following URL: *http://www.whitehouse.gov/omb/grants/spoc.html*.

*5. Funding Restrictions*

Grant awards will not allow reimbursement of pre-award costs.

Construction is not an allowable activity or expenditure under this solicitation.

*6. Other Submission Requirements*

*Submission by Mail:* An applicant must provide an original application with all attachments, signed by an authorized representative and two copies. Please see Section IV.3 for explanation of due dates. Applications should be mailed to: ACYF Operations Center, c/o The Dixon Group, Inc., 118 Q St., NE., Washington, DC 20002–2132, Attention: Children's Bureau.

*Hand Delivery:* An applicant must provide an original application with all attachments signed by an authorized representative and two copies. The application must be received at the address below by 4:30 p.m. eastern time on or before the closing date. Applications that are hand delivered will be accepted between the hours of 8 a.m. to 4:30 p.m. eastern time, Monday through Friday. Applications should be delivered to: ACYF Operations Center, c/o The Dixon Group, Inc., 118 Q St., NE., Washington, DC 20002–2132, Attention: Children's Bureau.

*Electronic Submission:* Please see Section IV.2 for guidelines and requirements when submitting applications electronically via *http://www.Grants.gov.*

## V. Application Review Information

*The Paperwork Reduction Act of 1995 (Pub. L. 104–13)*

Public reporting burden for this collection of information is estimated to averag 40 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed and reviewing the collection information.

The project description is approved under OMB control number 0970–0139 which expires April 30, 2007.

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.

1. Criteria

General Instructions

ACF is particularly interested in specific project descriptions that focus on outcomes and convey strategies for achieving intended performance. Project descriptions are evaluated on the basis of substance and measurable outcomes, not length. Extensive exhibits are not required. Cross-referencing should be used rather than repetition. Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant funded activity should be placed in an appendix. Pages should be numbered and a table of contents should be included for easy reference.

Introduction

Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions while being aware of the specified evaluation criteria. The text options give a broad overview of what your project description should include while the evaluation criteria identifies the measures that will be used to evaluate applications.

Project Summary/Abstract

Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance

Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Approach

Outline a plan of action that describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors that might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished.

When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates.

If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any ''collection of information that is conducted or sponsored by ACF.''

List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Organizational Profiles

Provide information on the applicant organization(s) and cooperating partners, such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information. If the applicant is a non-profit organization, submit proof of non-profit status in its application.

The non-profit agency can accomplish this by providing: (a) A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code; (b) a copy of a currently valid IRS tax exemption certificate, (c) a statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals; (d) a certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status, (e) any of the items immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

Budget and Budget Justification

Provide a budget with line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. Also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

General

Use the following guidelines for preparing the budget and budget justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. ''Federal resources'' refers only to the ACF grant for which you are applying.

''Non Federal resources'' are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: first column, object class categories; second column, Federal budget; next column(s), non-Federal budget(s), and last column, total budget. The budget justification should be a narrative.

Personnel

*Description:* Costs of employee salaries and wages.

*Justification:* Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time equivalent), annual salary, grant salary, wage rates, etc. Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits

*Description:* Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

*Justification:* Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel

*Description:* Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

*Justification:* For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ACF-sponsored workshops should be detailed in the budget.

Equipment

*Description:* ''Equipment'' means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of (a) the capitalization level established by the organization for the financial statement purposes, or (b) $5,000. (Note: Acquisition cost means the net invoice unit price of an item of equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation shall be included in or excluded from acquisition cost in accordance with the organization's regular written accounting practices.)

*Justification:* For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy or section of its policy which includes the equipment definition.

Supplies

*Description:* Costs of all tangible personal property other than that included under the Equipment category.

*Justification:* Specify general categories of supplies and their costs. Show computations and provide other information which supports the amount requested.

Contractual

*Description:* Costs of all contracts for services and goods except for those that belong under other categories such as equipment, supplies, construction, etc. Include third party evaluation contracts (if applicable) and contracts with secondary recipient organizations, including delegate agencies and specific project(s) or businesses to be financed by the applicant.

*Justification:* Demonstrate that all procurement transactions will be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients and subrecipients, other than States that are required to use Part 92 procedures, must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000).

Recipients might be required to make available to ACF pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc.

**Note:** Whenever the applicant intends to delegate part of the project to another agency, the applicant must provide a detailed budget and budget narrative for each delegate agency, by agency title, along with the required supporting information referred to in these instructions.

Other

Enter the total of all other costs. Such costs, where applicable and appropriate, may include but are not limited to insurance, food, medical and dental costs (noncontractual), professional services costs, space and equipment rentals, printing and publication, computer use, training costs, such as tuition and stipends, staff development costs, and administrative costs.

*Justification:* Provide computations, a narrative description and a justification for each cost under this category.

Indirect Charges

*Description:* Total amount of indirect costs. This category should be used only when the applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

*Justification:* An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, upon notification that an award will be made, it should immediately develop a tentative indirect cost rate proposal based on its most recently completed fiscal year, in accordance with the cognizant agency's guidelines for establishing indirect cost rates, and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. When an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgement that the applicant is accepting a lower rate than allowed.

Non-Federal Resources

*Description:* Amounts of non-Federal resources that will be used to support the project as identified in Block 15 of the SF–424.

*Justification:* The firm commitment of these resources must be documented and submitted with the application so the applicant is given credit in the review process. A detailed budget must be prepared for each funding source.

*Evaluation Criteria:*

The following evaluation criteria appear in weighted descending order. The corresponding score values indicate the relative importance that ACF places on each evaluation criterion; however, applicants need not develop their applications precisely according to the order presented. Application components may be organized such that a reviewer will be able to follow a seamless and logical flow of information (*e.g.* from a broad overview of the project to more detailed information about how it will be conducted).

In considering how applicants will carry out the responsibilities addressed under this announcement, competing applications for financial assistance will be reviewed and evaluated against the following criteria:

Approach (50 points)

In reviewing the approach, the following factors will be considered: (50 points)

(1) The extent to which there is a sound timeline for effectively implementing the proposed project, including major milestones and target dates. The extent to which the proposed project would develop an appropriate implementation plan during the first year of the project, complete the implementation of the new model or the replication of the existing model or selected components in a timely manner and conduct a thorough evaluation of its effectiveness within the next two years of the project time frame.

(2) The extent to which the proposed project would enhance the capacity of state and local child welfare agencies to develop and implement effective policies and procedures for identifying and coordinating timely services to substance exposed newborns and their families and through dissemination of findings from the projects, transfer knowledge into practice. The extent to which specific measurable outcomes will occur as a result of the proposed development or replication of model policies and procedures and promising practices. The extent to which there will be a strong relationship between the proposed model development or replication projects and improved outcomes for substance exposed newborns and their families.

(3) The extent to which there will be an effective administrative and organizational interface between the applicant and the appropriate State child welfare agencies, substance abuse treatment agencies, health care providers, and other community agencies. The extent to which there are appropriate letters of commitment from these partner organizations.

(4) The extent to which the application demonstrates a thorough understanding of the challenges and complexities of replicating a model that establishes policies and procedures for the identification, referral and service provision to substance exposed newborns and their families. The extent to which the application demonstrates a thorough understanding of the challenges that the proposed project will have in planning, implementing and evaluating the project and in maintaining fidelity to the original program or practice being replicated. The extent to which the applicant provides a sound plan explaining how the project would successfully overcome these challenges.

(5) The extent to which the proposed project will be capable of serving diverse populations.

(6) The extent to which the design of the proposed project reflects up-to-date knowledge from child welfare, child abuse and neglect and substance abuse research and literature. The extent to which the proposed model development or replication project is innovative and involves strategies that build on, or are an alternative to, existing strategies.

(7) The extent to which the project's evaluation plan would measure achievement of project objectives, customer satisfaction, acquisition of competencies, effectiveness of program services and project strategies, the efficiency of the implementation process, and the impact of the project. The extent to which the methods of evaluation would provide performance feedback, support periodic assessment of program progress and provide a sound basis for program adjustments. The extent to which the proposed evaluation plan would be likely to yield useful findings or results about effective strategies, and contribute to and promote evaluation research and evidence-based practices that could be used to guide model development or replication or testing in other settings. The extent to which applicants who do not have the in-house capacity to conduct an objective, comprehensive evaluation of the project present a sound plan for contracting with a third-party evaluator specializing in social science or evaluation, or a university or college to conduct the evaluation.

(8) The extent to which there is a sound plan for documenting project activities and results, including the development of a data collection infrastructure that is sufficient to support a methodologically sound and rigorous evaluation. The extent to which relevant data would be collected. The extent to which there is a sound plan for collecting these data, securing informed consent and implementing an Institutional Review Board (IRB) review, if applicable.

(9) The extent to which there is a sound plan for developing useful products during the proposed project and a reasonable schedule for developing these products. The extent to which the intended audience (*e.g.*, State and local officials, researchers, policymakers, and practitioners) for product dissemination is comprehensive and appropriate. The extent to which the dissemination plan includes appropriate mechanisms and forums that would effectively convey the information and support successful model development or replication by other interested agencies.

(10) The extent to which there is a sound plan for continuing this project beyond the period of Federal funding.

Organizational Profiles (20 points)

In reviewing the organizational profiles, the following factors will be considered: (20 points)

(1) The extent to which the application evidences sufficient experience and expertise in replicating and implementing model policies and procedures or approaches, especially in the area of service delivery to substance exposed newborns and their families; in supporting collaboration among the child welfare, substance abuse treatment, and health care communities, and other relevant community agencies; in culturally competent service delivery; and in administration, development, implementation, management, and evaluation of similar projects. The extent to which each participating organization (including partners and/or subcontractors) possesses the organizational capability to fulfill its assigned roles and functions effectively (if the application involves partnering and/or subcontracting with other agencies/organizations) in serving families involved with both the child welfare and substance abuse treatment communities.

(2) The extent to which the proposed project director and key project staff possess sufficient relevant knowledge, experience and capabilities to implement and manage a project of this size, scope and complexity effectively (*e.g.*, résumés). The extent to which the role, responsibilities and time commitments of each proposed project staff position, including consultants, subcontractors and/or partners, are clearly defined and appropriate to the successful implementation of the proposed project with respect to serving families with children prenatally exposed to illegal drugs.

(3) The extent to which there is a sound management plan for achieving the objectives of the proposed project on time and within budget, including clearly defined responsibilities, for accomplishing project tasks and ensuring quality. The extent to which the plan clearly describes the effective management and coordination of activities carried out by any partners, subcontractors and consultants (if applicable). The extent to which there would be a mutually beneficial relationship between the proposed project and other work planned, anticipated or underway with Federal assistance by the applicant.

Objectives and Need for Assistance (20 points)

In reviewing the objectives and need for assistance, the following factors will be considered: (20 points)

(1) The extent to which the application demonstrates an understanding of the requirements of the Child Abuse Prevention and Treatment Act (CAPTA), especially the requirements related to development of effective policies and procedures to identify and coordinate services to substance exposed newborns. The extent to which the applicant demonstrates an understanding of relevant program and service issues addressed in the Child and Family Services Reviews (CFSRs) regarding child safety and well-being. The extent to which the applicant demonstrates a clear understanding of the role of the State and local child protective service agencies and their responsibility under CAPTA, for receiving notification of substance exposed births and for coordinating with other community agencies, particularly health and substance abuse treatment agencies, to ensure the safety and well-being of children and families.

(2) The extent to which the application demonstrates a thorough understanding of child abuse and neglect, child welfare and substance abuse treatment issues and services needed, as well as the need for policies and procedures and approaches to identify and serve families with children who have been born prenatally exposed to illegal drugs.

(3) The extent to which the application presents a review of the relevant literature that reflects a clear understanding of the research on best practices and promising approaches as it relates to the proposed project. The extent to which the review of the literature sets a sound context and rationale for the project. The extent to which it provides evidence that the proposed project is innovative and, if successfully implemented and evaluated, likely to contribute to the knowledge base on effective policies and procedures regarding the identification and provision of services to substance exposed newborns and their families and enhancing collaboration among the child welfare, substance abuse, and health care communities.

(4) The extent to which the application presents a clear vision for the proposed model development or replication project to be planned, implemented, and evaluated. The extent to which the applicant makes a clear statement of the goals (end products of an effective project) and objectives (measurable steps for reaching these goals) of the proposed project. The extent to which these goals and objectives closely relate to the service needs of prenatally exposed newborns and the ability of agencies to replicate the critical components of successful service delivery policies and procedures.

(5) The extent to which the lessons learned through the proposed project would benefit state and local agencies in their efforts to develop an effective model of interagency collaboration in the identification, referral and service planning and provision for substance exposed newborns and their families.

(6) The extent to which the proposed project would develop a strong partnership among the child welfare, substance abuse treatment, and health care communities and other relevant community agencies to further the goal of improving the appropriate identification of, and service delivery to, substance exposed newborns and their families.

Budget and Budget Justification (10 points)

In reviewing the budget and budget justification, the following factors will be considered: (10 points)

(1) The extent to which the costs of the proposed project are reasonable and appropriate, in view of the activities to be conducted and expected results and benefits.

(2) The extent to which the applicant's fiscal controls and accounting procedures would ensure prudent use, proper and timely disbursement and accurate accounting of funds received under this program announcement.

2. Review and Selection Process

No grant award will be made under this announcement on the basis of an incomplete application.

Since ACF will be using non-Federal reviewers in the review process, applicants have the option of omitting

from the application copies (not the original) of specific salary rates or amounts for individuals specified in the application budget.

A panel of at least three reviewers (primarily experts from outside the Federal government) will use the evaluation criteria described in this announcement to evaluate each application. The reviewers will determine the strengths and weaknesses of each application, provide comments about the strengths and weaknesses and give each application a numerical score.

The results of the competitive review are a primary factor in making funding decisions. In addition, Federal staff conducts administrative reviews of the applications and, in light of the results of the competitive review, will recommend applications for funding to the ACYF Commissioner. ACYF reserves the option of discussing applications with other funding sources when this is in the best interest of the Federal government. ACYF may also solicit and consider comments from ACF Regional Office staff in making funding decisions. ACYF may take into consideration the involvement (financial and/or programmatic) of the private sector, national, or State or community foundations; a favorable balance between Federal and non-Federal funds for the proposed project; or the potential for high benefit from low Federal investment. ACYF may elect not to fund any applicants having known management, fiscal, reporting, programmatic, or other problems which make it unlikely that they would be able to provide effective services or effectively complete the proposed activity.

With the results of the peer review and the information from Federal staff, the Commissioner of ACYF makes the final funding decisions. The Commissioner may give special consideration to applications proposing services of special interest to the Government and to achieve geographic distributions of grant awards. Applications of special interest may include, but are not limited to, applications focusing on underserved or inadequately served clients or service areas and programs addressing diverse ethnic populations.

Approved but Unfunded Applications

Applications that are approved but unfunded may be held over for funding in the next funding cycle, pending the availability of funds, for a period not to exceed one year.

3. Anticipated Announcement and Award Dates

Applications will be reviewed during the Summer 2005. Grant awards will have a start date no later than September 30, 2005.

## VI. Award Administration Information

*1. Award Notices*

The successful applicants will be notified through the issuance of a Financial Assistance Award document which sets forth the amount of funds granted, the terms and conditions of the grant, the effective date of the grant, the budget period for which initial support will be given, the non-Federal share to be provided, and the total project period for which support is contemplated. The Financial Assistance Award will be signed by the Grants Officer and transmitted via postal mail.

Organizations whose applications will not be funded will be notified in writing.

*2. Administrative and National Policy Requirements*

Grantees are subject to the requirements in 45 CFR Part 74 (non-governmental) or 45 CFR Part 92 (governmental)

Direct federal grants, sub-award funds, or contracts under this program shall not be used to support inherently religious activities such as religious instruction, worship, or proselytization. Therefore, organizations must take steps to separate, in time or location, their inherently religious activities from the services funded under this program. Regulations pertaining to the prohibition of Federal funds for inherently religious activities can be found on the HHS Web site at *http://www.os.dhhs.gov/fbci/waisgate21.pdf.*

*3. Reporting Requirements*

*Program Progress Reports:* Semi-Annually.

*Financial Reports:* Semi-Annually.

Grantees will be required to submit program progress and financial reports (SF 269) throughout the project period. Program progress and financial reports are due 30 days after the reporting period. In addition, final programmatic and financial reports are due 90 days after the close of the project period.

## VII. Agency Contacts

*Program Office Contact:* Irene Bocella, Children's Bureau, 330 C Street, SW., Washington, DC 20447, phone: 202–205–1723, e-mail: *ibocella@acf.hhs.gov.*

*Grants Management Office Contact:* Peter Thompson, Grants Officer, Administration for Children and Families, Children's Bureau, 330 C Street, SW. Room 2070, Washington, DC 20447, phone: 202–401–4608, e-mail: *pathompson@acf.hhs.gov.*

## VIII. Other Information

Additional information about this program and its purpose can be located on the following Web site: *http://www.acf.hhs.gov/programs/cb/.*

For general information regarding this announcement please contact: ACYF Operations Center, c/o The Dixon Group, Inc. ATTN: Children's Bureau, 118 Q St., NE., Washington, DC 20002–2132, telephone: 866–796–1591.

*Notice:* Beginning with FY 2005, the Administration for Children and Families (ACF) will no longer publish grant announcements in the **Federal Register**. Beginning October 1, 2005, applicants will be able to find a synopsis of all ACF grant opportunities and apply electronically for opportunities via: *http://www.Grants.gov.* Applicants will also be able to find the complete text of *http://www.acf.hhs.gov/grants/index.html.*

Please reference Section IV.3 for details about acknowledgement of received applications.

Dated: May 25, 2005.

**Susan Orr,**

*Acting Commissioner, Administration on Children, Youth and Families.*

[FR Doc. 05–11196 Filed 6–3–05; 8:45 am]

BILLING CODE 4184–01–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Office of Community Services; Community Food and Nutrition Program

*Funding Opportunity Title:* Community Food and Nutrition Program.

*Announcement Type:* Initial.

*Funding Opportunity Number:* HHS–2005–ACF–OCS–EN–0018.

*CFDA Number:* 93.571.

*Due Date for Applications:* Application is due July 21, 2005.

*Executive Summary:*

*Authority:* The Community Services Block Grant Act (the Act), as amended, authorizes the Secretary of Health and Human Services to make funds available under several programs to support program activities that will result in direct benefits targeted to low-income people. This program announcement covers the grant authority found at

Section 681 of the Act, (Pub. L. 97–35), as amended by the Community Opportunities, Accountability, and Training and Educational Services Act of 1998 (Pub. L. 105–285). The Act authorizes the Secretary to award grants on a competitive basis to eligible agencies for community-based, local, statewide, and national programs (1) to coordinate private and public food assistance resources, wherever the grant recipient involved determines such coordination to be inadequate, to better serve low-income populations; (2) to assist low-income communities to identify potential sponsors of child nutrition programs and to initiate such programs in underserved or unserved areas; and (3) to develop innovative approaches at the State and local level to meet the nutrition needs of low-income individuals.

*Purpose:* The Administration for Children and Families, Office of Community Services (OCS), invites eligible agencies to submit competitive grant applications for the award of one cooperative agreement to support the Community Food and Nutrition Program's (CFNP) Nationwide Initiative: Youth Obesity, An American Crisis.

The problem of overweight children and adolescents is an American crisis. The Surgeon General reports that:

- In 2001–2002, 16 percent of children aged 6 to 19 years in the United States were overweight, and 31 percent were at risk for being overweight. This prevalence has nearly tripled for adolescents in the past 2 decades.
- Risk factors for heart disease, such as high cholesterol and high blood pressure, occur with increased frequency in overweight children and adolescents compared to children with a healthy weight.
- Type 2 diabetes, previously considered an adult disease, has increased dramatically in children and adolescents. Overweightness and obesity are closely linked to Type 2 diabetes.
- Overweight adolescents have a 70 percent chance of becoming overweight or obese adults.
- The most immediate consequence of being overweight, as perceived by the children themselves, is social discrimination. This is associated with poor self-esteem and depression.

Recently, Federal and State governments, industry, schools, and numerous organizations nationwide have taken comprehensive and ambitious actions to reverse the rapid rise in obesity among children and youth. In 2005, the Department of Health and Human Services, in collaboration with the U.S. Department of Agriculture, released ''Dietary Guidelines for Americans 2005'' (DGAs). The DGAs establish Federal nutrition standards for food and nutrition programs, including nutrition assistance programs.

ACF/OCS is seeking assistance, through a cooperative agreement, to identify, complement, coordinate, and promote the numerous youth-obesity programs nationwide. The goal will be to identify and compile data on youth obesity, specifically focusing on the prevalence of youth obesity throughout rural, urban, and suburban locations nationwide. Socioeconomic factors, demographics, income level and percentage of youth obesity in low-income households will be assessed. This information will be utilized to recommend intervention as warranted. The cooperative agreement will require active partnership between ACF/OCS and the successful applicant.

## I. Funding Opportunity Description

### *1. Purpose, Scope, Focus*

The Administration for Children and Families, Office of Community Services (OCS), invites eligible agencies to submit competitive grant applications for the award of one cooperative agreement to support the Community Food and Nutrition Program's (CFNP) Nationwide Initiative: Youth Obesity, An American Crisis.

The problem of overweight children and adolescents is an American crisis. The Surgeon General reports that:

- In 2001–2002, 16 percent of children aged 6 to 19 years in the United States were overweight, and 31 percent were at risk for being overweight. This prevalence has nearly tripled for adolescents in the past 2 decades.
- Risk factors for heart disease, such as high cholesterol and high blood pressure, occur with increased frequency in overweight children and adolescents compared to children with a healthy weight.
- Type 2 diabetes, previously considered an adult disease, has increased dramatically in children and adolescents. Overweightness and obesity are closely linked to Type 2 diabetes.
- Overweight adolescents have a 70 percent chance of becoming overweight or obese adults. As overweight or obese adults, they are at risk for a number of health problems including heart disease, type 2 diabetes, high blood pressure, and some forms of cancer.
- The most immediate consequence of being overweight, as perceived by the children themselves, is social discrimination. This is associated with poor self-esteem and depression.

Recently, Federal and State governments, industry, schools, and numerous organizations nationwide have taken comprehensive and ambitious actions to reverse the rapid rise in obesity among children and youth. In 2005, the Department of Health and Human Services, in collaboration with the U.S. Department of Agriculture, released ''Dietary Guidelines for Americans 2005'' (DGAs). The DGAs establish Federal nutrition standards for food and nutrition programs, including nutrition assistance programs. The Federal Government makes available health and obesity prevention grants and a major health insurance company now offers obesity prevention benefits.

ACF/OCS is seeking assistance, through a cooperative agreement, to identify, complement, coordinate, and promote the numerous youth obesity programs nationwide. The goal will be to identify and compile data on youth obesity, specifically focusing on the prevalence of youth obesity throughout rural, urban, and suburban locations nationwide. Socioeconomic factors, demographics, income level, and percentage of youth obesity in low-income households will be assessed. This information will be utilized to recommend intervention as warranted. The cooperative agreement will require active partnership between ACF/OCS and the successful applicant.

### *2. Authority*

The Community Services Block Grant (CSBG) Act (the Act) (Pub.L. 97–35), as amended, authorizes the Secretary of Health and Human Services to make funds available under several programs to support program activities that will result in direct benefits targeted to low-income people. This program announcement covers the grant authority found at Section 681 of the Act, as amended by the Community Opportunities, Accountability, and Training and Educational Services Act of 1998 (Pub. L. 105–285). The Act authorizes the Secretary to award grants on a competitive basis to eligible agencies for non-profit, faith-based, community-based, local, statewide, and national programs (1) to coordinate private and public food assistance resources, wherever the grant recipient involved determines such coordination to be inadequate, to better serve low-income populations; (2) to assist low-income communities to identify potential sponsors of child nutrition programs and to initiate such programs

in underserved or unserved areas; and (3) to develop innovative approaches at the State and local level to meet the nutrition needs of low-income individuals.

*3. The Cooperative Agreement*

This announcement uses a cooperative agreement as the vehicle for funding the nationwide initiative. A cooperative agreement is an assistance instrument for which substantial involvement is anticipated between the awarding office and the recipient during performance of the funded activity. Substantial involvement may include collaboration or participation by the designated awarding office staff in activities specified in the award and, as appropriate, decision-making at specified milestones related to performance. Potential types of substantial involvement under a cooperative agreement include, but are not limited to, collaborating in the design of a research protocol or a training or service delivery model; approving research protocols or analytical approaches or approving the initiation of a subsequent phase in a phased activity; training project staff in participating organizations; assisting in the evaluation of potential contractors; participating in the presentation of research results, including co-authorship of papers; or providing other assistance in program management or technical performance.

ACF/OCS and the recipient will each be responsible for particular duties and responsibilities throughout the project.

*Responsibilities of ACF/OCS:*

- Throughout the term of the cooperative agreement, provide the time and expertise of ACF/OCS to help the applicant implement the goals and objectives of the project. Specifically, ACF/OCS will organize periodic consultations and teleconferences to review planned activities, to share information, and to promote nationwide coordination;
- Provide to the applicant a complete list of current Community Food and Nutrition Program (CFNP) grantees;
- Organize a 2–3 day meeting in Washington, DC to discuss and finalize the major goals and objectives of the overall project and the fiscal year work plan, to exchange program information, and to share information on strategies for achieving the goals and objectives of the project;
- Review and comment on quarterly progress reports and other relevant materials prior to their finalization;
- Make available to the applicant program information and/or products from ACF/OCS activities that are available and relevant to the project;
- Promote the involvement of the applicant in meetings, conferences, and other initiatives to strengthen its knowledge and resource base for providing effective assistance to ACF/OCS and CFNP grantees;
- Provide consultation to the grantee with regard to the development of the work plan approaches to address problems that arise, and identification of areas needing technical assistance;
- Consult with and provide the grantee the data collection requirements of ACF/OCS, and keep the grantee informed of policy developments as they affect the implementation of the project;
- Provide timely review, comment and decisions on significant project documents;
- Work together to address issues or problems with regard to the grantee's ability to carry out the full range of activities included in the approved application in the most efficient and effective manner; and
- Promptly review written requests for approval of deviations from the project description or approved budget. Any changes that affect the terms and conditions of the grant award or revisions/amendments to the cooperative agreement or to the approved scope of activities will require prior written approval by the ACF Grants Management Officer.

*Responsibilities of the Grantee:*

- In collaboration with ACF/OCS, design, coordinate, and implement the project;
- Attend a 2–3 day meeting in Washington, DC to discuss and finalize the major goals and objectives of the overall project and the fiscal year work plan, exchange and share information on strategies for achieving the goals and objectives of the project;
- Establish subordinate objectives to guide the focus of their research based upon the needs assessed in the major objectives;
- Develop a CFNP database for use and maintenance by ACF/OCS;
- Implement activities described in the approved project description;
- Develop and implement work plans that will ensure that the services and activities included in the approved application address the goals and objectives of the approved project in an efficient, effective and timely manner;
- Submit regular semi-annual Financial Status (Standard Form 269) and progress reports that describe activities including, at a minimum, (a) information about the actions taken to implement the proposed project, and (b) the proposed plan for outcomes measurement and program evaluation of the activities supported with Federal funds;
- Work cooperatively and collaborately with ACF officials, other Federal agency officials conducting related activities, and other entities or organizations contracted by ACF to assist in carrying out the purposes of the Community Food and Nutrition Program; such cooperation and collaboration shall include, but not be limited to, providing requested financial and programmatic information, creating opportunities for interviews with agency officials and staff, and allowing on-site observation of activities supported under the cooperative agreement;
- Notify the Community Food and Nutrition Project Officer if revisions are needed to the cooperative agreement; and
- Consult with the Office of Community Services Project Officer in implementing the activities on an ongoing and frequent basis during each phase of the project.

*4. Definition of Terms*

*The following definitions apply:*

Budget Period

The interval of time into which a grant period of assistance (project period) is divided for budgetary and funding purposes.

Cooperative Agreement

An award instrument of financial assistance when substantial involvement is anticipated between the awarding agency of the Federal Government and the recipient during performance of the contemplated project. Substantial involvement may include collaboration or participation by the designated awarding office staff in activities specified in the award and, as appropriate, decision-making at specified milestones related to performance. The involvement may range from joint conduct of a project to awarding office approval prior to the recipient's undertaking the next phase of a project.

Eligible Entity

Public and private non-profit agencies, including organizations benefiting Indians and migrant and seasonal farm workers. Faith-based organizations and community-based organizations are eligible to apply for this Community Food and Nutrition Program grant.

Indian Tribe

A tribe, band, or other organized group of Native American Indians recognized in the State or States in which it resides, or considered by the Secretary of the Interior to be an Indian tribe or an Indian organization.

Innovative Project

One that departs from, or significantly modifies, past program practices and tests a new approach.

Migrant Farm Worker

An individual who works in agricultural employment of a seasonal or other temporary nature who is required to be absent from his/her place of permanent residence in order to secure such employment.

Non-profit Organization

Refers to an organization, including a faith-based or community-based organization, which meets the requirement for proof of non-profit status in the III. Eligibility Information 3. Other section of this announcement and has demonstrated experience in providing training to individuals and organizations on methods of effectively addressing the needs of low-income families and communities.

Poverty Income Guidelines

Guidelines published annually by the U.S. Department of Health and Human Services (HHS). HHS establishes the level of poverty defined as low-income for individuals and their families. The guideline information is posted on the Internet at the following address: *http://www.aspe.hhs.gov/poverty.*

Seasonal Farm Worker

Any individual employed in agricultural work of a seasonal or other temporary nature who is able to remain at his/her place of permanent residence while employed.

Project Period

The total time for which a project is approved for support, including any approved extensions.

Self-Sufficiency

A condition where an individual or family does not need, and is not eligible to receive, TANF assistance under Title I of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Part A of Title IV of the Social Security Act.)

Underserved Area

(As it pertains to child nutrition programs) A locality in which less than one-half of the low-income children eligible for assistance participate in any child nutrition program.

*5. Other*

*Mobilization of Resources*—There is no match requirement for the Community Food and Nutrition Program. However, ACF/OCS would like to mobilize as many resources as possible to enhance this nationwide initiative. The lack of a cost share or match will not affect application responsiveness or screening, review or scoring, or selection for funding.

*Administrative Costs/Indirect Costs*—There is no predetermined administrative cost ceiling for projects funded under this program. Indirect costs consistent with approved indirect cost rate agreements are allowable. Applicants should enclose a copy of the current approved rate agreement. However, it should be understood that indirect costs are part of, and not in addition to, the amount of funds awarded in the subject grant.

*Multiple Submittals*—There is no limit to the number of applications that can be submitted by an eligible applicant as long as each application is for a different project. However, no applicant will receive more than one grant.

*Repeat Grantee*—Applicants receiving ACF/OCS funds for CFNP projects completed within the last five years must submit with the application an abstract for each such project. The abstract should include the applicant's name, address, CFNP grant number and amount, the title of the project, and a summary of accomplishments.

**Priority Area 1**

*Description*

The Community Food and Nutrition Program—Nationwide Initiative is a national research project to study the impact of current CFNP projects on low-income communities, families, and children nationwide. The applicant selected to manage the Nationwide Initiative will be responsible for performing this task in coordination with the Office of Community Services.

**II. Award Information**

*Funding Instrument Type:* Cooperative Agreement.

*Federal Substantial Involvement With Cooperative Agreement:* This announcement uses a cooperative agreement as the vehicle for funding the nationwide initiative. A cooperative agreement is an assistance instrument for which substantial involvement is anticipated between the awarding office and the recipient during performance of the funded activity. Substantial involvement may include collaboration or participation by the designated awarding office staff in activities specified in the award and, as appropriate, decision-making at specified milestones related to performance. Potential types of substantial involvement under a cooperative agreement include, but are not limited to, collaborating in the design of a research protocol or a training or service delivery model; approving research protocols or analytical approaches or approving the initiation of a subsequent phase in a phased activity; training project staff in participating organizations; assisting in the evaluation of potential contractors; participating in the presentation of research results, including co-authorship of papers; or providing other assistance in program management or technical performance.

ACF/OCS and the recipient will each be responsible for particular duties and responsibilities throughout the project.

*Responsibilities of ACF/OCS:*

- Throughout the term of the cooperative agreement, provide the time and expertise of ACF/OCS to help the applicant implement the goals and objectives of the project. Specifically, ACF/OCS will organize periodic consultations and teleconferences to review planned activities, to share information, and to promote nationwide coordination;
- Provide to the applicant a complete list of current Community Food and Nutrition Program (CFNP) grantees;
- Organize a 2–3 day meeting in Washington, DC to discuss and finalize the major goals and objectives of the overall project and the fiscal year work plan, to exchange program information, and to share information on strategies for achieving the goals and objectives of the project;
- Review and comment on quarterly progress reports and other relevant materials prior to their finalization;
- Make available to the applicant program information and/or products from ACF/OCS activities that are available and relevant to the project;
- Promote the involvement of the applicant in meetings, conferences, and other initiatives to strengthen its knowledge and resource base for providing effective assistance to ACF/OCS and CFNP grantees;
- Provide consultation to the grantee with regard to the development of the work plan approaches to address problems that arise, and identification of areas needing technical assistance;
- Consult with and provide the grantee the data collection requirements

of ACF/OCS, and keep the grantee informed of policy developments as they affect the implementation of the project;

• Provide timely review, comment and decisions on significant project documents;

• Work together to address issues or problems with regard to the grantee's ability to carry out the full range of activities included in the approved application in the most efficient and effective manner; and

• Promptly review written requests for approval of deviations from the project description or approved budget. Any changes that affect the terms and conditions of the grant award or revisions/amendments to the cooperative agreement or to the approved scope of activities will require prior written approval by the ACF Grants Management Officer.

*Responsibilities of the Grantee:*

• In collaboration with ACF/OCS, design, coordinate, and implement the project;

• Attend a 2–3 day meeting in Washington, DC to discuss and finalize the major goals and objectives of the overall project and the fiscal year work plan, exchange and share information on strategies for achieving the goals and objectives of the project;

• Establish subordinate objectives to guide the focus of their research based upon the needs assessed in the major objectives;

• Develop a CFNP database for use and maintenance by ACF/OCS;

• Implement activities described in the approved project description;

• Develop and implement work plans that will ensure that the services and activities included in the approved application address the goals and objectives of the approved project in an efficient, effective and timely manner;

• Submit regular semi-annual Financial Status (Standard Form 269) and progress reports that describe activities including, at a minimum, (a) information about the actions taken to implement the proposed project, and (b) the proposed plan for outcomes measurement and program evaluation of the activities supported with Federal funds;

• Work cooperatively and collaborately with ACF officials, other Federal agency officials conducting related activities, and other entities or organizations contracted by ACF to assist in carrying out the purposes of the Community Food and Nutrition Program; such cooperation and collaboration shall include, but not be limited to, providing requested financial and programmatic information, creating opportunities for interviews with agency officials and staff, and allowing on-site observation of activities supported under the cooperative agreement;

• Notify the Community Food and Nutrition Project Officer if revisions are needed to the cooperative agreement; and

• Consult with the Office of Community Services Project Officer in implementing the activities on an ongoing and frequent basis during each phase of the project.

*Anticipated Total Priority Area Funding:* $236,019.

*Anticipated Number of Awards:* 1.

*Ceiling on Amount of Individual Awards Per Budget Period:* $236,019.

An application that exceeds the upper value of the dollar range specified will be considered non-responsive.

*Average Projected Award Amount Per Budget Period:* $236,019.

*Length of Project Periods:* 36-month project with three 12-month budget periods.

## III. Eligibility Information

### *1. Eligible Applicants*

Non-profits having a 501(c)(3) status with the IRS, public agencies, other than institutions of higher education; Non-profits that do not have a 501(c)(3) status with the IRS, public agencies, other than institutions of higher education; and State, county and local public agencies.

*Additional Information on Eligibility:*

Faith-based and community-based organizations are eligible to apply.

### *2. Cost Sharing/Matching*

No. There is no match requirement for the Community Food and Nutrition Program. However, OCS would like to mobilize as many resources as possible to enhance this nationwide initiative. While OCS supports and encourages applications submitted by applicants whose programs include a voluntary cost share, either cash or third party in-kind, the presence or level of a proposed voluntary cost share or match will not affect application responsiveness or screening, review or scoring, or selection for funding.

### *3. Other*

All applicants must have a Dun & Bradstreet number. On June 27, 2003 the Office of Management and Budget published in the **Federal Register** a new Federal policy applicable to all Federal grant applicants. The policy requires Federal grant applicants to provide a Dun & Bradstreet Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements on or after October 1, 2003. The DUNS number will be required whether an applicant is submitting a paper application or using the government-wide electronic portal (*http://www.Grants.gov*). A DUNS number will be required for every application for a new award or renewal/continuation of an award, including applications or plans under formula, entitlement and block grant programs, submitted on or after October 1, 2003.

Please ensure that your organization has a DUNS number. You may acquire a DUNS number at no cost by calling the dedicated toll-free DUNS number request line on 1–866–705–5711 or you may request a number on-line at *http://www.dnb.com*.

Non-profit organizations applying for funding are required to submit proof of their non-profit status.

Proof of non-profit status is any one of the following:

• A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code.

• A copy of a currently valid IRS tax exemption certificate.

• A statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earning accrue to any private shareholders or individuals.

• A certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status.

• Any of the items in the subparagraphs immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm*.

Disqualification Factors

Applications that exceed the ceiling amount will be considered non-responsive and will not be considered for funding under this announcement.

Any application that fails to satisfy the deadline requirements referenced in Section IV.3 will be considered non-

responsive and will not be considered for funding under this announcement.

## IV. Application and Submission Information

*1. Address To Request Application Package*

Catherine Beck, Administration for Children and Families, Office of Community Services' Operations Center, 1515 Wilson Boulevard, Suite 100, Arlington, VA 22209, Phone: 202–401–9352, Fax: 703–528–0716, e-mail: *OCSGRANTS@acf.hhs.gov*; URL: *http://www.lcgnet.com*.

*2. Content and Form of Application Submission*

*Application Content*—An original and two copies of each application are required. Each application must include the following components:

- *Table of Contents.* The Table of Contents must include page numbers.
- *Abstract of the Proposed Project.* Very brief, not to exceed 250 words. The abstract should be suitable for use in an announcement that the application has been selected for a grant award and that identifies the type of project, the target population and the major elements of the work plan
- *Completed Standard Form 424.* Must be signed by an official of the organization applying for the grant who has authority to obligate the organization legally.
- *Standard Form 424A.* Budget Information-Non-Construction Programs.
- *Narrative Budget Justification.* Justify each object class category required under Section B, Standard Form 424A. Applicants have the option of omitting from the application copies (not the original) of specific salary rates or amounts for individuals specified in the application budget.
- *Project Narrative.* A narrative that addresses issues described in Section V of this announcement, ''Application Review Information.''

*Application Format*—Submit application materials on white 8½ x 11 inch paper only. Do not use colored, oversized or folded materials. Please do not include organizational brochures or other promotional materials, slides, films, clips, etc. The font size may be no smaller than 12 pitch and the margins must be at least one inch on all sides. Number all application pages sequentially throughout the package, beginning with the abstract of the proposed project as page number one. Please present application materials either in loose-leaf notebooks or in folders with pages two-hole punched at the top center and fastened separately with a slide paper fastener.

*Page Limitation*—The application package including sections for the Table of Contents, Project Abstract, Project and Budget Narratives must not exceed 45 pages. The page limitation does not include the following attachments and appendices: Standard Forms for Assurances, Certifications, Disclosures and appendices. The page limitation also does not apply to any supplemental documents as required in this announcement.

*Required Standard Forms*—Applicants requesting financial assistance for a non-construction project must sign and return Standard Form 424B, Assurances: Non-Construction Programs with their applications. Applicants must provide a Certification Regarding Lobbying. Prior to receiving an award in excess of $100,000, applicants shall furnish an executed copy of the lobbying certification. Applicants must sign and return the certification with their application. Applicants must make the appropriate certification of their compliance with the requirements of the Pro-Children Act of 1994 as outlined in Certification Regarding Environmental Tobacco Smoke.

You may submit your application to us in either electronic or paper format.

To submit an application electronically, please use the *http://www.Grants.gov/Apply* site. If you use Grants.gov, you will be able to download a copy of the application package, complete it off-line, and then upload and submit the application via the Grants.gov site. ACF will not accept grant applications via e-mail or facsimile transmission.

Please note the following if you plan to submit your application electronically via Grants.gov:

- Electronic submission is voluntary, but strongly encouraged.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.
- To use Grants.gov, you, as the applicant, must have a DUNS number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the SF 424 and all necessary assurances and certifications.
- Your application must comply with any page limitation requirements described in this program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Administration for Children and Families will retrieve your application from Grants.gov.
- We may request that you provide original signatures on forms at a later date.
- You may access the electronic application for this program on *http://www.Grants.gov*.
- You must search for the downloadable application package by the CFDA number.

Applicants who are submitting their application in paper format should submit an original and two copies of the complete application. The original and each of the two copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative, have original signatures, and be submitted unbound.

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm*.

*Standard Forms and Certifications:*

The project description should include all the information requirements described in the specific evaluation criteria outlined in the program announcement under Section V Application Review Information. In addition to the project description, the applicant needs to complete all the standard forms required for making applications for awards under this announcement.

Applicants seeking financial assistance under this announcement must file the Standard Form SF 424, Application for Federal Assistance; SF 424A, Budget Information—Non-Construction Programs; SF 424B, Assurances—Non-Construction Programs. The forms may be reproduced for use in submitting applications. Applicants must sign and return the standard forms with their application.

Applicants must furnish prior to award an executed copy of the Standard Form LLL, Certification Regarding

Lobbying, when applying for an award in excess of $100,000. Applicants who have used non-Federal funds for lobbying activities in connection with receiving assistance under this announcement shall complete a disclosure form, if applicable, with their applications (approved by the Office of Management and Budget under control number 0348–0046). Applicants must sign and return the certification with their application.

Applicants must also understand that they will be held accountable for the smoking prohibition included within Pub. L. 103–227, Title XII Environmental Tobacco Smoke (also known as the PRO-KIDS Act of 1994). A copy of the **Federal Register** notice that implements the smoking prohibition is included with forms. By signing and submitting the application, applicants are providing the certification and need not mail back the certification with the application.

Applicants must make the appropriate certification of their compliance with all Federal statutes relating to nondiscrimination. By signing and submitting the applications, applicants are providing the certification and need not mail back the certification form. Complete the standard forms and the associated certifications and assurances based on the instructions on the forms. The forms and certifications may be found at: *http://www.acf.hhs.gov/programs/ofs/forms.htm*.

Please see Section V.1. Criteria, for instructions on preparing the full project description.

*3. Submission Dates and Times*

Due Date for Applications: August 5, 2005.

*Explanation of Due Dates:*

The closing time and date for receipt of applications is referenced above. Applications received after 4:30 p.m. eastern time on the closing date will be classified as late.

*Deadline:* Applications shall be considered as meeting an announced deadline if they are received on or before the deadline time and date referenced in Section IV.6. Applicants are responsible for ensuring applications are mailed or submitted electronically well in advance of the application due date.

Applications hand carried by applicants, applicant couriers, other representatives of the applicant, or by overnight/express mail couriers shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., eastern time, at the address referenced in Section IV.6., between Monday and Friday (excluding Federal holidays).

ACF cannot accommodate transmission of applications by facsimile. Therefore, applications transmitted to ACF by fax will not be accepted regardless of date or time of submission and time of receipt.

Receipt acknowledgement for application packages will not be provided to applicants who submit their package via mail, courier services, or by hand delivery. Applicants will receive an electronic acknowledgement for applications that are submitted via Grants.gov.

*Late Applications:* Applications that do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

Any application received after 4:30 p.m. eastern time on the deadline date will not be considered for competition.

Applicants using express/overnight mail services should allow two working days prior to the deadline date for receipt of applications. Applicants are cautioned that express/overnight mail services do not always deliver as agreed.

*Extension of deadlines:* ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, etc.) occur, or when there are widespread disruptions of mail service, or in other rare cases. A determination to extend or waive deadline requirements rests with the Chief Grants Management Officer.

*Checklist:*

You may use the checklist below as a guide when preparing your application package.

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Table of Contents | See Section IV | the ''Application Format'' section of this announcement. | By application due date. |
| Project Abstract | See Section IV | the ''Application Format'' section of this announcement. | By application due date. |
| Project Narrative | See Section IV | the ''Application Format'' section of this announcement. | By application due date. |
| SF424 | See Section IV | *http://www.acf.hhs.gov/programs/ofs/forms.htm* | By application due date. |
| SF424A | See Section IV | *http://www.acf.hhs.gov/programs/ofs/forms.htm* | By application due date. |
| Assurances and Certifications. | See Section IV | *http://www.acf.hhs.gov/programs/ofs/forms.htm* | By application due date. |
| Certification Regarding Lobbying. | See Section IV | *http://www.acf.hhs.gov/programs/ofs/forms.htm* | By application due date. |
| Certification Regarding Environmental Tobacco Smoke. | See Section IV | *http://www.acf.hhs.gov/programs/ofs/forms.htm* | By application due date. |

*Additional Forms:*

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

| What to submit | Required content | Location | When to submit |
|---|---|---|---|
| Survey for Private, Non-Profit Grant Applicants. | See form | May be found on *http://www.acf.hhs.gov/programs/ofs/forms.htm*. | By application due date. |

*4. Intergovernmental Review*

State Single Point of Contact (SPOC)

This program is covered under Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' and 45 CFR Part 100, ''Intergovernmental Review of Department of Health and Human Services Programs and Activities.'' Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of October 1, 2004, the following jurisdictions have elected to participate in the Executive Order process: Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New York, North Dakota, Rhode Island, South Carolina, Texas, Utah, West Virginia, Wisconsin, American Samoa, Guam, North Mariana Islands, Puerto Rico, and Virgin Islands. As these jurisdictions have elected to participate in the Executive Order process, they have established SPOCs. Applicants from participating jurisdictions should contact their SPOC, as soon as possible, to alert them of prospective applications and receive instructions. Applicants must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2).

A SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards. SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations which may trigger the ''accommodate or explain'' rule.

When comments are submitted directly to ACF, they should be addressed to: Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., Aerospace Building, Washington, DC 20447–0002.

Although the remaining jurisdictions have chosen not to participate in the process, entities that meet the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, etc. does not have a SPOC. Therefore, applicants from these jurisdictions, or for projects administered by federally-recognized Indian Tribes, need take no action in regard to E.O. 12372.

The official list, including addresses, of the jurisdictions that have elected to participate in E.O. 12372 can be found on the following URL: *http://www.whitehouse.gov/omb/grants/spoc.html.*

A list of Single Points of Contact for each State and Territory is included with the application materials for this announcement.

*5. Funding Restrictions*

*SF 424, SF 424A, and SF 424B*—The application must contain a signed Standard Form 424, Application for Federal Assistance (SF 424), a Standard Form 424A Budget Information (SF 424A) and signed Standard Form 424B Assurance—Non-Construction Programs (SF 424B) completed according to instructions provided in this Program Announcement.

*Proof of Non-Profit Status*—For non-profit organizations, the application must contain documentation of the applicant's tax-exempt status as indicated in Section III of this announcement, Eligible Applicants.

*Project Narrative*—The application must include a project narrative that addresses issues described in Section V of this announcement.

*Sub-Contracting or Delegating Projects*—ACF/OCS will not fund any project where the role of the applicant is primarily to serve as a conduit for funds to organizations other than the applicant. The applicant must have a substantive role in the implementation of the project for which funding is requested. This prohibition does not bar the making of sub-grants or sub-contracting for specific services or activities to conduct the project.

*Number of Projects in Application*—Each application may include only one proposed project.

*Page Limitation*—The application package including sections for the Table of Contents, Project Abstract, Project and Budget Narratives must not exceed 45 pages. The page limitation does not include the following attachments and appendices: Standard Forms for Assurances, Certifications, Disclosures and appendices. The page limitation also does not apply to any supplemental documents as required in this announcement.

*Maximum Grant Amount*—An application that exceeds the ceiling on the amount of the award, will be considered non-responsive and be returned to the applicant without further review.

*6. Other Submission Requirements*

*Submission by Mail:* An applicant must provide an original application with all attachments, signed by an authorized representative and two copies. The application must be received at the address below by 4:30 p.m. eastern time on or before the closing date. Applications should be mailed to: Administration for Children and Families, Office of Community Services' Operations Center, 1515 Wilson Boulevard, Suite 100, Arlington, VA 22209, Attention: Catherine Beck.

*Hand Delivery:* An applicant must provide an original application with all attachments signed by an authorized representative and two copies. The application must be received at the address below by 4:30 p.m. eastern time on or before the closing date. Applications that are hand delivered will be accepted between the hours of 8 a.m. to 4:30 p.m. eastern time, Monday through Friday. Applications should be delivered to: Administration for Children and Families, Office of Community Services' Operations Center, 1515 Wilson Boulevard, Suite 100, Arlington, VA 22209; Attention: Catherine Beck.

*Electronic Submission: http://www.Grants.gov* Please see section IV. 2 Content and Form of Application Submission, for guidelines and requirements when submitting applications electronically.

## V. Application Review Information

*The Paperwork Reduction Act of 1995 (Pub. L. 104–13)*

Public reporting burden for this collection of information is estimated to average 25 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed and reviewing the collection information.

The project description is approved under OMB control number 0970–0139 which expires April 30, 2007.

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.

*1. Criteria*

Purpose

The project description provides a major means by which an application is evaluated and ranked to compete with other applications for available assistance. The project description should be concise and complete and should address the activity for which Federal funds are being requested.

Supporting documents should be included where they can present information clearly and succinctly. In preparing your project description, information responsive to each of the requested evaluation criteria must be provided. Awarding offices use this and other information in making their funding recommendations. It is important, therefore, that this information be included in the application in a manner that is clear and complete.

General Instructions

ACF is particularly interested in specific project descriptions that focus on outcomes and convey strategies for achieving intended performance. Project descriptions are evaluated on the basis of substance and measurable outcomes, not length. Extensive exhibits are not required. Cross-referencing should be used rather than repetition. Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant funded activity should be placed in an appendix. Pages should be numbered and a table of contents should be included for easy reference.

Introduction

Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions while being aware of the specified evaluation criteria. The text options give a broad overview of what your project description should include while the evaluation criteria identifies the measures that will be used to evaluate applications.

Project Summary/Abstract

Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance

Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Results or Benefits Expected

Identify the results and benefits to be derived.

Approach

Outline a plan of action that describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors that might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished.

When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates.

If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any ''collection of information that is conducted or sponsored by ACF.''

List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Additional Information

Following are requests for additional information that need to be included in the application:

Staff and Position Data

Provide a biographical sketch and job description for each key person appointed. Job descriptions for each vacant key position should be included as well. As new key staff is appointed, biographical sketches will also be required.

Organizational Profiles

Provide information on the applicant organization(s) and cooperating partners, such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information. If the applicant is a non-profit organization, submit proof of non-profit status in its application.

The non-profit agency can accomplish this by providing: (a) A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code; (b) a copy of a currently valid IRS tax exemption certificate; (c) a statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals; (d) a certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status; (e) any of the items immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

Letters of Support

Provide statements from community, public and commercial leaders that support the project proposed for funding. All submissions should be included in the application OR by application deadline.

Budget and Budget Justification

Provide a budget with line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. Also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

General

Use the following guidelines for preparing the budget and budget

justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. ''Federal resources'' refers only to the ACF grant for which you are applying. ''Non-Federal resources'' are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: first column, object class categories; second column, Federal budget; next column(s), non-Federal budget(s), and last column, total budget. The budget justification should be a narrative.

Personnel

Description: Costs of employee salaries and wages.

Justification: Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time equivalent), annual salary, grant salary, wage rates, etc. Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits

Description: Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

Justification: Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel

Description: Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

Justification: For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ACF-sponsored workshops should be detailed in the budget.

Equipment

Description: ''Equipment'' means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of (a) the capitalization level established by the organization for the financial statement purposes, or (b) $5,000. (**Note:** Acquisition cost means the net invoice unit price of an item of equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation shall be included in or excluded from acquisition cost in accordance with the organization's regular written accounting practices.)

Justification: For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy or section of its policy which includes the equipment definition.

Supplies

Description: Costs of all tangible personal property other than that included under the Equipment category.

Justification: Specify general categories of supplies and their costs. Show computations and provide other information which supports the amount requested.

Contractual

Description: Costs of all contracts for services and goods except for those that belong under other categories such as equipment, supplies, construction, etc. Include third party evaluation contracts (if applicable) and contracts with secondary recipient organizations, including delegate agencies and specific project(s) or businesses to be financed by the applicant.

Justification: Demonstrate that all procurement transactions will be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients and subrecipients, other than States that are required to use 45 CFR Part 92 procedures, must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000).

Recipients might be required to make available to ACF pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc.

**Note:** Whenever the applicant intends to delegate part of the project to another agency, the applicant must provide a detailed budget and budget narrative for each delegate agency, by agency title, along with the required supporting information referred to in these instructions.

Other

Enter the total of all other costs. Such costs, where applicable and appropriate, may include but are not limited to insurance, food, medical and dental costs (noncontractual), professional services costs, space and equipment rentals, printing and publication, computer use, training costs, such as tuition and stipends, staff development costs, and administrative costs.

Justification: Provide computations, a narrative description and a justification for each cost under this category.

Indirect Charges

Description: Total amount of indirect costs. This category should be used only when the applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

Justification: An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, upon notification that an award will be made, it should immediately develop a tentative indirect cost rate proposal based on its most recently completed fiscal year, in accordance with the cognizant agency's guidelines for establishing indirect cost rates, and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. When an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgement that the applicant is accepting a lower rate than allowed.

Non-Federal Resources

Description: Amounts of non-Federal resources that will be used to support the project as identified in Block 15 of the SF–424.

Justification: The firm commitment of these resources must be documented and submitted with the application so the applicant is given credit in the review process. A detailed budget must be prepared for each funding source.

*Evaluation Criteria:*

The following evaluation criteria appear in weighted descending order. The corresponding score values indicate the relative importance that ACF places on each evaluation criterion; however,

applicants need not develop their applications precisely according to the order presented. Application components may be organized such that a reviewer will be able to follow a seamless and logical flow of information (*e.g.*, from a broad overview of the project to more detailed information about how it will be conducted).

In considering how applicants will carry out the responsibilities addressed under this announcement, competing applications for financial assistance will be reviewed and evaluated against the following criteria:

Organizational Profiles 45 Points

*(a) Organizational Experience in Program Area (20 Points)*

The application will be evaluated on the extent to which it documents the organization's capability and relevant experience in developing and operating a nationwide program that deals with problems similar to those to be addressed by the proposed project. Documentation provided should indicate that projects previously undertaken have been relevant and effective and have provided permanent benefits. Organizations proposing training and technical assistance should have detailed competence in the program area and expertise in training and technical assistance. If applicable, information provided in these applications should also address related achievements and competence of each cooperating or sponsoring organization.

*(b) Management History (0–10Points)*

The application will be evaluated on the extent to which it demonstrates the applicant's ability to implement sound and effective management practices. If the applicant has been a recipient of other Federal or governmental grants, it must also document its compliance with financial and program progress reporting and audit requirements. Such documentation may be in the form of references to any available audit or progress reports and should be accompanied by a statement from a Certified or Licensed Public Accountant as to the sufficiency of the applicant's financial management system to protect adequately any Federal funds awarded under the application submitted.

*(c) Staff Skills, Resources and Responsibilities (0–15 Points)*

The application will be evaluated on the extent to which it adequately describes the experience and skills of the proposed Project Director, showing that the individual is not only well qualified, but that his/her professional capabilities are relevant to successfully implementing the project. If the key staff person has not yet been identified, the application should contain a comprehensive position description indicating that the responsibilities to be assigned to the Project Director are relevant to successfully implementing the project. The application must indicate that it has adequate facilities and resources (*i.e.* space and equipment) to carry out the work plan successfully. In addressing the above criterion, the applicant must clearly show that sufficient time of the Project Director and other senior staff will be budgeted to assure timely project implementation and oversight and that the assigned responsibilities of the staff are appropriate to the tasks identified.

Objectives and Need for Assistance 25 Points

*(a) Description of Target Population (0–10 Points)*

The application will be evaluated on the extent to which it describes the target area and population to be served.

*(b) Analysis of Needs/Priorities (0–15 Points)*

The application will be evaluated on the extent to which it discusses the nature and extent of the nationwide youth overweight and obesity problem, including specific information on low-income and minority population youth.

Approach 15 Points

*(a) Realistic Quarterly Time Lines (0–5 Points)*

The application will be evaluated on the extent to which it provides realistic quarterly projections of the activities to be carried out.

*(b) Detailed Work Plan (0–10 Points)*

The application will be evaluated on the extent to which it ensures that activities are adequately described and appear reasonably likely to achieve results that will have a desired impact on the identified problem(s).

Budget and Budget Justification 10 Points

Every application must include a Budget Justification, placed after the budget forms SF 424 and 424A, explaining the sources and uses of project funds. The budget is adequate and administrative costs are appropriate to the services proposed.

Results or Benefits Expected 5 Points

Identify the results and benefits to be derived from the proposed project.

*2. Review and Selection Process*

No grant award will be made under this announcement on the basis of an incomplete application.

*Initial ACF/OCS Screening*—Each application submitted to ACF/OCS will be screened to determine whether it was received by the closing date and time.

Applications received by the closing date and time will be screened for completeness and conformity with the following requirements.

All applications must comply with the following requirements except as noted:

- The application must contain a signed Standard Form 424 Application for Federal Assistance ''SF 424,'' a Standard Form 424–A Budget Information ''SF 424A'' and signed Standard Form 424B Assurance—Non-Construction Programs ''SF 424B'' completed according to instructions provided in this Program Announcement. The forms SF 424 and the SF 424B must be signed by an official of the organization applying for the grant who has authority to obligate the organization legally. The applicant's legal name as required on the SF 424 (Item 5) must match that listed as corresponding to the Employer Identification Number (Item 6).
- The application must include a project narrative that meets the requirements set forth in this announcement at Section V.
- The application must contain documentation of the applicant's tax-exempt status as indicated in Section III of this announcement, Eligibility Information.
- The application package including sections for the Table of Contents, Project Abstract, Project and Budget Narratives must not exceed 45 pages. The page limitation does not include the following attachments and appendices: Standard Forms for Assurances, Certifications, Disclosures and appendices. The page limitation also does not apply to any supplemental documents as required in this announcement.
- Private, non-profit organizations are encouraged to submit with their applications the optional survey located under ''Grants Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

*ACF/OCS Evaluation of Applications*—Applications that pass the initial ACF/OCS screening will be reviewed and rated by a panel based on the program elements and review criteria presented in relevant sections of this program announcement.

The review criteria are designed to enable the review panel to assess the quality of a proposed project and determine the likelihood of its success. The criteria are closely related to each

other and are considered as a whole in judging the overall quality of an application.

The review panel awards points only to applications that are responsive to the program elements and relevant review criteria within the context of this program announcement.

The ACF/OCS Director and program staff use the reviewer scores when considering competing applications. Reviewer scores will weigh heavily in funding decisions, but will not be the only factors considered.

Applications generally will be considered in order of the average scores assigned by the review panel. Because other important factors are taken into consideration, highly ranked applications are not guaranteed funding. These other considerations include, for example: the timely and proper completion by the applicant of projects funded with ACF/OCS funds granted in the last five (5) years; comments of reviewers and government officials; staff evaluation and input; amount and duration of the grant requested and the proposed project's consistency and harmony with ACF/OCS goals and policies; geographic distribution of applications; previous program performance of applicants; compliance with grant terms under previous HHS grants; audit reports; investigative reports; and applicant's progress in resolving any final audit disallowance on previous ACF/OCS or other Federal agency grants.

Since ACF will be using non-Federal reviewers in the review process, applicants have the option of omitting from the application copies (not the original) specific salary rates or amounts for individuals specified in the application budget.

*Approved but Unfunded Applications.*

Applications that are approved but unfunded may be held over for funding in the next funding cycle, pending the availability of funds, for a period not to exceed one year.

*3. Anticipated Announcement and Award Dates*

Announcements and awards will be issued no later than September 30, 2005.

**VI. Award Administration Information**

*1. Award Notices*

The successful applicants will be notified through the issuance of a Financial Assistance Award document, which sets forth the amount of funds granted, the terms and conditions of the grant, the effective date of the grant, the budget period for which initial support will be given, the non-Federal share to be provided, and the total project period for which support is contemplated. The Financial Assistance Award will be signed by the Grants Officer and transmitted via postal mail.

Organizations whose applications will not be funded will be notified in writing.

*2. Administrative and National Policy Requirements*

Grantees are subject to the requirements in 45 CFR Part 74 (non-governmental) or 45 CFR Part 92 (governmental); 45 CFR Part 1050.

Direct Federal grants, subaward funds, or contracts under this Program shall not be used to support inherently religious activities such as religious instruction, worship, or proselytization. Therefore, organizations must take steps to separate, in time or location, their inherently religious activities from the services funded under this Program. Regulations pertaining to the prohibition of Federal funds for inherently religious activities can be found on the HHS Web site at: *http://www.os.dhhs.gov/fbci/waisgate21.pdf.*

*3. Reporting Requirements*

Program Progress Reports: Semi-Annually.

Financial Reports: Semi-Annually.

Grantees will be required to submit program progress and financial reports (SF 269) throughout the project period. Program progress and financial reports are due 30 days after the reporting period. In addition, final programmatic and financial reports are due 90 days after the close of the project period.

**VII. Agency Contacts**

Program Office Contact: Catherine Beck, Administration for Children and Families, Office of Community Services' Operations Center, 1515 Wilson Boulevard, Suite 100, Arlington, VA 22209, phone: 202–401–9352, Fax: 703–528–0716; e-mail: *OCSGRANTS@acf.hhs.gov.*

Grants Management Office Contact: Barbara Ziegler-Johnson, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., Aerospace Building, Washington, DC 20447–0002, phone: 202–401–4646, Fax: 703–528–0716; e-mail: *OCSGRANTS@acf.hhs.gov.*

**VIII. Other Information**

**Notice:** Beginning with FY 2006, the Administration for Children and Families (ACF) will no longer publish grant announcements in the **Federal Register**. Beginning October 1, 2005 applicants will be able to find a synopsis of all ACF grant opportunities and apply electronically for opportunities via: *http://www.Grants.gov.* Applicants will also be able to find the complete text of all ACF grant announcements on the ACF Web site located at: *http://www.acf.hhs.gov/grants/index.html.*

The FY 2006 President's budget does not include or propose funding for the Food and Nutrition Program. Future funding is based on the availability of Federal funds.

Please reference Section IV.3 for details about acknowledgement of received applications.

Dated: May 26, 2005.

**Josephine B. Robinson,**

*Director, Office of Community Services.*

[FR Doc. 05–11192 Filed 6–3–05; 8:45 am]

BILLING CODE 4184–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Office of Refugee Resettlement

*Funding Opportunity Title:* Discretionary Funds for Projects to Establish Individual Development Account (IDA) Programs for Refugees.

*Announcement Type:* Initial.

*Funding Opportunity Number:* HHS–2005–ACF–ORR–ZI–0093.

*CFDA Number:* 93.576.

*Due Date for Applications:* Application is due July 21, 2005.

*Executive Summary:*

The Office of Refugee Resettlement (ORR) invites eligible entities to submit competitive grant applications for projects to establish and manage Individual Development Accounts (IDAs) for low-income refugee participants. Eligible refugee participants who enroll in these projects will open and contribute systematically to IDAs for specified Savings Goals, including home ownership, business capitalization, vehicles for educational or work purposes, and postsecondary education. Grantees may use ORR funds to provide matches for the savings in the IDAs up to $2,000 per individual refugee and $4,000 per refugee household. Applications will be screened and evaluated as indicated in this program announcement. Awards will be contingent on the outcome of the competition and the availability of funds.

**I. Funding Opportunity Description**

*Legislative Authority:* Section 412(c)(1)(A) of the Immigration and Nationality Act (INA)(8 U.S.C. 1522(c)(1)(A)) authorizes the Director ''to make grants to, and enter into contracts with, public or private nonprofit agencies for projects specifically designed—(i) to assist refugees in obtaining the skills which are necessary for economic self-sufficiency, including projects for job training, employment services, day care, professional refresher training, and other recertification services; (ii) to provide training in English where necessary (regardless of whether the refugees are employed or receiving cash or other assistance); and (iii) to provide services where specific needs have been shown and recognized by the Director, health (including mental health) services, social services, educational and other services.''

*Discretionary Funds for Projects To Establish Individual Development Account (IDA) Programs for Refugees*

1. *Description:*

*Program Purpose and Objectives:* The Office of Refugee Resettlement invites qualified entities to submit competing grant applications for new projects that will establish, support, and manage Individual Development Accounts (IDAs) for eligible low-income refugee individuals and families. The Refugee IDA Program represents an anti-poverty strategy built on asset accumulation for low-income refugee individuals and families with the goal of promoting refugee economic independence. In particular, the objectives of this program are to: encourage regular saving habits among refugees; promote their participation in the financial institutions of this country; promote refugee acquisition of assets to build individual, family, and community resources; increase refugee knowledge of financial and monetary topics; assist refugees in advancing their education; increase home ownership among refugees; and assist refugees in gaining access to capital. These new projects will accomplish these objectives by establishing programs that combine the provision of matched savings accounts with financial training and counseling.

*Eligibility:*

Eligibility for this program is limited to refugees:

- Who are not yet citizens regardless of their date of arrival in the U.S. (However, refugees who arrived in the U.S. within the last five years have priority for services.);
- Who have earned income;
- Whose household earned income at time of enrollment does not exceed 200 percent of the federal poverty level; and
- Whose assets at time of enrollment do not exceed $10,000, excluding the value of a primary residence and one vehicle.

Please refer to the Definition of Terms section for the definition of ''household''. The 2004 Poverty Guidelines may be found at *http://aspe.hhs.gov/poverty/04poverty.shtml*.

*Asset Goals:*

Grantees, in partnership with qualified financial institutions, will create Individual Development Accounts for refugee participants. Refugee participants will systematically contribute to the IDAs out of earned income to purchase specified Savings Goals. The primary focus of the Savings Goals in their IDA program should be the following:

- Home Purchase;
- Postsecondary Education, Vocational Training, or Recertification; and
- Microenterprise Capitalization.

In cases of documented necessity, the purchase of an automobile is allowable for the purposes of employment or education. Automobiles may only constitute 10 percent of a program, with 90 percent of the match funds obligated to the other goals. The purpose of an automobile purchase must be thoroughly justified and well documented. Additional information on these Savings Goals is provided in the Definition of Terms section of this announcement.

*Supplemental IDA and Administrative Funds:*

ORR strongly recommends applicants to include in their applications commitment, or plan for developing a commitment of, additional public or private funds for matching IDA deposits, operational overhead, and training. These funds will supplement ORR funds in order to serve greater numbers of refugees and assist the program in its future sustainability. If additional funds have been secured, documentation should be provided in the application in writing, executed with the entity providing the non-ORR contribution on letterhead of the entity, and signed by a person authorized to make a commitment on behalf of the entity.

*Savings Plan Agreement and Documentation:*

The grantee will establish a ''Savings Plan Agreement'' with each refugee participant. The Savings Plan Agreement must include:

(1) A proposed schedule of savings deposits by the participant;

(2) The rate at which the participant's savings will be matched;

(3) The Savings Goal(s) for which the account is maintained;

(4) Any training or counseling which the participant agrees to attend;

(5) An agreement that the participant will not withdraw funds except for the specified Savings Goal or for an emergency and only after notification to the grantee;

(6) A statement by the participant that the participant has not received the maximum allowable match from any other ORR-funded IDA program;

(7) A procedure for amending the Agreement;

(8) A date by which asset must be purchased or the date on which the program will end;

(9) A designation of beneficiary; and

(10) If saving for a vehicle, a statement by the participant that the vehicle will be used for the purpose of maintaining or upgrading employment or for the purpose of transportation for postsecondary education, vocational training, or recertification.

Applicants under this grant announcement may propose additional provisions to be included in Savings Plan Agreements. In addition to the Savings Plan Agreement, grantees must collect and maintain documentation showing supplementary confirmation of the client's household budget, assets and liabilities, and earned income (this can be in the form of pay stubs, tax returns, etc.). ORR strongly suggests that each participant provide an overall household budget plan, describing how their IDA savings will derive from their discretionary income.

Appropriate documentation for the usage of an automobile could include: calculation of long distances from the participant's home to their place of employment or educational institution, bus schedules showing unreasonable time tables and connections, and the anticipation of increased wages due to more time on the job or access to better wages or employment due to reduced commuting time.

*Accounts and Drawdown of Funds:*

The IDA contains only the refugee participant's deposits and interest earned on those deposits. Grantees may establish non-interest bearing IDA accounts for participants only with ORR approval. The grantee will create one Parallel Account, separate from the participants' IDAs, at a qualified financial institution in which all matching ORR grant funds will be deposited and maintained on behalf of the refugee participants. Drawdown of the ORR grant funds and deposit of those funds into the Parallel Account

will be permitted no earlier than the time of the refugee's deposit to the IDA. Grantees must draw down ORR funds for matching IDA deposits within three months of the date that the refugee participant makes the deposit, and must continue to draw down at least on a quarterly basis thereafter as participants make deposits.

*Program Income:*

The interest that accrues on the ORR matching funds deposited in the parallel account must be used to enroll additional refugee participants or to match interest earned on the refugee participant's deposits. The interest on the match funds in the parallel account may not be retained by the grantee for any purpose, including program administration, participant support services, or program data collection. (See 45 CFR 74.24(b)(1))

*Match Funds:*

ORR funds may be used at a matching rate no greater than one-to-one for each dollar deposited in the IDA by the refugee participant. Grantees may choose to vary the amount of the match by type of Savings Goal and/or by income level of the refugee participants, such as limiting the total match for automobiles to $1,000. Over the course of the five-year project period, not more than $2,000 in ORR grant funds may be provided through matching contributions to any one refugee individual and not more than $4,000 may be provided to any one refugee household (see the Definition of Terms section for the definition of ''household''). When the refugee purchases the Savings Goal, the grantee must provide payment of the participant's IDA matching funds directly to the asset vendor. Applicants must provide ORR with information on the impact of IDA savings and match on refugee eligibility for public benefits, and must submit alternative maximum match limits to ORR for review if necessary.

*Training:*

Applicants must incorporate in these projects financial training for the refugee participants. The training may be provided directly by the grantee or the grantee may choose to provide the training through subgrantees or other providers; grantees are strongly encouraged to partner with other community agencies already providing general financial or asset-specific training. The training provided by a grantee should reflect both the refugee population and the Savings Goals to be included in the program. Such training should include budgeting, cash management, savings, investment, and credit counseling. Specialized training and technical assistance should be provided for refugee participants for each Savings Goal provided through the program. Although the applicant listed on the Savings Plan Agreement should be the person who attends the training, the entire household should be encouraged to participate.

*Close Out and Client Withdrawals:*

Under these projects, grantees should schedule their account activities so that all IDA accounts reach their maximum savings, and refugee participants have purchased their Savings Goal, within the five-year project period. If educational tuition or fees are paid in installments to an institution, grantee must establish a plan to return funds to the government if all of the match money is not utilized by the student. If the participant stops contributing towards their IDA for a period of three months without grantee approval, or fails to meet his/her savings goal, the grantee may use those funds to enroll another participant. If a participant has failed to meet their savings goal and purchase their asset at the end of the project period, the grantee must return the matching funds to the government in accordance with 45 CFR 74.71.

*Definition of Terms:*

Individual Development Accounts (IDAs) are leveraged, or matched, savings accounts. IDAs are established in insured accounts in qualified financial institutions. The funds are intended for the Savings Goals specified in this announcement. Although the refugee participant maintains control of all funds that the participant deposits in the IDA, including all interest that may accrue on the funds, the participant must sign a Savings Plan Agreement with the grantee that specifies that the funds in the account will be used only for the participant's Savings Goal or for an emergency withdrawal. A signed Savings Plan Agreement is required for the refugee participant to be eligible for matching funds.

A ''household'' is an applicant and all other persons living as an individual economic unit at one address that submits a single federal tax return.

The Savings Goals, as specified below, are the purchases/investments for which the matching funds are available when used in conjunction with the savings from the IDAs of refugee participants. The Savings Goal specified by a participant in the Savings Plan Agreement may be for the benefit of the refugee participant or of a refugee dependent (children under 21 years of age who are dependent on an adult for their livelihood) of the refugee participant. Purchase of any savings goal should not create an excessive debt burden for the refugee participant. Primary Savings Goals are defined as follows:

- *Home Ownership:* includes costs of a principal residence including the down payment and closing costs when purchasing a home. The purchaser must be a first-time homebuyer. Prior to approval for a client to save for this asset, the grantee must assess the likelihood that the client can obtain appropriate financing prior to the end of the project period. Grantee must also assess client's abilities to maintain a mortgage and the upkeep of a home.
- *Microenterprise Capitalization:* means costs for a micro-business described in a qualified business plan, such as capital, plant, equipment, working capital, and inventory expenses. The business plan must be approved by a financial institution, a microenterprise development organization, or a non-profit loan fund. The plan must also describe services or goods to be sold and include a marketing plan and projected financial statements.
- *Post-secondary Education, Vocational Training, and Recertification:* Tuition or fees, professional recertification fees, books, supplies, and equipment, including a computer, related to the enrollment or attendance of a refugee student at an educational institution. Funds may be used for a dependent refugee if that child begins postsecondary education or vocational training within the project period. Proof of enrollment must be documented in the client's file.

The Purchase of an Automobile is defined as a vehicle that is a documented necessity for the purpose of maintaining or upgrading employment or for the purpose of transportation for postsecondary education, vocational training, or recertification. Accounts established for automobiles must represent less than 10 percent of all those established. Funds can be used for the actual cost of the vehicle as well as one-time fees and taxes associated with the purchase of the vehicle. Vehicles may not be purchased through auctions.

Qualified financial institution means a Federally insured bank or credit union or a State-insured bank or credit union if no Federally insured bank or credit union is available.

A Parallel Account is an insured account opened by the grantee in a qualified financial institution for the purpose of depositing the matching funds for the savings deposited by refugee participants in their individual IDAs. Interest earned on the matching funds must remain in the Parallel Account and be used to enroll

additional refugee participants or to match the interest earned on the refugee participant's deposits. The matching funds must be made available to the refugee participant at the time that the participant purchases the Savings Goal. The matching funds are not available to the refugee participant except for the Savings Goals defined in this announcement.

An emergency withdrawal is a withdrawal of funds, or a portion of funds, deposited by the refugee participant in his/her Individual Development Account. The withdrawal may also include any of the interest that may have accrued to the participant's savings in the account but does not include any matching funds. The participant must notify the project grantee of the withdrawal prior to the withdrawal. Causes for emergency withdrawals include, but are not limited to, medical expenses, payments to prevent eviction or foreclosure, or payments for necessary living expenses. If funds withdrawn for emergency purposes are not repaid within 12 months, the refugee participant forfeits the match on those funds. Emergency withdrawals may never be authorized from the Parallel Account(s).

## II. Award Information

*Funding Instrument Type:* Grant.

*Anticipated Total Priority Area Funding:* $1,500,000.

*Anticipated Number of Awards:* 7 to 8.

*Ceiling on Amount of Individual Awards Per Budget Period:* $400,000.

*Average Projected Award Amount Per Budget Period:* $200,000.

*Length of Project Periods:* 60 month project with five 12 month budget periods.

Funds designated for the purpose of providing matches for the refugee IDA accounts should be approximately 75 percent of the total project. ORR funds not used for such matches may be used for such other purposes to include, but not be limited to, the administrative and operational costs of the project and for financial training, counseling, and technical assistance. ''Administrative and operational costs'' are defined as anything pertaining to the management of the operation of the grant by the grantee or subgrantee (if applicable); these costs may be slightly higher or lower in any one budget period.

The Director reserves the right to award more or less than the funds described in the absence of worthy applications or such other circumstances as may be deemed to be in the best interest of the government. Applicants may be required to reduce the scope of selected projects based on the amount of the approved grant award.

## III. Eligibility Information

### *1. Eligible Applicants*

State Governments, County governments, City or township governments, Non-profits having a 501(c)(3) status with the IRS, other than institutions of higher education, Non-profits that do not have a 501(c)(3) status with the IRS, other than institutions of higher education.

*Additional Information on Eligibility:* Eligible non-profit organizations include faith-based and community organizations. Applicants must also provide documentation of participation of a qualified financial institution(s) in the project. This documentation must be in writing, on letterhead of the financial institution, and signed by a person authorized to make the commitment on behalf of the financial institution. The documentation must include a commitment by the financial institution to establish IDAs for the refugee participants, to establish a parallel account (or accounts) for the matching funds, and to provide the grantee with account activity data on the IDAs and the parallel account(s) in a timely manner.

Successful grantees will be expected to coordinate their policies and procedures for developing and administering refugee IDA projects with ORR and with the existing refugee IDA network. To ensure an exchange of technical and training information among programs, all grantees are encouraged to attend up to two ORR training meetings during each year of their participation in this program area. Grant funds may be used to offset the cost of attendance. Additionally, agencies may be asked to participate in an ORR-initiated program evaluation.

### *2. Cost Sharing/Matching*

No.

### *3. Other*

All applicants must have a Dun & Bradstreet number. On June 27, 2003 the Office of Management and Budget published in the **Federal Register** a new Federal policy applicable to all Federal grant applicants. The policy requires Federal grant applicants to provide a Dun & Bradstreet Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements on or after October 1, 2003. The DUNS number will be required whether an applicant is submitting a paper application or using the government-wide electronic portal (*http://www.Grants.gov*). A DUNS number will be required for every application for a new award or renewal/continuation of an award, including applications or plans under formula, entitlement and block grant programs, submitted on or after October 1, 2003.

Please ensure that your organization has a DUNS number. You may acquire a DUNS number at no cost by calling the dedicated toll-free DUNS number request line on 1–866–705–5711 or you may request a number on-line at *http://www.dnb.com.*

Non-profit organizations applying for funding are required to submit proof of their non-profit status.

Proof of non-profit status is any one of the following:

- A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code.
- A copy of a currently valid IRS tax exemption certificate.
- A statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earning accrue to any private shareholders or individuals.
- A certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status.
- Any of the items in the subparagraphs immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

When applying electronically we strongly suggest you attach your proof of non-profit status with your electronic application.

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

Disqualification Factors

Applications that exceed the ceiling amount will be considered non-responsive and will not be considered for funding under this announcement.

Any application that fails to satisfy the deadline requirements referenced in Section IV.3 will be considered non-responsive and will not be considered for funding under this announcement.

## IV. Application and Submission Information

*1. Address To Request Application Package*

Sylvia Johnson, Grants Management Officer, Office of Grants Management, Administration for Children and Families, 370 L'Enfant Promenade SW., 4th Floor West, Washington, DC 20447, Phone: 202–401–5513. E-mail: *ACFOGME-Grants@acf.hhs.gov.* URL: *www.acf.hhs.gov/programs/orr.*

*2. Content and Form of Application Submission*

ACF is particularly interested in specific factual information and statements of measurable goals in quantitative terms. Project descriptions are evaluated on the basis of substance, not length. Extensive exhibits are not required. Cross-referencing should be used rather than repetition. Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant-funded activity should be placed in an appendix. A table of contents and an executive summary should be included. The application narrative should be in a 12-pitch font with a 25 page narrative limit (up to an additional 20 pages of attachments are allowable, not including letters of support, table of contents, executive summary, or standard forms and certifications). Reviewers may disregard any narrative over the page limit. Each page should be numbered sequentially, including any attachments or appendices. Please do not staple or in any way bind the application other than with a rubber band or clip. Please do not include books or videotapes as they are not easily reproduced and are, therefore, inaccessible to reviewers.

You may submit your application to us in either electronic or paper format.

To submit an application electronically, please use the *http://www.Grants.gov/Apply* site. If you use Grants.gov, you will be able to download a copy of the application package, complete it off-line, and then upload and submit the application via the Grants.gov site. ACF will not accept grant applications via e-mail or facsimile transmission.

Please note the following if you plan to submit your application electronically via Grants.gov

- Electronic submission is voluntary, but strongly encouraged.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.
- We recommend you visit Grants.gov at least 30 days prior to filing your application to fully understand the process and requirements. We encourage applicants who submit electronically to submit well before the closing date and time so that if difficulties are encountered an applicant can still send in a hard copy overnight. If you encounter difficulties, please contact the Grants.gov Help Desk at 1–800–518–4276 to report the problem and obtain assistance with the system.
- To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the SF 424 and all necessary assurances and certifications.
- Your application must comply with any page limitation requirements described in this program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Administration for Children and Families will retrieve your application from Grants.gov.
- We may request that you provide original signatures on forms at a later date.
- You may access the electronic application for this program on *http://www.Grants.gov.*
- You must search for the downloadable application package by the CFDA number.

Applicants that are submitting their application in paper format should submit an original and two copies of the complete application. An original and two copies of the complete application are required. The original and each of the two copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative, have original signatures, and be submitted unbound.

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

*Standard Forms and Certifications:*

The project description should include all the information requirements described in the specific evaluation criteria outlined in the program announcement under Section V Application Review Information. In addition to the project description, the applicant needs to complete all the standard forms required for making applications for awards under this announcement.

Applicants seeking financial assistance under this announcement must file the Standard Form (SF) 424, Application for Federal Assistance; SF–424A, Budget Information—Non-Construction Programs; SF–424B, Assurances—Non-Construction Programs. The forms may be reproduced for use in submitting applications. Applicants must sign and return the standard forms with their application.

Applicants must furnish prior to award an executed copy of the Standard Form LLL, Certification Regarding Lobbying, when applying for an award in excess of $100,000. Applicants who have used non-Federal funds for lobbying activities in connection with receiving assistance under this announcement shall complete a disclosure form, if applicable, with their applications (approved by the Office of Management and Budget under control number 0348–0046). Applicants must sign and return the certification with their application.

Applicants must also understand they will be held accountable for the smoking prohibition included within P.L. 103–227, Title XII Environmental Tobacco Smoke (also known as the PRO-KIDS Act of 1994). A copy of the **Federal Register** notice which implements the smoking prohibition is included with forms. By signing and submitting the application, applicants are providing the certification and need not mail back the certification with the application.

Applicants must make the appropriate certification of their compliance with all Federal statutes relating to nondiscrimination. By signing and submitting the applications, applicants are providing the certification and need not mail back the certification form. Complete the standard forms and the associated certifications and assurances based on the instructions on the forms. The forms and certifications may be found at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

Those organizations required to provide proof of non-profit status, please refer to Section III.3.

Please see Section V.1, for instructions on preparing the full project description.

*3. Submission Dates and Times*

*Due Date for Applications:* August 5, 2005.

*Explanation of Due Dates:*

The closing date for submission of applications is referenced above. Mailed applications postmarked after the closing date will be classified as late.

*Deadline:* Mailed applications shall be considered as meeting an announced deadline if they are either received on or before the deadline date or sent on or before the deadline date and received by ACF in time for the independent review referenced in Section IV.6.

Applicants must ensure that a legibly dated U.S. Postal Service postmark or a legibly dated, machine produced postmark of a commercial mail service is affixed to the envelope/package containing the application(s). To be acceptable as a proof of timely mailing, a postmark from a commercial mail service must include the logo/emblem of the commercial mail service company and must reflect the date the package was received by the commercial mail service company from the applicant. Private Metered postmarks shall not be acceptable as proof of timely mailing. (Applicants are cautioned that express/overnight mail services do not always deliver as agreed.)

Applications hand carried by applicants, applicant couriers, or by other representatives of the applicant shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., eastern time, at the address referenced in Section IV.6., between Monday and Friday (excluding Federal holidays). Applicants are cautioned that express/overnight mail services do not always deliver as agreed.

ACF cannot accommodate transmission of applications by fax. Therefore, applications transmitted to ACF by fax will not be accepted regardless of date or time of submission and time of receipt.

Receipt acknowledgement for application packages will not be provided to applicants who submit their package via mail, courier services, or by hand delivery. However, applicants will receive an electronic acknowledgement for applications that are submitted via *http://www.Grants.gov.*

*Late applications:* Applications which do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

*Extension of deadlines:* ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, etc.) occur, or when there are widespread disruptions of mail service, or in other rare cases. Determination to extend or waive deadline requirements rest with the Chief Grants Management Officer.

*Checklist:*

You may use the checklist below as a guide when preparing your application package.

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Project Abstract | See Sections IV.2 and V | Found in Sections IV.2 and V | By application due date. |
| Project Description | See Sections IV.2 and V | Found in Sections IV.2 and V | By application due date. |
| Budget Narrative/Justification | See Sections IV.2 and V | Found in Sections IV.2 and V | By application due date. |
| SF424 | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By application due date. |
| SF–LLL Certification Regarding Lobbying. | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By date of award. |
| Certification Regarding Environmental Tobacco Smoke. | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By date of award. |
| Assurances | See Section IV.2 | | By date of award. |
| Support Letters | V | Provide statements from community, public and commercial leaders that support the project proposed for funding.. | All submissions should be included in the application OR by application deadline. |

*Additional Forms:*

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

| What to submit | Required content | Location | When to submit |
|---|---|---|---|
| Survey for Private, Non-Profit Grant Applicants. | See form. | Found in *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By application due date. |

*4. Intergovernmental Review*

State Single Point of Contact (SPOC)

This program is covered under Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' and 45 CFR Part 100, ''Intergovernmental Review of Department of Health and Human Services Programs and Activities.'' Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of October 1, 2004, the following jurisdictions have elected to participate in the Executive Order process: Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New York, North Dakota, Rhode Island, South Carolina, Texas, Utah, West Virginia, Wisconsin, American Samoa, Guam, North Mariana Islands, Puerto Rico, and Virgin Islands. As these jurisdictions have elected to participate in the Executive Order process, they have established SPOCs. Applicants from participating jurisdictions should contact their SPOC, as soon as possible,

to alert them of prospective applications and receive instructions. Applicants must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2).

A SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards. SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations which may trigger the ''accommodate or explain'' rule.

When comments are submitted directly to ACF, they should be addressed to the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade SW., 4th floor, Washington, DC 20447.

When comments are submitted directly to ACF, they should be addressed to: Department of Health and Human Services, Administration for Children and Families, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., Washington, DC 20447.

Although the remaining jurisdictions have chosen not to participate in the process, entities that meet the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, etc. does not have a SPOC. Therefore, applicants from these jurisdictions, or for projects administered by Federally-recognized Indian Tribes, need take no action in regard to E.O. 12372.

The official list, including addresses, of the jurisdictions that have elected to participate in E.O. 12372 can be found on the following URL: *http://www.whitehouse.gov/omb/grants/spoc.html.*

*5. Funding Restrictions*

Grant awards will not allow reimbursement of pre-award costs.

See Section II for information on IDA match requirements.

*6. Other Submission Requirements*

*Submission by Mail:* An applicant must provide an original application with all attachments, signed by an authorized representative and two copies. Please see Section IV.3 for an explanation of due dates. Applications should be mailed to: Sylvia Johnson, Grants Management Officer, Office of Grants Management, Administration for Children and Families, 370 L'Enfant Promenade SW., 4th Floor West, Washington, DC 20447.

*Hand Delivery:* An applicant must provide an original application with all attachments signed by an authorized representative and two copies. The application must be received at the address below by 4:30 p.m. eastern time on or before the closing date. Applications that are hand delivered will be accepted between the hours of 8 a.m. to 4:30 p.m. eastern time, Monday through Friday. Applications should be delivered to: Sylvia Johnson, Administration for Children and Families, Office of Grants Management, ACF Mailroom, Second Floor (near loading dock), Aerospace Center, 901 D Street, SW., Washington, DC 20024.

*Electronic Submission: http://www.Grants.gov.* Please see Section IV.2 for guidelines and requirements when submitting applications electronically.

**V. Application Review Information**

*The Paperwork Reduction Act of 1995 (Pub. L. 104–13)*

Public reporting burden for this collection of information is estimated to average 40 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed and reviewing the collection information.

The project description is approved under OMB control number 0970–0139 which expires 4/30/2007.

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.

1. Criteria

The following are instructions and guidelines on how to prepare the ''project summary/abstract'' and ''full project description'' sections of the application. Under the evaluation criteria section, note that each criterion is preceded by the generic evaluation requirement under the ACF Uniform Project Description (UPD).

Part I—The Project Description Overview

Purpose

The project description provides a major means by which an application is evaluated and ranked to compete with other applications for available assistance. The project description should be concise and complete and should address the activity for which Federal funds are being requested. Supporting documents should be included where they can present information clearly and succinctly. In preparing your project description, information responsive to each of the requested evaluation criteria must be provided. Awarding offices use this and other information in making their funding recommendations. It is important, therefore, that this information be included in the application in a manner that is clear and complete.

General Instructions

ACF is particularly interested in specific project descriptions that focus on outcomes and convey strategies for achieving intended performance. Project descriptions are evaluated on the basis of substance and measurable outcomes, not length. Extensive exhibits are not required. Cross-referencing should be used rather than repetition. Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant funded activity should be placed in an appendix. Pages should be numbered and a table of contents should be included for easy reference.

Part II—General Instructions for Preparing a Full Project Description

Introduction

Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions while being aware of the specified evaluation criteria. The text options give a broad overview of what your project description should include while the evaluation criteria identifies the measures that will be used to evaluate applications.

Project Summary/Abstract

Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance

Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/

beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Results or Benefits Expected

Identify the results and benefits to be derived.

For example, ORR is particularly interested in the projected outcomes for the refugee participants, including the number of IDAs established, the amount of savings by refugee participants, the number and size of withdrawals for each of the Savings Goals, and the impact of the purchase of the Savings Goal on the refugee participant's movement toward self-sufficiency.

Approach

Outline a plan of action that describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors that might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished.

Evaluation

Provide a narrative addressing how the conduct of the project and the results of the project will be evaluated. In addressing the evaluation of results, state how you will determine the extent to which the project has achieved its stated objectives and the extent to which the accomplishment of objectives can be attributed to the project. Discuss the criteria to be used to evaluate results, and explain the methodology that will be used to determine if the needs identified and discussed are being met and if the project results and benefits are being achieved. With respect to the conduct of the project, define the procedures to be employed to determine whether the project is being conducted in a manner consistent with the work plan presented and discuss the impact of the project's various activities on the project's effectiveness.

Geographic Location

Describe the precise location of the project and boundaries of the area to be served by the proposed project. Maps or other graphic aids may be attached.

Additional Information

Following are requests for additional information that need to be included in the application:

Staff and Position Data

Provide a biographical sketch and job description for each key person appointed. Job descriptions for each vacant key position should be included as well. As new key staff is appointed, biographical sketches will also be required.

Organizational Profiles

Provide information on the applicant organization(s) and cooperating partners, such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information. If the applicant is a non-profit organization, submit proof of non-profit status in its application.

The non-profit agency can accomplish this by providing: (a) a reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code; (b) a copy of a currently valid IRS tax exemption certificate; (c) a statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals; (d) a certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status; (e) any of the items immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

Third-Party Agreements

Provide written and signed agreements between grantees and subgrantees or subcontractors or other cooperating entities. These agreements must detail scope of work to be performed, work schedules, remuneration, and other terms and conditions that structure or define the relationship.

Letters of Support

Provide statements from community, public and commercial leaders that support the project proposed for funding. All submissions should be included in the application OR by application deadline.

Budget and Budget Justification

Provide a budget with line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. Also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

General

Use the following guidelines for preparing the budget and budget justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. ''Federal resources'' refers only to the ACF grant for which you are applying. ''Non-Federal resources'' are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: first column, object class categories; second column, Federal budget; next column(s), non-Federal budget(s), and last column, total budget. The budget justification should be a narrative.

Personnel

*Description:* Costs of employee salaries and wages.

*Justification:* Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time equivalent), annual salary, grant salary, wage rates, etc. Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits

*Description:* Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

*Justification:* Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel

*Description:* Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

*Justification:* For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ACF-sponsored workshops should be detailed in the budget.

Equipment

*Description:* ''Equipment'' means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of (a) the capitalization level established by the organization for the financial statement purposes, or (b) $5,000. (Note: Acquisition cost means the net invoice unit price of an item of equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation shall be included in or excluded from acquisition cost in accordance with the organization's regular written accounting practices.)

*Justification:* For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy or section of its policy which includes the equipment definition.

Supplies

*Description:* Costs of all tangible personal property other than that included under the Equipment category.

*Justification:* Specify general categories of supplies and their costs. Show computations and provide other information which supports the amount requested.

Contractual

*Description:* Costs of all contracts for services and goods except for those that belong under other categories such as equipment, supplies, construction, etc. Include third party evaluation contracts (if applicable) and contracts with secondary recipient organizations, including delegate agencies and specific project(s) or businesses to be financed by the applicant.

*Justification:* Demonstrate that all procurement transactions will be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients and subrecipients, other than States that are required to use Part 92 procedures, must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000).

Recipients might be required to make available to ACF pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc.

**Note:** Whenever the applicant intends to delegate part of the project to another agency, the applicant must provide a detailed budget and budget narrative for each delegate agency, by agency title, along with the required supporting information referred to in these instructions.

Other

Enter the total of all other costs. Such costs, where applicable and appropriate, may include but are not limited to insurance, food, medical and dental costs (noncontractual), professional services costs, space and equipment rentals, printing and publication, computer use, training costs, such as tuition and stipends, staff development costs, and administrative costs.

*Justification:* Provide computations, a narrative description and a justification for each cost under this category.

Indirect Charges

*Description:* Total amount of indirect costs. This category should be used only when the applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

*Justification:* An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, upon notification that an award will be made, it should immediately develop a tentative indirect cost rate proposal based on its most recently completed fiscal year, in accordance with the cognizant agency's guidelines for establishing indirect cost rates, and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. When an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgement that the applicant is accepting a lower rate than allowed.

Program Income

*Description:* The estimated amount of income, if any, expected to be generated from this project.

*Justification:* Describe the nature, source and anticipated use of program income in the budget or refer to the pages in the application which contain this information.

*Evaluation Criteria:*

The following evaluation criteria appear in weighted descending order. The corresponding score values indicate the relative importance that ACF places on each evaluation criterion; however, applicants need not develop their applications precisely according to the order presented. Application components may be organized such that a reviewer will be able to follow a seamless and logical flow of information (*i.e.*, from a broad overview of the project to more detailed information about how it will be conducted).

In considering how applicants will carry out the responsibilities addressed under this announcement, competing applications for financial assistance will be reviewed and evaluated against the following criteria:

Approach—30 points

(a) Narrative Work Plan—The application provides a clear explanation of a feasible, appropriate, and complete plan for establishing and managing IDAs for the refugee participants and for leveraging any additional non-Federal financial matching resources that may have been or may be committed. The plan clearly describes the structure, uses, requirements, and management of the IDAs and includes procedures for managing the Parallel Account, ensuring that interest on the matches is utilized to enroll additional refugee participants or to match interest earned on the refugee participant's deposits, providing financial training appropriate to the

refugee population and to the Savings Goals included in the project, and closing all IDAs within the project period. Describes all major elements, activities, and procedures such as those listed below. (Provide expected outcomes for each activity.)

(i) Selecting and training key staff for the project.

(ii) After researching public benefits and the impact of IDAs on benefits for the applicant's clients, provide a proposed plan to ensure public benefits are not adversely affected by the IDA.

(iii) Establishing and maintaining the Parallel Account.

(iv) Developing protocols for managing the Parallel Account, including a system for allocating interest income to enroll additional project participants or to match interest earned on the refugee participant's deposits.

(v) Establishing strong working relationships with one or more financial institution(s) that will participate in the project.

(vi) Establishing and maintaining IDAs for each participant.

(vii) Providing basic financial education and asset-specific training to participants.

(viii) Developing Savings Plan Agreements with participants and working with them to save in accordance with the plan.

(ix) Providing payments of participants' IDA match directly to the asset vendors for each of the Savings Goals.

(x) Assisting participants who have difficulty completing the financial education or meeting the requirements of their Savings Plan Agreement.

(xi) Ensuring that participants use IDA funds appropriately.

(xii) Ensuring that project participants purchase an eligible asset within the project period.

(xiii) Providing required financial and programmatic reports to ACF.

(xiv) Self-evaluation of the overall project goals and accomplishments.

(b) Timeline—Applicant should provide a timeline of services, keeping in mind that generally the first and last years of the project require a higher concentration on administrative services. The timeline should be consistent with the proposed budget, reflect key activities outlined in the narrative work plan, and ensure that all project participants complete their financial education, finish saving, and purchase their asset prior to the end of the project period. Applicants are strongly encouraged to present the timeline in the format of a Gantt chart.

(c) Additional Financial Resources—To the extent possible, applicants provide a plan for obtaining cash or in-kind funds from other sources using the ORR IDA funds to leverage these additional non-Federal financial matching resources.

Results or Benefits Expected—20 points

The outcomes and benefits proposed are reasonable and reflect the objectives of this announcement. Explain how the project will produce results by specifying short and long-term measurable outcomes. Describe the strategy for collecting and validating data for use in program management, monitoring and evaluation. Describe the electronic management information system that the applicant will use for project data. The methodology proposed for collecting outcome data should be reasonable.

Organizational Profiles—20 points

Applicant organization, staff and partner organizations have demonstrated capability to implement and manage new programs and to recruit and work with the refugee population. The applicant has developed a partnership with a financial institution(s) to implement the IDAs. Applicant should discuss previous IDA grants administered by the agency and the IDA program outcomes, fiscal abilities, and evidence that they have gained the trust of the refugee community. Discuss instances of managing grants of the same size as you are requesting here.

Additionally, applicant should list public and private non-profit and for-profit organization(s), qualified financial institution(s), or microenterprise development organization(s) that will participate in the proposed project. For example, list partner organization(s) to review and approve refugee business plans for a microenterprise asset. Provide a description of the roles and responsibilities of each organization. Describe how additional partners will be recruited throughout the project period.

Budget and Budget Justification—15 points

The budget is reasonable and clearly justified. The methodologies for estimating the number of refugee participants and amount of matching funds are reasonable. Seventy-five percent of the ORR grant funds are designated for the purpose of providing matches for the refugee IDA accounts.

Objectives and Need for Assistance—15 points

The application identifies the refugee population to be assisted by this project and describes the need for assistance of this population. Indicators of the need for assistance include low rates of home ownership, education, access to capital, and use of financial institutions and high rates of reliance on public assistance and of incomes below 200 percent of the Federal poverty level. Applicant should demonstrate knowledge of refugee communities and potential clients.

2. Review and Selection Process

No grant award will be made under this announcement on the basis of an incomplete application.

The ORR Director and program staff use review panel scores when considering competing applications. Review panel scores will weigh heavily in funding decisions, but will not be the only factors considered. Applications generally will be considered in order of the average scores assigned by the review panel. Because other important factors are taken into consideration, highly ranked applications are not guaranteed funding. These other considerations include the timely and proper completion by the applicant of projects funded with ORR funds granted in the last five (5) years; comments of reviewers and government officials; ORR staff evaluation and input; amount and duration of the grant requested and the proposed project's consistency and harmony with ORR goals and policy; administrative costs associated with any sub-grantees; geographic distribution of applications; previous program performance of applicants; compliance with grant terms under previous HHS grants; audit reports; investigative reports; and applicant's progress in resolving any final audit disallowance on previous ORR or other Federal agency grants.

Approved but Unfunded Applications

Applications that are approved but unfunded may be held over for funding in the next funding cycle pending the availability of funds for a period not to exceed one year.

## VI. Award Administration Information

*1. Award Notices*

The successful applicants will be notified through the issuance of a Financial Assistance Award document which sets forth the amount of funds granted, the terms and conditions of the grant, the effective date of the grant, the budget period for which initial support will be given, the non-Federal share to be provided (if applicable), and the total project period for which support is contemplated. The Financial Assistance

Award will be signed by the Grants Officer and transmitted via postal mail.

Organizations whose applications will not be funded will be notified in writing.

*2. Administrative and National Policy Requirements*

Grantees are subject to the requirements in 45 CFR Part 74 (non-governmental) or 45 CFR Part 92 (governmental).

Direct Federal grants, subaward funds, or contracts under this Program shall not be used to support inherently religious activities such as religious instruction, worship, or proselytization. Therefore, organizations must take steps to separate, in time or location, their inherently religious activities from the services funded under this Program. Regulations pertaining to the prohibition of Federal funds for inherently religious activities can be found on the HHS Web site at *http://www.os.dhhs.gov/fbci/waisgate21.pdf.*

*3. Reporting Requirements*

*Program Progress Reports:* Quarterly.

*Financial Reports:* Semi-Annually.

Grantees will be required to submit program progress and financial reports (SF 269) throughout the project period. Program progress and financial reports are due 30 days after the reporting period. In addition, final programmatic and financial reports are due 90 days after the close of the project period.

**VII. Agency Contacts**

*Program Office Contact:* Lisa Campbell, Project Officer, Office of Refugee Resettlement, 370 L'Enfant Promenade SW., 8th Floor West, Washington, DC 20447, phone: 202–205–4597, e-mail: *lcampbell@acf.hhs.gov.*

*Grants Management Office Contact:* Sylvia Johnson, Grants Management Officer, Office of Grants Management, 370 L'Enfant Promenade SW., 4th Floor West, Washington, DC 20447, phone: 202–401–5513, e-mail: *ACFOGME-Grants@acf.hhs.gov.*

**VIII. Other Information**

Notice: Beginning with FY 2005, the Administration for Children and Families (ACF) will no longer publish grant announcements in the **Federal Register**. Beginning October 1, 2005, applicants will be able to find a synopsis of all ACF grant opportunities and apply electronically for opportunities via: *http://www.Grants.gov.* Applicants will also be able to find the complete text of *http://www.acf.hhs.gov/grants/index.html.*

Please reference Section IV.3 for details about acknowledgement of received applications.

ORR typically sponsors two training workshops per year, and applicants should budget accordingly.

Dated: June 1, 2005.

**Nguyen Van Hanh,**

*Director, Office of Refugee Resettlement.*

[FR Doc. 05–11198 Filed 6–3–05; 8:45 am]

BILLING CODE 4184–01–P

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Grants and Cooperative Agreements; Availability etc.: Healthy Marriage Initiative

*Program Office:* Office of Planning, Research and Evaluation.

*Funding Opportunity Title:* Healthy Marriage Research Initiative.

*Announcement Type:* Grant—Initial.

*Funding Opportunity Number:* HHS–2005–ACF–OPRE–OJ–0090.

*CFDA Number:* 93.647.

*Due Date For Letter of Intent or Preapplications:* June 27, 2005.

*Due Date for Applications:* July 26, 2005.

*Executive Summary:* The Office of Planning, Research and Evaluation (OPRE), within the Administration for Children and Families (ACF), announces the availability of funds to support new research under the Healthy Marriage Research Initiative. Applications for both short-term (12–17 months) and long-term (up to 60 months) studies will be considered. OPRE will consider applications in three broad categories of evaluation and research: intervention studies; basic studies; and methodological and analytical studies.

**I. Funding Opportunity Description**

*Legislative Authority: Section 1110 of the Social Security Act [42 U.S.C. 1310]*

*Program Purpose:* To stimulate and fund short- and long-term studies focused on healthy marriage in population groups for which a limited body of research exists. This means, primarily, lower-income individuals and couples, including but not limited to those in poverty, as well as ethnic and racial minority groups. Federal funding under this announcement will be approved to support research and evaluation activities only, not program operation or service provision.

This funding is intended to support different types of studies including: Basic studies to understand the determinants and barriers to sustained, healthy marriage among low-income couples and differences among racial/ethnic minorities; methodological and measurement studies to improve the quality of marital research related to low-income and racial/ethnic minorities; and intervention evaluation research to understand effective ways to help interested low-income couples achieve their desire for a healthy marriage. Studies under this announcement are intended to inform the design and operation of programs to support healthy marriages, and are intended to complement other ACF research initiatives related to building and sustaining healthy marriages (described below).

As indicated, OPRE anticipates funding both short-term projects (*e.g.*, 12–17 months) and longer-term studies (up to 60 months). Recipients of multi-year project awards will be allowed to apply for additional funding in subsequent years, within the overall approved project period, on a non-competitive basis. Short-term projects may include one-time awards for project and budget periods of up to 17 months.

OPRE may provide sole funding for projects, provide principal funding, or support individual components of projects which have other funders. The latter types of applications (*i.e.*, those with other funding sources) should include information about the funding sources for all components of the project in addition to the detailed budget information (as discussed in Section III) for the component(s) for which funding under this announcement is being sought.

In cases where more applications are approved for funding than ACF can fund with the money available, the Grants Officer shall fund applications in their order of approval until funds run out. In this case, ACF has the option of carrying over the approved applications up to a year for funding consideration in a later competition of the same program. These applications need not be reviewed and scored again if the program's evaluation criteria have not changed. However, they must then be placed in rank order along with other applications in later competitions.

Overview and Description of Research Priorities

*Background:* The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 authorizing the Temporary Assistance for Needy Families (TANF) program, outlined critical goals for assistance to needy families. The following three objectives

relate directly to building and sustaining healthy marriages:

- To end dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
- To encourage the formation and maintenance of two-parent families;
- To reduce the incidence of out-of-wedlock pregnancies.

There is mounting evidence that children raised by their married, biological parents fare better on many outcome measures and that high rates of non-marital childbearing and marital dissolution put children at increased risk. In addition, although not a panacea, research points to healthy marriage as an important factor in keeping children and families out of poverty. Research also suggests that marriage is a key source of greater economic security, health, and happiness for adults, and a vital resource for healthy communities.

Over the past several years, varied approaches to broadening access to supports for healthy marriage have emerged. The initiatives vary in many ways including the types of organizations or entities involved (*e.g.*, state and local governments, community organizations, faith-based organizations, coalitions of organizations or partnerships), the types of individuals or families targeted, and the types of activities supported (*e.g.*, training for high school and college students on healthy dating and relationships, pre-marital inventories, marriage education and enrichment classes, mentoring). In some instances, approaches include adding healthy marriage components to ongoing programs serving or utilized by lower-income families, such as community family resource centers, parenting programs, refugee assistance programs, or childbirth classes/clinics. We have limited information about the effectiveness of interventions among low-income populations.

Research has shown that individuals and couples across the economic spectrum are similar in their desire to have stable, healthy marriage and family relationships for themselves and their children. However, those dealing with economic difficulties often face additional challenges to achieving these goals relative to couples who are more economically secure. Research shows that lower-income is associated with higher rates of divorce. We have limited information about the factors that contribute to these differences, across economic and racial/ethnic groups. We also have limited information about factors that contribute to marital quality and stability and child well-being within lower-income groups and different racial and ethnic groups and whether the factors are the same or different across population groups.

OPRE has developed a research agenda related to healthy marriage that will help provide additional information in some of these areas. OPRE's current and recent projects are briefly described below. Where reports are available, they are referenced.

1. Building Strong Families (BSF). This project builds upon recent research showing that most unmarried, low-income couples are living together or romantically involved when their child is born. Moreover, most have strong hopes for marriage to each other. Unfortunately, only a small fraction will realize those hopes. BSF is a long-term experimental demonstration and evaluation study of intervention programs designed to help lower-income, unmarried parents gain the skills and knowledge needed to sustain a healthy relationship and achieve a healthy marriage if that is the path they choose. Information is available at *http://www.buildingstrongfamilies.info.*

2. Supporting Healthy Marriage (SHM). This project builds upon research that shows that, while lower-income individuals highly value marriage, they experience higher break-up rates. SHM is a long-term, experimental, demonstration and evaluation study of intervention programs designed to help lower-income couples who are either married or plan to marry gain the skills and knowledge needed to sustain a healthy marriage. Information is available at *http://www.supportinghealthymarriage.org.*

3. Community Healthy Marriage Initiatives (CHMI) Evaluation. A growing number of communities are initiating grass-roots efforts to help couples build and sustain healthy marriages through public awareness campaigns and saturating the community with educational opportunities. CHMI is a major, long-term effort to evaluate the implementation of such community-wide programs and evaluate impacts in selected sites.

4. Service Delivery Settings and Evaluation Design Options for Strengthening and Promoting Healthy Marriages. This project examined existing and potential service delivery systems for marriage education and provided recommendations for evaluation approaches and designs. In addition, the project involved a systematic review of studies on the effectiveness of interventions to strengthen marriage. Reports may be accessed at: *http://www.acf.hhs.gov/programs/opre/strengthen/serv_delivery/index.html.*

5. Economic Disincentives to Marriage Project. This project is building a comprehensive database of the state and federal incentives and disincentives for low-income couples who marry, as well as developing a dynamic software application that can accurately portray the costs and benefits to a particular couple of the decision to marry.

6. Conceptualizing and Measuring Healthy Marriages for Empirical Research and Evaluation Studies. This project is reviewing the state of the art of measurement in marriage and couple relationship research. The project includes a compendium of measures and a framework for addressing measurement questions and improving the battery of measures related to marriage and couple relationships. See Brief at: *http://www.childtrends.org/_catdisp_page.cfm?LID=141#MarriageFamily.*

*Project Description*

As stated previously, the purpose of this announcement is to stimulate and fund short and long-term research or evaluation studies focused on healthy marriage in population groups for which a limited body of research exists. This means, primarily, lower-income individuals and couples, including but not limited to those in poverty, and ethnic and racial minority groups (*e.g.*, Latino/Hispanic, African-American, Native American, Asian and Pacific Islander). We are particularly interested in research and evaluation that would benefit two special initiatives within ACF: the African-American Healthy Marriage Initiative and the Hispanic Healthy Marriage Initiative. ACF strongly encourages applicants to consider domestic violence in proposed research activities. The research funded under this announcement will be germane to the government's goal of ensuring that more children grow up in stable homes with their own two parents (biological or adoptive) in a healthy marriage. Proposed research studies should not duplicate the efforts of ongoing ACF research studies.

Proposed studies may be applied, basic, or methodological. By applied we mean to include intervention and evaluation studies that increase knowledge about the effectiveness of an array of approaches designed to help individuals and couples build and sustain healthy marriages. By basic research we mean projects that will explore patterns and processes related to building and sustaining healthy marriages. Methodological studies are

those that address conceptual, analytic, and measurement issues in studying marriage and couple relationships.

In addition to empirical research, proposals may include conceptual studies and meta-analyses that synthesize existing work and point in fertile directions for research and policy and program development. In addition to quantitative, empirical studies, applicants may propose to conduct qualitative studies that help illuminate relationship processes and the social context that enhances or diminishes the prospects of healthy marriage for population groups of interest. Original projects as well as enhancements to ongoing research will be considered.

Because the study of marriage and intimate relationships is complex and multidimensional, we are interested in proposals that will approach a research question from multiple disciplinary perspectives and via numerous methods. For example, some proposed studies will benefit from the joint participation of scholars and marriage practitioners.

Below we address in more detail the kinds of studies that are of interest to OPRE and that will advance ACF's healthy marriage research agenda. The discussion below is intended to be illustrative; it does not represent established priorities. Proposals may involve elements from more than one category discussed below. Studies that directly involve participants or individual level data must include plans for ensuring the confidentiality of participant identifiers and information.

1. Applied Research

We are interested in studies that test the effectiveness of approaches, programs and curricula to help low-income individuals and couples to improve their relationship skills and build and sustain a healthy marriage. We are interested in studies that would examine a range of questions regarding marriage education that will help to strengthen the practice of marriage education in general. Examples of such studies include but are not limited to: evaluation of curricula not previously tested; evaluation of variation in intensity or dosage; or tests of alternative methods or approaches for content presentation.

2. Basic Research

This work may include conceptual and empirical studies, both quantitative and qualitative, and both broad, macroscopic research and more focused work with clear application to the marriage initiative and program issues. We are interested in basic research on how individuals and couples build and sustain strong marriages as well as on factors that help or hinder the goals for a healthy marriage for youth and young adults. We are also interested in studies that replicate research on higher income couples' interaction processes with lower-income couples and studies that examine other/external stressors related to socio-economic status and other factors. We are also interested in studies with blended or step-families.

3. Methodological and Analytical Studies

We are also interested in supporting research that has a strong or exclusive methodological focus with excellent potential for improving marriage research. We are interested in both measurement studies and analytical studies.

Measurement studies may address questions about how researchers conceptualize and operationalize key concepts in a study and the measurement tools used and needed. In this area we are interested not only in self-reports of marital satisfaction but also in different conceptual lenses that highlight important constructs such as commitment, partnership, and sacrifice and effective measurement tools to capture the depth of marital and other unions. Development of observational measures and development or refinement of valid measures for use with under-studied population groups are also needed.

Improved analytical studies that utilize stronger theoretical frameworks and more sophisticated analytical tools to help overcome the limitations of correlational research in supporting causal interpretations are of interest. We are interested in studies using conceptual frameworks and analytical tools that link sets of variables at multiple levels of analysis: personal characteristics, dyadic relationships, family processes, and external or ecological factors. In addition, because quantitative research of marriage and couple relationships often leaves researchers speculating about the processes underlying their findings, we are interested in studies that integrate quantitative and qualitative work. Further, we are interested in quantitative studies that build on qualitative investigations by attempting to map the prevalence of processes found in qualitative research.

**Priority Area**

*Healthy Marriage Research Initiative*

1. Description

The Office of Planning, Research and Evaluation (OPRE), within the Administration for Children and Families (ACF), announces the availability of FY 2005 funds to support new research under the Healthy Marriage Research Initiative. If applications cannot be funded before September 30, 2005 using FY 2005 funds, awards will be made after October 1 using FY 2006 funds.

Applications for both short-term (12–17 months) and long-term (up to 60 months) studies will be considered. OPRE will consider applications in three broad categories of evaluation and research: applied research (intervention studies); basic studies; and methodological and analytical studies.

**II. Award Information**

*Funding Instrument Type:* Grant.

*Anticipated Total Priority Area Funding:* $900,000.

*Anticipated Number of Awards:* 4 to 8.

*Ceiling on Amount of Individual Awards:* $200,000 per budget period.

*Floor on Amount of Individual Awards:* None.

*Average Projected Award Amount:* $150,000 per budget period.

*Length of Project Periods:* Other.

*Explanation of Other:* For FY 2005, approximately $900,000 is expected to be available for the total group of approved projects. We estimate that this level of funding will support 4 to 8 separate projects under this announcement in FY 2005, depending on scope and scale. On average, we anticipate funding two to four multi-year projects at $150,000–$200,000 per budget period and approximately three to four one-time, smaller grants at $90,000 or less for 12–17 months. For longer-term projects, OPRE anticipates providing funding at approximately the same level for up to four additional years, subject to the availability of funds, satisfactory progress by the grantee, and the best interests of the Government. All grants are expected to be awarded by September 30, 2005. If applications cannot be funded before September 30, 2005 using FY 2005 funds, awards will be made after October 1 using FY 2006 funds.

**III. Eligibility Information**

*1. Eligible Applicants*

- Unrestricted (*i.e.*, open to any type of entity subject to exceptions specified in Additional Information on Eligibility)

*Additional Information on Eligibility:*

Faith-based and community organizations are also eligible applicants.

No grant funds may be paid as profit to any recipient even if the recipient is a commercial organization. Profit is any amount in excess of allowable direct and indirect costs (45 CFR 74.81).

While a variety of organizations and entities are eligible to apply for funding under this announcement, potential applicants should carefully review the evaluation criteria to determine that they meet the requirements for experience and expertise for conducting rigorous, well-designed evaluations and studies of the type and scope discussed herein. Applicants are reminded that funding under this announcement is not available to support programs or service provision, but rather research and evaluation.

*2. Cost Sharing/Matching: Yes*

Grantees are required to meet a non-Federal share of the project costs, in accordance with section 1110 of the Social Security Act [42 U.S.C. 1310], which provides for making grants for paying part of the cost of research projects. Grantees must provide at least *5* percent of the total approved cost of the project. The total approved cost of the project is the sum of the ACF share and the non-Federal share. The non-Federal share may be met by cash or in-kind contributions, although applicants are encouraged to meet their match requirements through cash contributions. Therefore, a project requesting *$300,000* in Federal funds (based on an award of *$100,000* per budget period) must provide a match of at least *$15,790* (*5%* of the total approved project costs). Grantees will be held accountable for commitments of non-Federal resources even if over the amount of the required match. Failure to provide the amount which the applicant indicates is committed to the project may result in a disallowance of Federal dollars. Lack of supporting documentation at the time of application will not impact the responsiveness of the application for competitive review.

*3. Other*

All applicants must have a Dun & Bradstreet number. On June 27, 2003 the Office of Management and Budget published in the **Federal Register** a new Federal policy applicable to all Federal grant applicants. The policy requires Federal grant applicants to provide a Dun & Bradstreet Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements on or after October 1, 2003. The DUNS number will be required whether an applicant is submitting a paper application or using the government-wide electronic portal (*www.Grants.gov*). A DUNS number will be required for every application for a new award or renewal/continuation of an award, including applications or plans under formula, entitlement and block grant programs, submitted on or after October 1, 2003.

Please ensure that your organization has a DUNS number. You may acquire a DUNS number at no cost by calling the dedicated toll-free DUNS number request line on 1–866–705–5711 or you may request a number on-line at *http://www.dnb.com.*

Non-profit organizations applying for funding are required to submit proof of their non-profit status. Proof of non-profit status is any one of the following:

- A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code.
- A copy of a currently valid IRS tax exemption certificate.
- A statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals.
- A certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status.
- Any of the items in the subparagraphs immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

When applying electronically we strongly suggest you attach your proof of non-profit status with your electronic application.

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

*Disqualification Factors*

Applications that exceed the ceiling amount will be considered non-responsive and will not be considered for funding under this announcement.

Any application that fails to satisfy the deadline requirements referenced in Section IV.3 will be considered non-responsive and will not be considered for funding under this announcement.

## IV. Application and Submission Information

*1. Address to Request Application Package*

OPRE Grant Review Team, Xtria, LLC, 8045 Leesburg Pike, Suite 400, Vienna, VA 22182, phone: 877–663–0250, e-mail: *opre@xtria.com,* URL: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

*2. Content and Form of Application Submission*

Letters of Intent: Those parties expecting to submit an application in response to this announcement are requested to submit a letter of intent by email that includes the funding opportunity title and number and the name and address of the applicant organization.

Due Date for Letters of Intent: 20 calendar days from date of publication in the **Federal Register**. Letters of Intent are strongly encouraged but not required.

Address to Submit Letters of Intent:

OPRE Grant Review Team, Xtria, LLC, 8045 Leesburg Pike, Suite 400, Vienna, VA 22182, phone: 877–663–0250, e-mail: *opre@xtria.com.*

The length of the application, excluding application forms, certifications, resumes and budget justification should not exceed 25 pages, double-spaced, using 12-point font or larger. Applicants are requested not to send pamphlets, brochures or other printed materials with the application. Such materials and/or pages exceeding the 25 page limit, if submitted, will not be reviewed. Applicants have the option of omitting from application copies (not originals) specific salary rates or amounts for individuals specified in the application budget. The copies may include summary salary information.

You may submit your application to us in either electronic or paper format. To submit an application electronically, please use the *http://www.Grants.gov/Apply* site. If you use Grants.gov, you will be able to download a copy of the application package, complete it off-line, and then upload and submit the application via the Grants.gov site. ACF will not accept grant applications via e-mail or facsimile transmission.

Please note the following if you plan to submit your application electronically via Grants.gov:

- Electronic submission is voluntary, but strongly encouraged.
- When you enter the Grants.gov site, you will find information about

submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.

- We recommend you visit Grants.gov at least 30 days prior to filing your application to fully understand the process and requirements. We encourage applicants who submit electronically to submit well before the closing date and time so that if difficulties are encountered an applicant can still send in a hard copy overnight. If you encounter difficulties, please contact the Grants.gov Help Desk at 1–800–518–4276 to report the problem and obtain assistance with the system.
- To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the SF 424 and all necessary assurances and certifications.
- Your application must comply with any page limitation requirements described in this program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Administration for Children and Families will retrieve your application from Grants.gov.
- We may request that you provide original signatures on forms at a later date.
- You may access the electronic application for this program on *http://www.Grants.gov*
- You must search for the downloadable application package by the CFDA number.

Applicants that are submitting their application in paper format should submit an original and two copies of the complete application. The original and each of the two copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative, have original signatures, and be submitted unbound.

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

*Standard Forms and Certifications*

The project description should include all the information requirements described in the specific evaluation criteria outlined in the program announcement under Section V Application Review Information. In addition to the project description, the applicant needs to complete all the standard forms required for making applications for awards under this announcement.

Applicants seeking financial assistance under this announcement must file the Standard Form (SF) 424, Application for Federal Assistance; SF–424A, Budget Information—Non-Construction Programs; SF–424B, Assurances—Non-Construction Programs. The forms may be reproduced for use in submitting applications. Applicants must sign and return the standard forms with their application.

Applicants must furnish prior to award an executed copy of the Standard Form LLL, Certification Regarding Lobbying, when applying for an award in excess of $100,000. Applicants who have used non-Federal funds for lobbying activities in connection with receiving assistance under this announcement shall complete a disclosure form, if applicable, with their applications (approved by the Office of Management and Budget under control number 0348–0046). Applicants must sign and return the certification with their application.

Applicants must also understand they will be held accountable for the smoking prohibition included within P.L. 103–227, Title XII Environmental Tobacco Smoke (also known as the PRO–KIDS Act of 1994). A copy of the **Federal Register** notice which implements the smoking prohibition is included with this form. By signing and submitting the application, applicants are providing the certification and need not mail back the certification with the application.

Applicants must make the appropriate certification of their compliance with all Federal statutes relating to nondiscrimination. By signing and submitting the applications, applicants are providing the certification and need not mail back the certification form. Complete the standard forms and the associated certifications and assurances based on the instructions on the forms. The forms and certifications may be found at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

Use of Human Subjects. If your evaluation plan includes gathering data from or about individuals, unless the project meets specified exemption criteria (see *http://www.hhs.gov/ohrp/humansubjects/guidance/exmpt-pb.htm*), there are specific procedures which must be followed in order to protect their privacy and ensure the confidentiality of the information about them. Applicants planning to gather such data are asked to describe their plans regarding an Institutional Review Board (IRB) review. If applicable, applicants must include a completed Form 310, Protection of Human Subjects. For more information about use of human subjects and IRB's you can visit these Web sites: *http://www.hhs.gov/ohrp/irb/irb_chapter2.htm#d2*

and

*http://www.hhs.gov/ohrp/humansubjects/guidance/ictips.htm.*

Those organizations required to provide proof of non-profit status, please refer to Section III.3. Please see Section V.1 for instructions on preparing the full project description.

*3. Submission Dates and Times*

Due Date For Letter of Intent or Preapplications: June 27, 2005.

Due Date for Applications: July 26, 2005.

**Explanation of Due Dates**

The closing time and date for receipt of applications is referenced above. Applications received after 4:30 p.m. eastern time on the closing date will be classified as late.

*Deadline:* Applications shall be considered as meeting an announced deadline if they are received on or before the deadline time and date referenced in Section IV.6. Applicants are responsible for ensuring applications are mailed or submitted electronically well in advance of the application due date.

Applications hand carried by applicants, applicant couriers, other representatives of the applicant, or by overnight/express mail couriers shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., eastern time, at the address referenced in Section IV.6., between Monday and Friday (excluding Federal holidays).

ACF cannot accommodate transmission of applications by facsimile. Therefore, applications transmitted to ACF by fax will not be accepted regardless of date or time of submission and time of receipt.

*Late Applications:* Applications that do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition.

Any application received after 4:30 p.m. eastern time on the deadline date will not be considered for competition.

Applicants using express/overnight mail services should allow two working days prior to the deadline date for receipt of applications. Applicants are cautioned that express/overnight mail services do not always deliver as agreed.

*Extension of deadlines:* ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, etc.) occur, or when there are widespread disruptions of mail service, or in other rare cases. A determination to extend or waive deadline requirements rests with the Chief Grants Management Officer.

Receipt acknowledgement for application packages will not be provided to applicants who submit their package via mail, courier services, or by hand delivery. Applicants will receive an electronic acknowledgement for applications that are submitted via *http://www.Grants.gov.*

Checklist:

You may use the checklist below as a guide when preparing your application package.

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Letter of Intent | See Section IV.2 | Found in Section IV.2 | 20 days from date of announcement. |
| Project Description | See Sections IV.2 and V | Found in Sections IV.2 and V | By application due date. |
| Budget Narrative/Justification | See Sections IV.2 and V | Found in Sections IV.2 and V | By application due date. |
| SF424 | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By application due date. |
| SF–LLL Certification Regarding Lobbying. | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By date of award. |
| Certification Regarding Environmental Tobacco Smoke. | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By date of award. |
| Assurances | See Section IV.2 | May be found at *http://www.acf.hhs.gov/program/ofs/forms.htm.* | By date of award. |
| Proof of Non-Profit Status | See Section III.3 | Found in Section III.3 | By date of award. |
| Assurance Regarding Protection of Human Subjects. | IV.2 | *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By application due date. |

Additional Forms: Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Survey for Private, Non-Profit Grant Applicants. | See form | Found in *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By application due date. |

*4. Intergovernmental Review*

State Single Point of Contact (SPOC)

This program is covered under Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' and 45 CFR Part 100, ''Intergovernmental Review of Department of Health and Human Services Programs and Activities.'' Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of October 1, 2004, the following jurisdictions have elected to participate in the Executive Order process: Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New York, North Dakota, Rhode Island, South Carolina, Texas, Utah, West Virginia, Wisconsin, American Samoa, Guam, North Mariana Islands, Puerto Rico, and Virgin Islands. As these jurisdictions have elected to participate in the Executive Order process, they have established SPOCs. Applicants from participating jurisdictions should contact their SPOC, as soon as possible, to alert them of prospective applications and receive instructions. Applicants must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2).

A SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards. SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations which may trigger the ''accommodate or explain'' rule.

When comments are submitted directly to ACF, they should be addressed to the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade SW., 4th floor, Washington, DC 20447.

Although the remaining jurisdictions have chosen not to participate in the process, entities that meet the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, etc. does not have a SPOC. Therefore, applicants from these jurisdictions, or for projects administered by federally-recognized Indian Tribes, need take no action in regard to E.O. 12372.

The official list, including addresses, of the jurisdictions that have elected to participate in E.O. 12372 can be found on the following URL: *http://www.whitehouse.gov/omb/grants/spoc.html.*

*5. Funding Restrictions*

Grant awards will not allow reimbursement of pre-award costs.

Grant awards are for research and evaluation costs only, not for program services or the support of conferences. This limitation does not preclude inclusion of costs associated with dissemination or presentation of findings by authors.

No grant funds may be paid as profit to any recipient even if the recipient is a commercial organization. Profit is any amount in excess of allowable direct and indirect costs (45 CFR 74.81).

*6. Other Submission Requirements*

Submission by Mail: An applicant must provide an original application with all attachments, signed by an authorized representative and two copies. Please see Section IV.3 for an explanation of due dates. Applications should be mailed to: OPRE Grant Review Team, Xtria, LLC, 8045 Leesburg Pike, Suite 400, Vienna, VA 22182.

*Hand Delivery:* An applicant must provide an original application with all attachments signed by an authorized representative and two copies. The application must be received at the address below by 4:30 p.m. eastern time on or before the closing date. Applications that are hand delivered will be accepted between the hours of 8 a.m. to 4:30 p.m. eastern time, Monday through Friday. Applications should be delivered to: OPRE Grant Review Team, Xtria, LLC, 8045 Leesburg Pike, Suite 400, Vienna, VA 22182.

*Electronic Submission:* Please see Section IV.2 for guidelines and requirements when submitting applications electronically via *http://www.Grants.gov*.

**V. Application Review Information**

*The Paperwork Reduction Act of 1995 (Pub. L. 104–13)*

Public reporting burden for this collection of information is estimated to average 20 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed and reviewing the collection information.

The project description is approved under OMB control number 0970–0139 which expires 4/30/2007.

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.

*1. Criteria*

The following are instructions and guidelines on how to prepare the ''project summary/abstract'' and ''full project description'' sections of the application. Under the evaluation criteria section, note that each criterion is preceded by the generic evaluation requirement under the ACF Uniform Project Description (UPD).

Part I The Project Description Overview

Purpose

The project description provides a major means by which an application is evaluated and ranked to compete with other applications for available assistance. The project description should be concise and complete and should address the activity for which Federal funds are being requested. Supporting documents should be included where they can present information clearly and succinctly. In preparing your project description, information responsive to each of the requested evaluation criteria must be provided. Awarding offices use this and other information in making their funding recommendations. It is important, therefore, that this information be included in the application in a manner that is clear and complete.

General Instructions

ACF is particularly interested in specific project descriptions that focus on outcomes and convey strategies for achieving intended performance. Project descriptions are evaluated on the basis of substance and measurable outcomes, not length. Extensive exhibits are not required. Cross-referencing should be used rather than repetition. Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant funded activity should be placed in an appendix.

Pages should be numbered and a table of contents should be included for easy reference.

Introduction

Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions while being aware of the specified evaluation criteria. The text options give a broad overview of what your project description should include while the evaluation criteria identifies the measures that will be used to evaluate applications.

Project Summary/Abstract

Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance

Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes.

Incorporate demographic data and participant/beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Results or Benefits Expected

Identify the results and benefits to be derived.

Clearly state the ways in which knowledge about what works will be improved through the funding of a project to evaluate a marriage education program for low-income couples, using an experimental design with random assignment of couples or individuals.

Approach

Outline a plan of action that describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors that might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished.

When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates.

If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any

''collection of information that is conducted or sponsored by ACF.''

List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Evaluation

Provide a narrative addressing how the conduct of the project and the results of the project will be evaluated. In addressing the evaluation of results, state how you will determine the extent to which the project has achieved its stated objectives and the extent to which the accomplishment of objectives can be attributed to the project. Discuss the criteria to be used to evaluate results, and explain the methodology that will be used to determine if the needs identified and discussed are being met and if the project results and benefits are being achieved. With respect to the conduct of the project, define the procedures to be employed to determine whether the project is being conducted in a manner consistent with the work plan presented and discuss the impact of the project's various activities on the project's effectiveness.

Staff and Position Data

Provide a biographical sketch and job description for each key person appointed. Job descriptions for each vacant key position should be included as well. As new key staff is appointed, biographical sketches will also be required.

Dissemination Plan

Provide a plan for distributing reports and other project outputs to colleagues and the public. Applicants must provide a description of the kind, volume and timing of distribution.

Third-Party Agreements

Provide written and signed agreements between grantees and subgrantees or subcontractors or other cooperating entities. These agreements must detail scope of work to be performed, work schedules, remuneration, and other terms and conditions that structure or define the relationship.

Budget and Budget Justification

Provide a budget with line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. Also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

General

Use the following guidelines for preparing the budget and budget justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative justification. ''Federal resources'' refers only to the ACF grant for which you are applying. ''Non Federal resources'' are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: First column, object class categories; second column, Federal budget; next column(s), non-Federal budget(s), and last column, total budget. The budget justification should be a narrative.

Personnel

*Description:* Costs of employee salaries and wages.

*Justification:* Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time equivalent), annual salary, grant salary, wage rates, etc. Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits

*Description:* Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

*Justification:* Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel

*Description:* Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

*Justification:* For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ACF-sponsored workshops should be detailed in the budget.

Equipment

*Description:* ''Equipment'' means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of (a) the capitalization level established by the organization for the financial statement purposes, or (b) $5,000. (Note: Acquisition cost means the net invoice unit price of an item of equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation shall be included in or excluded from acquisition cost in accordance with the organization's regular written accounting practices.)

*Justification:* For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy or section of its policy which includes the equipment definition.

Supplies

*Description:* Costs of all tangible personal property other than that included under the Equipment category.

*Justification:* Specify general categories of supplies and their costs. Show computations and provide other information which supports the amount requested.

Contractual

*Description:* Costs of all contracts for services and goods except for those that belong under other categories such as equipment, supplies, construction, etc. Include third party evaluation contracts (if applicable) and contracts with secondary recipient organizations, including delegate agencies and specific project(s) or businesses to be financed by the applicant.

*Justification:* Demonstrate that all procurement transactions will be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients and subrecipients, other than States that are required to use Part 92 procedures, must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000).

Recipients might be required to make available to ACF pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc.

**Note:** Whenever the applicant intends to delegate part of the project to another agency, the applicant must provide a detailed budget and budget narrative for each delegate agency, by agency title, along with the required supporting information referred to in these instructions.

Other

Enter the total of all other costs. Such costs, where applicable and appropriate, may include but are not limited to insurance, food, medical and dental costs (noncontractual), professional services costs, space and equipment rentals, printing and publication, computer use, training costs, such as tuition and stipends, staff development costs, and administrative costs.

*Justification:* Provide computations, a narrative description and a justification for each cost under this category.

Indirect Charges

*Description:* Total amount of indirect costs. This category should be used only when the applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

*Justification:* An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, upon notification that an award will be made, it should immediately develop a tentative indirect cost rate proposal based on its most recently completed fiscal year, in accordance with the cognizant agency's guidelines for establishing indirect cost rates, and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. When an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgement that the applicant is accepting a lower rate than allowed.

Non-Federal Resources

*Description:* Amounts of non-Federal resources that will be used to support the project as identified in Block 15 of the SF–424.

*Justification:* The firm commitment of these resources must be documented and submitted with the application so the applicant is given credit in the review process. A detailed budget must be prepared for each funding source.

Total Direct Charges, Total Indirect Charges, Total Project Costs

*Evaluation Criteria*

The following evaluation criteria appear in weighted descending order. The corresponding score values indicate the relative importance that ACF places on each evaluation criterion; however, applicants need not develop their applications precisely according to the order presented. Application components may be organized such that a reviewer will be able to follow a seamless and logical flow of information (*i.e.*, from a broad overview of the project to more detailed information about how it will be conducted).

In considering how applicants will carry out the responsibilities addressed under this announcement, competing applications for financial assistance will be reviewed and evaluated against the following criteria:

Approach—30 Points

Applications will be evaluated on the extent to which the proposed approach, methods, and analytic techniques are appropriate and sufficient for addressing the questions proposed in the application.

Applications will be evaluated on the extent to which the approach is the most rigorous appropriate, including the use of random assignment for evaluation studies. Further, the review will assess the extent to which the planned analyses reflect knowledge and use of state-of-the-art analytic techniques and can be expected to advance the state of the art and knowledge in relation to research on healthy marriage, particularly among low-income populations and racial and ethnic minorities.

Applications will be evaluated on the extent to which the project plan reflects careful and appropriate consideration of differences in low-income populations and racial and ethnic minorities in a study focused on healthy marriage.

Applications will be evaluated on the extent to which the overall project plan is reasonable and can be expected to be successfully accomplished on the schedule proposed, at the funding and staffing levels proposed.

Results or Benefits Expected—25 Points

Applications will be evaluated on the extent to which the results expected, as described in the application, will lead to knowledge and improvements that can be straightforwardly applied and used by those providing direct services in the field of healthy marriage.

Applications will be evaluated on the extent to which the project and expected findings/results will substantially improve knowledge and understanding regarding family formation and healthy marriage among low-income populations and racial and ethnic minorities within the context of direct services or research in the field of healthy marriage.

Staff and Position Data—20 Points

Applications will be evaluated on the demonstrated relevance of the experience and expertise of the proposed principal investigator and other key staff for carrying out the proposed project.

Applicants should describe relevant prior experience for all key personnel in carrying out the activities and the types of analyses expected to be necessary in the proposed project. Listings or descriptions of prior studies are not sufficient.

Applications will be evaluated on the extent to which proposed key staff have demonstrated experience working with or studying low-income populations and racial and ethnic minorities in the area of family formation and/or healthy marriage.

Applications will be evaluated on the extent to which the time to be devoted to the project by the principal investigator is sufficient to ensure a high level of professional input and attention to all aspects of the study.

Objectives and Need for Assistance—15 Points

Applications will be evaluated on the clarity of the statement of the problem or issue they will address and the relevance of that problem/issue to the objectives of ACF's Healthy Marriage Initiative and the purposes of this announcement.

Applications will be evaluated on the extent to which they demonstrate that the project or study will address an important need related to the study of or direct services for healthy marriage, particularly among low-income populations and racial and ethnic minorities.

Budget and Budget Justification—10 Points

Applications will be evaluated on the reasonableness and appropriateness of the budget in relation to the proposed scope and scale of the project.

Applications will be evaluated on the extent to which the budget items are well justified in support of the proposed project and objectives and do not include superfluous items.

Applications will be evaluated on the extent of the cost-share provided. Grantees must provide at least 5 percent of the total approved cost of the project.

*2. Review and Selection Process*

No grant award will be made under this announcement on the basis of an incomplete application.

Timely applications from eligible applicants will be reviewed and scored competitively. Reviewers will use the evaluation criteria listed above to review and score the application.

In addition, ACF may solicit comments from ACF Regional Office staff, other Federal agencies, and, if determined to be appropriate, other knowledgeable individuals. These comments along with those of the reviewers will be considered by ACF in making the funding decision.

In making award decisions, ACF will aim to fund a group of studies that together address a wide range of questions of the greatest importance to ACF, states, other governmental agencies, and the general public. In order to ensure that a wide array of questions, topics, and issues will be addressed through projects funded under this announcement, in making the final selections, in addition to the review criteria identified below, ACF may consider additional factors including geographic diversity, racial/ethnic populations studied, project type, opportunities to analyze particular sub-groups of the population, methods being used and the issues being examined.

Further, to maximize the benefit of the Federal investment to stimulate research and advance knowledge about healthy marriages, ACF may give preference to applicants who provide evidence of other sources of funding for the project (e.g., applicant resources or private foundation funding) beyond the cost share.

On the basis of the review of an application, ACF will: (a) Approve the application for funding; or (b) disapprove the application; or (c) approve the application but not fund it for such reasons as a lack of funds or a need for further review.

Since ACF will be using non-Federal reviewers in the process, applicants have the option of omitting from the application copies (not the original) specific salary rates or amounts for individuals specified in the application budget and Social Security Numbers, if otherwise required for individuals. The copies may include summary salary information.

*Approved but Unfunded Applications*

Applications that are approved but unfunded may be held over for funding in the next funding cycle, pending the availability of funds, for a period not to exceed one year.

*Anticipated Announcement and Award Dates*

Awards are expected to be made by September 30, 2005. If applications cannot be funded before September 30, 2005 using FY 2005 funds, awards will be made after October 1 using FY 2006 funds.

Unsuccessful applicants will be notified in writing after award actions are made.

## VI. Award Administration Information

*1. Award Notices*

The successful applicants will be notified through the issuance of a Financial Assistance Award document which sets forth the amount of funds granted, the terms and conditions of the grant, the effective date of the grant, the budget period for which initial support will be given, the non-Federal share to be provided (if applicable), and the total project period for which support is contemplated. The Financial Assistance Award will be signed by the Grants Officer and transmitted via postal mail.

Organizations whose applications will not be funded will be notified in writing.

*2. Administrative and National Policy Requirements*

Grantees are subject to the requirements in 45 CFR Part 74 (non-governmental) or 45 CFR Part 92 (governmental).

Grantees are subject to the requirements in 45 CFR Part 74 (non-governmental) or 45 CFR Part 92 (governmental).

Direct federal grants, subaward funds, or contracts under this Program shall not be used to support inherently religious activities such as religious instruction, worship, or proselytization. Therefore, organizations must take steps to separate, in time or location, their inherently religious activities from the services funded under this Program. Regulations pertaining to the prohibition of Federal funds for inherently religious activities can be found on the HHS Web site at *http://www.os.dhhs.gov/fbci/waisgate21.pdf.*

*3. Reporting Requirements*

Grantees will be required to submit program progress and financial reports (SF–269 found at *http://www.acf.hhs.gov/programs/ofs/forms.htm*) throughout the project period. Program progress and financial reports are due 30 days after the reporting period. Final programmatic and financial reports are due 90 days after the close of the project period.

*Program Progress Reports:* Semi-Annually.

*Financial Reports:* Semi-Annually.

Grantees' programmatic reports should indicate progress and accomplishments in carrying out the approved study to date compared to what was expected or proposed in the application and actions that have been taken to correct problems or delays. To the extent relevant based on study design/approach, programmatic progress reports should include interim findings. The progress report should also include information on completed and planned presentations on the project.

## VII. Agency Contacts

Program Office Contact: OPRE Grant Review Team, Xtria, LLC, 8045 Leesburg Pike, Suite 400, Vienna, VA 22182, phone: 877–663–0250, e-mail: *opre@xtria.com.*

Grants Management Office Contact: Sylvia Johnson, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., 4th Floor West, Washington, DC 20447, phone: 202–401–4524, e-mail: *syjohnson@acf.hhs.gov.*

## VIII. Other Information

Notice: Beginning with FY 2006, the Administration for Children and Families (ACF) will no longer publish grant announcements in the **Federal Register**. Beginning October 1, 2005 applicants will be able to find a synopsis of all ACF grant opportunities and apply electronically for opportunities via: *http://www.Grants.gov.* Applicants will also be able to find the complete text of all ACF grant announcements on the ACF Web site located at: *http://www.acf.hhs.gov/grants/index.html.* Information about existing OPRE sponsored research projects and publications may be found at *http://www.acf.hhs.gov/programs/opre.* and information about the ACF Healthy Marriage Initiative may be found at *http://www.acf.hhs.gov/healthymarriage/index.html.*

Please reference Section IV.3 for details about acknowledgement of received applications.

Dated: May 26, 2005.

**Naomi Goldstein,**

*Director, Office of Planning, Research and Evaluation.*

[FR Doc. 05–11191 Filed 6–3–05; 8:45 am]

**BILLING CODE 4184–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Administration on Children, Youth and Families, Children's Bureau; Funding Opportunity

*Funding Opportunity Title:* National Quality Improvement Center on the Privatization of Child Welfare Services.

*Announcement Type:* Initial.

*Funding Opportunity Number:* HHS–2005–ACF–ACYF–CA–0027.

*CFDA Number:* 93.670.

*Due Date for Applications:* Application is due August 5, 2005.

*Executive Summary:* The purpose of this funding announcement is to award a cooperative agreement for the creation of a national Quality Improvement Center (QIC) focused on identifying effective practices in the privatization of child welfare services. The QIC will assess needs and resources, then plan and implement research and demonstration activities to develop knowledge about improving child welfare services and systems through privatization.

The QIC will be awarded funds for a planning period and an implementation phase. During the planning period, the QIC will engage in a collaborative process to review the literature, clarify the focus and refine the implementation plan for the remainder of its child welfare privatization knowledge-building activities. During the implementation phase, the QIC will sponsor (through sub-grants), monitor and evaluate research or demonstration projects that test a variety of privatization models or hypotheses at multiple sites. The QIC will also provide technical assistance to its sub-grantees, funded under this initiative.

### I. Funding Opportunity Description

The purpose of this funding announcement is to award a cooperative agreement for the creation of a national Quality Improvement Center (QIC) focused on identifying effective practices in the privatization of child welfare services. The QIC will assess needs and resources, then plan and implement research and demonstration activities to develop knowledge about improving child welfare services and systems through privatization.

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*Priority Area 1*

*National Quality Improvement Center on the Privatization of Child Welfare Services*

1. Description

The purpose of this funding announcement is to award a cooperative agreement for the creation of a national Quality Improvement Center (QIC) focused on identifying effective practices in the privatization of child welfare services. The QIC will assess needs and resources, then plan and implement research and demonstration activities to develop knowledge about improving child welfare services and systems through privatization.

The QIC will be awarded funds for a planning period and an implementation phase. During the planning period, the QIC will engage in a collaborative process to review the literature, clarify the focus and refine the implementation plan for the remainder of its child welfare privatization knowledge-building activities. During the implementation phase, the QIC will sponsor (through sub-grants), monitor and evaluate research or demonstration projects that test a variety of privatization models or hypotheses at multiple sites. The QIC will also provide technical assistance to its sub-grantees, funded under this initiative.

*Background*

Our nation's child welfare systems are faced with the challenge of producing positive outcomes for the children and families they serve. Over the past several years, many States have embarked on system improvement efforts in response to changes in Federal laws, shrinking State budgets, and/or emerging trends and innovations in the field of child welfare. System improvements have been further spurred by the CB's approach to monitoring the performance of State child welfare systems by assessing outcomes. These reviews seek to determine what is actually happening to children and families as they are engaged in State child welfare services, and to assist States to enhance their capacity to help children and families achieve positive outcomes.

In October, 2004, the Administration for Children and Families (ACF)/Children's Bureau released its report on findings from the initial Child and Family Services Reviews (CFSRs). This report includes data from all 50 States, the District of Columbia, and Puerto Rico regarding States' conformity with Federal standards for child welfare. General findings from the Federal Child and Family Services Review may be found at *http://www.acf.hhs.gov/programs/cb/cwrp/results/statefindings/genfindings04/index.htm.* The report discusses common challenges that States face in providing for the safety, permanency and well-being of children. One common challenge pertains to conducting risk and safety assessments that are sufficiently comprehensive to capture underlying family problems that might contribute to child maltreatment. Other common challenges pertain to providing sufficient services to children and parents when children remain in their own homes, monitoring participation in services, and determining on an ongoing basis whether the family situation has altered enough to reduce risk of harm to the child. Another key challenge for many States is having a sufficient number and type of placement options to ensure that a child's out-of-home placement is based on appropriateness rather than availability. Many States also are experiencing challenges in implementing concurrent planning on a consistent basis.

Some States and counties are turning to privatization of their child welfare services. They believe this will move the system toward innovation through competition with incentives for good results. Their goals are to increase efficiency and effectiveness, improve outcomes for children and families, and control costs. Given the Children's Bureau's mission of child safety, permanency of placement, and well-being of children and families, it is incumbent that new and promising approaches to supporting children and families be tested.

Some child welfare services have already been privatized, some are in the process of being privatized and some States are considering privatization. Kansas and Florida have implemented statewide privatization efforts, while in

Missouri; Maine; Hamilton County, Ohio; and Wayne County, Michigan, initiatives are targeted to specific populations such as foster care and low-risk families (An Assessment of the Privatization of Child Welfare Services: Challenges and Successes; 2003, Freundlich, M.; Gerstenzang, S; Children's Rights, Inc., New York, NY).

Growing numbers of public child welfare agencies are entering into arrangements with private entities to provide services for children and families. However, experts do not always agree on the value of these efforts, in terms of cost savings, efficiency, and improved outcomes (Experts Disagree About Benefits of Child Welfare Privatization, Children's Bureau Express, March, 2003 *http://cbexpress.acf.hhs.gov/nonissart.cfm?issue_id=2003–03&disp_art=610&hlt=1.*

Privatization can take a variety of forms. Privatization—

○ can be State wide or limited to certain parts of States.

○ can include all of child welfare, or just parts, such as investigation, family preservation, in-home services, adoption and/or foster care.

○ can be done all at once, or phased in gradually.

○ approaches include purchase-of-service, managed care and network development (*i.e.*, contract with local lead agencies that in turn subcontract to create comprehensive service networks).

○ service providers may be non-profit or for-profit organizations.

The success of privatization initiatives—

○ can be judged by the extent to which it improves outcomes for children and families and/or saves money.

○ can depend on the quality of the performance-based contract.

Privatization efforts take place against a backdrop of Federal law and regulations that must be considered as public agencies strategically use contracting to help them achieve their goals. These include, but are not limited to:

○ Section 471(a) (2) of the Social Security Act, which requires that a single State agency administer or supervise the administration of the title IV–E programs to assure the uniform statewide operation of these programs and proper accountability to the Federal government.

○ 45 CFR–205.100(b), which provide for this uniformity and accountability by requiring the designated single State agency to perform those administrative functions that require the exercise of discretion. The regulations prohibit the State agency from delegating (to other than its own officials) its authority for exercising administrative discretion in the administration or supervision of the [State] plan.

○ Office of Management and Budget Circular A–76, ''Performance of Commercial Activities,'' which in pertinent part sets the parameters for identifying inherently governmental function.

When privatizing child welfare services, the State maintains administrative control and ultimate responsibility for the components of the Child Welfare system that are being contracted out to the private sector.

In 1998 the Child Welfare League of America stated ''Twenty-nine states reported to the Child Welfare League of America that they utilized a managed care or privatization model for the delivery of child welfare services. The states identified a total of 47 initiatives that were designed to improve the effectiveness and efficiency of services through changes in management tools and funding or contract strategies. Most of the initiatives have transferred responsibility for the management and delivery of services to private nonprofit agencies. However, the public agency has a primary role in decision making.'' (Managed Care and Privatization Child Welfare Tracking Project: 1998 State and County Survey Results, McCullough, C.;Schmitt, B.; Child Welfare League of America).

Through the national Quality Improvement Center on the Privatization of Child Welfare Services, the ACF/Children's Bureau will develop and disseminate knowledge about what works to States or counties which are considering or have chosen to privatize part or all of their Child Welfare system. This support is intended to improve the likelihood that these privatization activities will result in better outcomes for children and families.

The Children's Bureau has an interest in finding answers to questions about privatization of child welfare services, including—

○ What is currently known about challenges, successful strategies, lessons learned, recommendations, best practices?

○ What knowledge gaps exist regarding challenges, successful strategies, lessons learned, recommendations, best practices?

○ Is enough now known about privatization of child welfare services to promote it, or does the field first need to find out more about it? Are there aspects that can be promoted now, like best practices in contracting, while more is learned about other issues?

○ Are there aspects of child welfare privatization that are more commonly practiced, or that are more effectively practiced?

○ What is known about the role of faith-based child welfare agencies and their congregational partners in the privatization of the child welfare system? Is there any evidence of effective models of collaboration?

○ Are there portions of the child welfare system that lend themselves to privatization more than other portions?

○ Are there some areas that should not be privatized?

○ What kind of contract monitoring capacity should exist within child welfare agencies before they undertake these efforts?

○ Are there certain jurisdictions (*e.g.* urban/rural) or populations (youth, children with special needs) for which privatization is more appropriate?

○ How is child welfare privatization similar to/different from privatization of other social services like child care, child support enforcement, health care, etc.? If there are similarities, what can be learned from these other privatization initiatives that can be applied to child welfare privatization?

*Legislative Authority*

The Promoting Safe and Stable Families Program, Title IV–B, subpart 2 of the Social Security Act, as amended (42 U.S.C. 629 *et seq.*); see Section 435 (42 U.S.C. 629(e)).

The Child Abuse Prevention and Treatment Act Section 105(b)(5)a (42 U.S.C. 5106).

Projects funded under this announcement will be expected to:

1. Have the project fully functioning within 90 days following the notification of the grant award.

2. Participate if the Children's Bureau chooses to do a national evaluation or a technical assistance contract that relates to this funding announcement.

3. Submit all performance indicator data, program and financial reports in a timely manner, in recommended format (to be provided), and submit the final report on disk or electronically using a standard word-processing program.

4. Submit a copy of the final report, the evaluation report, and any program products to the National Clearinghouse on Child Abuse and Neglect Information, 330 C Street, SW., Washington, DC 20447, within 90 days of project end date. This is in addition to the standard requirement that the final program and evaluation report must also be submitted to the Grants Management Specialist and the Federal Project Officer.

5. Allocate sufficient funds in the budget to:

(a) Provide for the project director, the evaluator and other key partners to attend an annual 3-day grantees' meeting in Washington, DC.

(b) Provide for the project director, the evaluator and other key partners to attend an early kickoff meeting for grantees funded under this priority area to be held within the first three months of the project (first year only) in Washington, DC; and

(c) Provide for 10–15 percent of the proposed budget to project evaluation.

*Roles and Responsibilities of the Quality Improvement Center on the Privatization of Child Welfare Services*

The Quality Improvement Center on the Privatization of Child Welfare Services is expected to perform the following functions:

(a) Develop knowledge about improving outcomes for children and family in the child welfare system through privatization;

(b) Promote collaborative problem solving among sub-grantees;

(c) Develop and implement privatization research and demonstration projects to promote innovation, evidence-based practice improvements, and advancement of knowledge about privatization of child welfare services;

(d) Establish an information-sharing network to disseminate information on promising practices; and

(e) Evaluate the impact of privatization on the quality, availability, cost-effectiveness and overall effectiveness of child welfare services.

It must be emphasized that the QIC on the Privatization of Child Welfare Services will not assume training, technical assistance and information dissemination functions and responsibilities currently performed by the Children's Bureau National Resource Centers, Clearinghouses, and other T/TA Network partners.

One distinctive function of the QIC that separates it from other support resources provided by the Children's Bureau is that the QIC will build knowledge in the area of child welfare service privatization by announcing and disbursing sub-grant funding to conduct research and demonstration projects. The QIC will also monitor and evaluate these research or demonstration projects and provide technical assistance and support to these sub-grantees.

Research and demonstration projects sponsored by the QIC under this initiative must:

(a) Develop and implement an evidence-based privatization model or innovative improvement through privatization of the Child Welfare system with specific components or strategies that are based on theory, research, or evaluation data;

(b) Conduct an evaluation and cost analysis to determine the effectiveness and cost-effectiveness of the model and its components or strategies using multiple measures of results; and

(c) Produce detailed procedures and materials, based on the evaluation, that will contribute to and promote evidence-based strategies, practices and programs that may be used to guide replication or testing in other settings.

*Specific Tasks To Be Performed by the Quality Improvement Center During the Planning and Implementation Phases*

Applicants are required to submit a design that clearly and concisely describes a strategy for a 12-month planning phase (Phase I) for the development of the QIC to be followed by a 48-month implementation phase (Phase II). In Phase II, the QIC will announce, award, monitor and evaluate 48-month, research and demonstration project sub-grants. The QIC will also provide technical assistance (using its own resources or through sub-contracts with other technical assistance providers) to sub-grantees funded under this initiative.

The QIC will be required to cooperate fully with any evaluation requested by the ACF/Children's Bureau. The QIC will also be required to conduct an evaluation of the research and demonstration projects they sponsor.

*Travel for Conferences and Presentations*

Within two months after the award of the 12-month planning phase of the cooperative agreement, the project director of the QIC will be required to attend a 1-day work planning meeting in Washington, DC, with the Federal Project Officer and other staff of the ACF/Children's Bureau for the purpose of discussing details of the project work plan and cooperative agreement.

Additionally, 10 months after the award of the 12-month planning cooperative agreements, the QIC awardee will be required to make an oral presentation to the ACF/Children's Bureau staff in Washington, DC, to describe and defend their plan for the Phase II-Version A implementation (described below). Applicants are advised to propose sending three project staff to make the presentation—the project director, the evaluator and one other key partner).

The budget for the 12-month planning grant should include funding for these three meetings in Washington, DC: the project director's meeting within two months, the three-person presentation meeting at month 10, and two key staff persons to the ACF/Children's Bureau annual grantees meeting, usually held in the spring. In each of the four implementation years, the QIC awardee will be expected to send only the project director and the evaluator to the annual grantee meeting.

*Plan for Phase I (Planning)*

Applicants are expected to present a Phase I plan that addresses the components described in the Background section of this announcement and includes, but is not limited to: (1) An analysis of the current state of privatization in child welfare, and the issues and opportunities privatization presents for improving child welfare practice and (2) a feasible and appropriate method for conducting a comprehensive needs assessment; (3) a systematic approach for fine tuning the topic focus and refining the implementation plan; (4) a strategy for developing a comprehensive review of the literature and best practices; (5) an approach and method for the timely development of the Phase II implementation plan; and (6) a preliminary design for the Phase II-Version A implementation plan that presents a clear and comprehensive vision of how the proposed QIC would operate.

Although applicants will be accorded considerable flexibility in developing a strategy tailored to the needs and resources they identify in their Year 1 comprehensive needs assessment, it is anticipated that applications for the first year of funding must present a method for completing the following tasks during Phase I:

(a) *Conduct a comprehensive needs assessment* that describes and evaluates the effectiveness of current child welfare service privatization efforts and identifies service gaps, knowledge gaps, and other issues (e.g., legal, cultural, administrative) related to the effective privatization of child welfare services. This assessment should include, but not be limited to, the collection and analysis of data on the following factors, as appropriate:

- Demographic characteristics of the children and families receiving privatized child welfare services and the disposition of these cases (e.g., investigated, referred to social services, or referred to court);
- Availability of agencies and community-based organizations that can provide privatized services (including drug/alcohol and mental health

treatment facilities and programs) for families involved in the child welfare system;

- Legal, administrative, court, social service, financial and other issues related to the effective privatization of child welfare services;
- Strengths and weaknesses of current privatization practices pertaining to engagement, assessment, case planning and service delivery, monitoring and evaluation, case closure and outcomes for children;
- Agencies on the national, regional, State and local level that are engaged in child welfare service privatization activities;
- Availability of resources on the national, regional, State and local level; and
- Gaps in knowledge and resources on the national, regional, State and local level.

In developing a strategy for conducting the needs assessment, applicants are advised to propose methods that do *not* require respondents to complete written surveys or questionnaires, because these surveys will require prior approval from the Office of Management and Budget (OMB). The OMB approval process takes approximately 5–6 months. Methods that do not require prior OMB approval include conference calls, focus groups, and unstructured telephone or in-person interviews.

(b) *Conduct a literature review* that provides a comprehensive analysis of the research and promising practices nationally and regionally on privatization of child welfare services, including cultural, financial, legal, bureaucratic and other barriers to the effective privatization of child welfare services;

In the implementation phase (Phase II), the QIC will focus on 4 years of research/demonstration projects. Therefore, the work plan has to be of sufficient scope and magnitude to merit intensive investigation. The activities identified in the work plan and the findings from the research and demonstration projects sponsored by the QIC should have a high probability of significantly advancing theory, policy and evidence-based practice in the field. Additionally, and as explained below, the research and demonstration projects implemented in Phase II should be designed to evaluate multiple approaches and/or multi-site interventions on the selected focus topic. This strategy dictates that the number of subjects (e.g., children, families, social service providers, case workers, supervisors) be large enough to sustain a rigorous, methodologically sound implementation and evaluation plan.

Because the QIC initiative is funded through a cooperative agreement, the work plan will be subject to final approval by the Children's Bureau.

*Plan for Phase II—Version A: Implementation*

In Phase I, the QIC will be required to develop and submit a Phase II—Version A plan for announcing and awarding research and demonstration sub-grants, and monitoring and evaluating these projects. These plans are expected to build on knowledge gained from a review of the literature and promising practices in the field, the results from the comprehensive needs assessment, and input from other sources.

Applicants are required to submit a *preliminary* design for Phase II—Version A in this application that presents a clear and comprehensive vision of how the proposed QIC would operate. Applicants are expected to describe the approach and processes that will be used to develop the implementation plan, and address anticipated logistical and administrative issues. The Phase II—Version A plan will be due 9 months after the award of the cooperative agreement and must include, but not be limited to, the following components:

1. Comprehensive review of the literature developed during the planning phase (Phase I);
2. Conceptual framework or logic model describing the linkages between and among the (a) attributes of the populations, problems, conditions, and systems that are the target of the interventions; (b) strategies; (c) resources; (d) traditional and innovative services/strategies to be provided; and (e) short- and long-term outcomes;
3. Administrative structure for announcing the availability of funding, and reviewing and awarding sub-grants, including program description, eligibility, funding levels, application evaluation criteria and selection process. Eligible applicants for sub-grants will be those agencies that have authority over the child welfare functions to be privatized;
4. The QIC will be required to provide technical assistance to *prospective* sub-grantees to assist them in designing initiatives that meet the standards for research and demonstration projects funded under this initiative. The design of these projects must be evidence-based with specific components or strategies that are based on theory, research, or evaluation data. They must also pertain to issues of national scope and incorporate logic models and an evaluation framework.

At a minimum, technical assistance provided by the QIC to *prospective* sub-grantees should consist of instructions and materials providing information on grant application requirements, suitable grant topics, the role of partnerships and collaborations, program and research designs, data sources and data collection strategies, and evaluation designs and analytic techniques. Other vehicles for providing technical assistance may be proposed. For example, QIC applicants may propose conducting a 1-day workshop open to all prospective grantees in the designated geographical region. The workshop should be designed to provide information and answer questions of attendees;

5. Technical assistance to sub-grantees awarded funding by the QIC. The QIC will be required to not only monitor the operations of the sub-grantee projects, but also provide ongoing support, guidance, and technical assistance to sub-grantees to assist them in project implementation, data collection and evaluation;
6. Administrative and management structure for ensuring that sub-projects are implemented within 90-days of the award of their funding by the QIC, monitoring sub-grants funded under this initiative, including appropriate plans for fiscal accountability from the sub-grantees;
7. Mechanisms for forming and maintaining a consortium and information-sharing network consisting of partnerships with and among sites awarded grants sponsored by the QIC (The Children's Bureau anticipates that the members of the consortium will meet regularly to exchange information and engage in collaborative problem-solving efforts.);
8. Methodology for evaluating sub-grantee research and demonstration projects, including ensuring that appropriate qualitative and quantitative process and outcome data are collected by sub-grantees and participating agencies and organizations;
9. Strategy for information dissemination, including fostering and strengthening communication and coordination activities with National Resource Centers and Clearinghouses including, but not limited to, the National Data Archive on Child Abuse and Neglect and the National Clearinghouse on Child Abuse and Neglect Information; and
10. Institutionalize linkages with appropriate agencies, organizations and resources on the local, State or Federal level that are addressing issues pertaining to the prevention and treatment of child abuse and neglect and

the functions and operations of child welfare services.

Presentation. Ten months after the award of the cooperative agreement, the grantee will be required to make an oral presentation to the ACF/Children's Bureau staff in Washington, D.C., to describe and defend their Phase II—Version A implementation plan.

*Plan for Phase II—Version B: Implementation*

One month after the presentation, the QIC will be required to submit a revised implementation work plan (Plan for Phase II—Version B) incorporating the recommendations of the Children's Bureau staff. This plan will be subject to further review and approval by the ACF/Children's Bureau prior to continuation funding.

**II. Award Information**

*Funding Instrument Type:* Cooperative Agreement.

*Federal Substantial Involvement with Cooperative Agreement:* A cooperative agreement is a specific method of awarding Federal assistance in which substantial Federal involvement is anticipated. A cooperative agreement clearly defines the respective responsibilities of the ACF/Children's Bureau and the grantee prior to the award. The ACF/Children's Bureau anticipates that agency involvement will produce programmatic benefits to the recipient otherwise unavailable to them for carrying out the project. The involvement and collaboration includes ACF/Children's Bureau review and approval of planning stages of the activities before implementation phases may begin; ACF/Children's Bureau involvement in the establishment of policies and procedures that maximize open competition, and rigorous and impartial development, review and funding of grant or sub-grant activities, if applicable; and ACF/Children's Bureau and recipient joint collaboration in the performance of key programmatic activities (*i.e.*, strategic planning, implementation, information technology enhancements, training and technical assistance, publications or products, and evaluation). It also includes close monitoring by the Children's Bureau of the requirements stated in this announcement that limit the grantee's discretion with respect to scope of services offered, organizational structure and management processes, coupled with close ACF/Children's Bureau monitoring during performance, which may, in order to ensure compliance with the intent of this funding, exceed those Federal stewardship responsibilities customary for grant activities.

*Anticipated Total Priority Area Funding:* $900,000.

*Anticipated Number of Awards:* 0 to 1.

*Ceiling on Amount of Individual Awards Per Budget Period:* $900,000.

*Average Projected Award Amount Per Budget Period:* $900,000.

*Length of Project Periods:* 60 month project with five 12 month budget periods; Other.

*Explanation of Other:* The maximum Federal share of this project is not to exceed $900,000 per period. In years 2–5 the grantee will use $550,000 per year for operating the QIC and will award the balance of the grant funds ($350,000 per year) to sub-grantees. The project awarded will be for a project period of 60 months. The initial grant award will be for a 12-month budget period. The award of continuation beyond each 12-month budget period will be subject to the availability of funds, satisfactory progress on the part of the grantee, and a determination that continued funding would be in the best interest of the government.

**III. Eligibility Information**

*1. Eligible Applicants*

State controlled institutions of higher education, Non-profits having a 501(c)(3) status with the IRS, other than institutions of higher education, Non-profits that do not have a 501(c)(3) status with the IRS, other than institutions of higher education, Private institutions of higher education, For-profit organizations other than small businesses, Small businesses.

*Additional Information on Eligibility:* Partnerships are encouraged between for-profit and non-profit agencies and universities with experience in child welfare and privatization issues, but applications should identify a primary applicant responsible for administering the grant.

Faith-based and community organizations that meet all other eligibility criteria are eligible to apply.

*2. Cost Sharing/Matching*

Yes.

In year 1 the required match is 10 percent of the total project, based on the $900,000 Federal share. The total approved cost of the project is the sum of the ACF share and the non-Federal share. The non-Federal share may be met by cash or in-kind contributions, although applicants are encouraged to meet their match requirements through cash contributions. Therefore, a project requesting $900,000 in Federal funds for the first budget period must provide a match of at least $100,000 (10 percent of the total approved project costs) in the first budget period. In years 2–5 the required match is 10 percent based on the $550,000 of the Federal share which the QIC uses to operate the project. In years 2–5 the QIC will not be required to match the $350,000 which is awarded by the QIC to its sub-grantees.

The project or activity will have a greater likelihood of success if the grantee contributes to the costs of the project. Cost-sharing will not be used as a preference and/or evaluation criterion in the review of applications.

*3. Other*

All applicants must have a Dun & Bradstreet number. On June 27, 2003 the Office of Management and Budget published in the **Federal Register** a new Federal policy applicable to all Federal grant applicants. The policy requires Federal grant applicants to provide a Dun & Bradstreet Data Universal Numbering System (DUNS) number when applying for Federal grants or cooperative agreements on or after October 1, 2003. The DUNS number will be required whether an applicant is submitting a paper application or using the government-wide electronic portal (*http://www.Grants.gov*). A DUNS number will be required for every application for a new award or renewal/continuation of an award, including applications or plans under formula, entitlement and block grant programs, submitted on or after October 1, 2003.

Please ensure that your organization has a DUNS number. You may acquire a DUNS number at no cost by calling the dedicated toll-free DUNS number request line on 1–866–705–5711 or you may request a number on-line at *http://www.dnb.com*.

Non-profit organizations applying for funding are required to submit proof of their non-profit status.

Proof of non-profit status is any one of the following:

- A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code.
- A copy of a currently valid IRS tax exemption certificate.
- A statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earning accrue to any private shareholders or individuals.
- A certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status.

• Any of the items in the subparagraphs immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

When applying electronically we strongly suggest you attach your proof of non-profit status with your electronic application.

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm*.

Disqualification Factors

Applications that exceed the ceiling amount will be considered non-responsive and will not be eligible for funding under this announcement.

Any application that fails to satisfy the deadline requirements referenced in Section IV.3 will be considered non-responsive and will not be considered for funding under this announcement.

## IV. Application and Submission Information

*1. Address To Request Application Package*

ACYF Operations Center, c/o The Dixon Group, Inc. ATTN: ACF/Children's Bureau, 118 Q St., NE., Washington, DC 20002–2132.

*2. Content and Form of Application Submission*

Each application must contain the following items in the order listed:

Application for Federal Assistance (Standard Form 424). Follow the instructions below and those that accompany the form.

In Item 5 of Form 424, put DUNS number in ''Organizational DUNS:'' box.

In Item 5 of Form 424, include name, phone number, and, if available, email and fax numbers of the contact person.

In Item 8 of Form 424, check ''New.''

In Item 10 of Form 424, clearly identify the Catalog of Federal Domestic Assistance (CFDA) program title and number for the program for which funds are being requested as stated in this funding opportunity announcement.

In Item 11 of Form 424, identify the single funding opportunity the application addresses.

In Item 12 of Form 424, identify the specific geographic area to be served.

In Item 14 of Form 424, identify Congressional districts of both the applicant and project.

Budget Information Non-Construction Programs (Form 424A) and Budget Justification.

Follow the instructions provided here and those in Section V. Application Review Information. Note that Federal funds provided to States and services or other resources purchased with Federal funds may not be used to match project grants.

*Certifications/Assurances.* Applicants requesting financial assistance for non-construction projects must file the Standard Form 424B, ''Assurances: Non-Construction Programs.'' Applicants must sign and return the Standard Form 424B with their applications. Applicants must provide a certification regarding lobbying when applying for an award in excess of $100,000. Applicants must sign and return the certification with their applications.

Applicants must disclose lobbying activities on the Standard Form LLL when applying for an award in excess of $100,000. Applicants who have used non-Federal funds for lobbying activities in connection with receiving assistance under this announcement shall complete a disclosure form to report lobbying. Applicants must sign and return the disclosure form, if applicable, with their applications.

Applicants must make the appropriate certification regarding environmental tobacco smoke. By signing and submitting the application, the applicant is providing the certification and need not mail back the certification with the applications.

If applicable, applicants must include a completed SPOC certification (Single Point of Contact) with the date of the SPOC contact entered in line 16, page 1 of the Form 424.

In implementing their projects, grantees are expected to comply with all applicable administrative regulations regarding extent or types of costs. Applicable DHHS regulations can be found in 45 CFR Part 74 or 92.

*Project Abstract/Summary (one page maximum, double spaced).* Clearly mark this page with the applicant name as shown on item 5 of the Form 424, identify the competitive grant funding opportunity and the title of the proposed project as shown in item 11 and the service area as shown in item 12 of the Form 424. The summary description should not exceed 300 words.

Care should be taken to produce an abstract/summary that accurately and concisely reflects the proposed project. It should describe the objectives of the project, the approach to be used and the results or benefits expected.

*Project Description for Evaluation.* Applicants should organize their project description in this sequence: (1) Objectives and Need for Assistance; (2) Approach; (3) Organizational Profiles; (4) Budget and Budget Justification.

*Match.* Provide a letter of commitment verifying the actual amount of the non-Federal share of project costs (see Section III.2).

*Indirect cost rate agreement.* If claiming indirect costs, provide documentation that applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

*Letters of agreement and memoranda of understanding.* If applicable, include a letter of commitment or Memorandum of Understanding from each partner and/or sub-contractor describing their role, detailing specific tasks to be performed, and expressing commitment to participate if the proposed project is funded.

General Content and Form Information

The application limit is 90 pages total including all forms and attachments. Pages over this page limit will be removed from the application and will not be reviewed.

The ACF/Children's Bureau strongly prefers that the entire application (including all forms, assurances and letters of commitment) be sent in one package.

To be considered for funding, each application must be submitted with the Standard Federal Forms (provided at the end of this announcement or through the electronic links provided) and following the guidance provided. The application must be signed by an individual authorized to act for the applicant agency and to assume responsibility for the obligations imposed by the terms and conditions of the grant award.

To be considered for funding, each applicant must submit one signed original and two additional copies of the application, including all forms and attachments, to the Application Receipt Point specified in the section titled Deadline at the beginning of the announcement. The original copy of the application must have original signatures.

The application must be typed, double spaced, printed on only one side, with at least ½ inch margins on each side and 1 inch at the top and bottom, using standard 12 Point fonts (such as Times Roman or Courier). Pages must be numbered.

All copies of an application must be submitted in a single package, and a

separate package must be submitted for each funding opportunity. The package must be clearly labeled for the specific funding opportunity it is addressing.

Because each application will be duplicated, do not use or include separate covers, binders, clips, tabs, plastic inserts, maps, brochures, or any other items that cannot be processed easily on a photocopy machine with an automatic feed. Do not bind, clip, staple, or fasten in any way *separate subsections* of the application, including supporting documentation; however, each *complete* copy must be stapled securely in the upper left corner. Applicants are advised that the copies of the application submitted, not the original, will be reproduced by the Federal government for review.

Applicants have the option of omitting from the application copies (not the original) specific salary rates or amounts for individuals specified in the application budget and Social Security numbers, if otherwise required for individuals. The copies may include summary salary information.

*Tips for Preparing a Competitive Application.* It is essential that applicants read the entire announcement package carefully before preparing an application and include all of the required application forms and attachments. The application must reflect a thorough understanding of the purpose and objectives of the applicable legislation. Reviewers expect applicants to understand the goals of the legislation and the ACF/Children's Bureau's interest in each topic. A ''responsive application'' is one that addresses all of the evaluation criteria in ways that demonstrate this understanding. Applications that are considered to be ''unresponsive'' generally receive very low scores and are rarely funded.

The ACF/Children's Bureau's Web site (*http://www.acf.dhhs.gov/programs/cb*) provides a wide range of information and links to other relevant Web sites. Before you begin preparing an application, we suggest that you learn more about the mission and programs of the Children's Bureau by exploring the Web site.

*Organizing Your Application.* The specific evaluation criteria in Section V of this funding announcement will be used to review and evaluate each application. The applicant should address each of these specific evaluation criteria in the project description. Applicants should organize their project description in this sequence: (1) Objectives and Need for Assistance; (2) Approach; (3) Organizational Profiles; (4) Budget and Budget Justification; and should use the same headings as these criteria, so that reviewers can readily find information that directly addresses each of the specific review criteria.

*Project Evaluation Plan.* Project evaluations are very important. If you do not have the in-house capacity to conduct an objective, comprehensive evaluation of the project, then the ACF/Children's Bureau advises that you propose contracting with a third-party evaluator specializing in social science or evaluation, or a university or college, to conduct the evaluation. A skilled evaluator can assist you in designing a data collection strategy that is appropriate for the evaluation of your proposed project. Additional assistance may be found in a document titled ''Program Manager's Guide to Evaluation.'' A copy of this document can be accessed at *http://www.acf.hhs.gov/programs/core/pubs_reports/prog_mgr.html* or ordered by contacting the National Clearinghouse on Child Abuse and Neglect Information, 330 C Street, SW., Washington, DC 20447; phone (800) 394–3366; fax (703) 385–3206; e-mail *nccanch@calib.com.*

*Use of Human Subjects.* If your evaluation plan includes gathering data from or about clients, there are specific procedures which must be followed in order to protect their privacy and ensure the confidentiality of the information about them. Applicants planning to gather such data are asked to describe their plans regarding an Institutional Review Board (IRB) review. If applicable, applicants must include a completed Form 310, Protection of Human Subjects. For more information about use of human subjects and IRB's you can visit these Web sites: *http://www.hhs.gov/ohrp/irb/irb_chapter2.htm#d2* and *http://www.hhs.gov/ohrp/humansubjects/guidance/ictips.htm.*

You may submit your application to us in either electronic or paper format. To submit an application electronically, please use the *http://www.Grants.gov/Apply* site. If you use Grants.gov, you will be able to download a copy of the application package, complete it off-line, and then upload and submit the application via the Grants.gov site. ACF will not accept grant applications via e-mail or facsimile transmission.

Please note the following if you plan to submit your application electronically via Grants.gov:

- Electronic submission is voluntary, but strongly encouraged.
- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation. We strongly recommend that you do not wait until the application deadline date to begin the application process through Grants.gov.
- We recommend you visit Grants.gov at least 30 days prior to filing your application to fully understand the process and requirements. We encourage applicants who submit electronically to submit well before the closing date and time so that if difficulties are encountered an applicant can still send in a hard copy overnight. If you encounter difficulties, please contact the Grants.gov Help Desk at 1–800–518–4276 to report the problem and obtain assistance with the system.
- To use Grants.gov, you, as the applicant, must have a DUNS Number and register in the Central Contractor Registry (CCR). You should allow a minimum of five days to complete the CCR registration.
- You will not receive additional point value because you submit a grant application in electronic format, nor will we penalize you if you submit an application in paper format.
- You may submit all documents electronically, including all information typically included on the SF 424 and all necessary assurances and certifications.
- Your application must comply with any page limitation requirements described in this program announcement.
- After you electronically submit your application, you will receive an automatic acknowledgement from Grants.gov that contains a Grants.gov tracking number. The Administration for Children and Families will retrieve your application from Grants.gov.
- We may request that you provide original signatures on forms at a later date.
- You may access the electronic application for this program on *www.Grants.gov*
- You must search for the downloadable application package by the CFDA number.

Originals, Copies and Signatures

If submitting your application in paper format, an original and two copies of the complete application are required. The original and each of the two copies must include all required forms, certifications, assurances, and appendices, be signed by an authorized representative, have original signatures, and be submitted unbound.

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for

Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

*Standard Forms and Certifications:* The project description should include all the information requirements described in the specific evaluation criteria outlined in the program announcement under Section V Application Review Information. In addition to the project description, the applicant needs to complete all the standard forms required for making applications for awards under this announcement.

Applicants seeking financial assistance under this announcement must file the Standard Form (SF) 424, Application for Federal Assistance; SF–424A, Budget Information—Non-Construction Programs; SF–424B, Assurances—Non-Construction Programs. The forms may be reproduced for use in submitting applications. Applicants must sign and return the standard forms with their application.

Applicants must furnish prior to award an executed copy of the Standard Form LLL, Certification Regarding Lobbying, when applying for an award in excess of $100,000. Applicants who have used non-Federal funds for lobbying activities in connection with receiving assistance under this announcement shall complete a disclosure form, if applicable, with their applications (approved by the Office of Management and Budget under control number 0348–0046). Applicants must sign and return the certification with their application.

Applicants must also understand they will be held accountable for the smoking prohibition included within Pub. L. 103–227, Title XII Environmental Tobacco Smoke (also known as the PRO-KIDS Act of 1994). A copy of the **Federal Register** notice which implements the smoking prohibition is included with forms. By signing and submitting the application, applicants are providing the certification and need not mail back the certification with the application.

Applicants must make the appropriate certification of their compliance with all Federal statutes relating to nondiscrimination. By signing and submitting the applications, applicants are providing the certification and need not mail back the certification form. Complete the standard forms and the associated certifications and assurances based on the instructions on the forms. The forms and certifications may be found at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

Those organizations required to provide proof of non-profit status, please refer to Section III.3.

Please see Section V.1, for instructions on preparing the full project description.

*3. Submission Dates and Times*

Explanation of Due Dates

The closing time and date for receipt of applications is 4:30 p.m. (Eastern Time Zone) on the date noted above. Mailed or hand carried applications received after 4:30 p.m. on the closing date will be classified as late.

Deadline: Mailed applications shall be considered as meeting an announced deadline if they are received on or before the deadline time and date at the ACYF Operations Center, c/o The Dixon Group, Inc., ATTN: ACF/Children's Bureau, 118 Q Street NE., Washington, DC 20002–2132. Applicants are responsible for mailing applications well in advance, when using all mail services, to ensure that the applications are received on or before the deadline time and date.

Applications hand-carried by applicants, applicant couriers, other representatives of the applicant, or by overnight/express mail couriers shall be considered as meeting an announced deadline if they are received on or before the deadline date, between the hours of 8 a.m. and 4:30 p.m., EST, at the ACYF Operations Center, c/o The Dixon Group, Inc., ATTN: ACF/Children's Bureau, 118 Q Street NE., Washington, DC 20002–2132, between Monday and Friday (excluding Federal holidays). This address must appear on the envelope/package containing the application with the note. Applicants are cautioned that express/overnight mail services do not always deliver as agreed.

Late applications: Applications which do not meet the criteria above are considered late applications. ACF shall notify each late applicant that its application will not be considered in the current competition. Any application received after 4:30 p.m. on the deadline date will not be considered for competition. Applicants using express/overnight mail services should allow two working days prior to the deadline date for receipt of applications. (Applicants are cautioned that express/overnight mail services do not always deliver as agreed).

Extension of deadlines: ACF may extend application deadlines when circumstances such as acts of God (floods, hurricanes, etc.) occur, or when there are widespread disruptions of mail service, or in other rare cases. A determination to extend or waive deadline requirements rests with the Chief Grants Management Officer.

*Checklist:*

You may use the checklist below as a guide when preparing your application package.

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Project Abstract | See Sections IV.2 and V | Found in Sections IV.2 and V | By application due date. |
| Project Description | See Sections IV.2 and V | Found in Sections IV.2 and V | By application due date. |
| Budget Narrative/Justification | See Sections IV.2 and V | Found in Sections IV.2 and V | By application due date. |
| SF424 | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By application due date. |
| SF-LLL Certification Regarding Lobbying | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By application due date. |
| Certification Regarding Environmental Tobacco Smoke. | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By application due date. |
| Assurances | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By application due date. |
| SF424A | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By application due date. |
| SF424B | See Section IV.2 | See *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By application due date. |
| Proof of Non-Profit Status | See Section III.3 | Found in Section III.3 | By application due date. |
| Letters of commitment from partners (if applicable). | See Section IV | See Section IV | By application due date. |
| Indirect Cost Rate Agreement (if applicable). | See Section IV | See Section IV | By application due date. |

| What to submit | Required content | Required form or format | When to submit |
|---|---|---|---|
| Non-Federal Commitment Letter | See Section III.2 | See Section III.2 | By Time of Award. |

*Additional Forms:*

Private, non-profit organizations are encouraged to submit with their applications the survey located under ''Grant Related Documents and Forms,'' ''Survey for Private, Non-Profit Grant Applicants,'' titled, ''Survey on Ensuring Equal Opportunity for Applicants,'' at: *http://www.acf.hhs.gov/programs/ofs/forms.htm.*

| What to submit | Required content | Location | When to submit |
|---|---|---|---|
| Survey for Private, Non-Profit Grant Applicants. | See form | Found in *http://www.acf.hhs.gov/programs/ofs/forms.htm.* | By application due date (with application). |

*4. Intergovernmental Review*

State Single Point of Contact (SPOC)

This program is covered under Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' and 45 CFR Part 100, ''Intergovernmental Review of Department of Health and Human Services Programs and Activities.'' Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs.

As of October 1, 2004, the following jurisdictions have elected to participate in the Executive Order process: Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New York, North Dakota, Rhode Island, South Carolina, Texas, Utah, West Virginia, Wisconsin, American Samoa, Guam, North Mariana Islands, Puerto Rico, and Virgin Islands. As these jurisdictions have elected to participate in the Executive Order process, they have established SPOCs. Applicants from participating jurisdictions should contact their SPOC, as soon as possible, to alert them of prospective applications and receive instructions. Applicants must submit all required materials, if any, to the SPOC and indicate the date of this submittal (or the date of contact if no submittal is required) on the Standard Form 424, item 16a. Under 45 CFR 100.8(a)(2).

A SPOC has 60 days from the application deadline to comment on proposed new or competing continuation awards. SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs are requested to clearly differentiate between mere advisory comments and those official State process recommendations which may trigger the ''accommodate or explain'' rule.

When comments are submitted directly to ACF, they should be addressed to the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Grants Management, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., 4th floor, Washington, DC 20447.

When comments are submitted directly to ACF, they should be addressed to: Department of Health and Human Services, Administration for Children and Families, Division of Discretionary Grants, 370 L'Enfant Promenade, SW., Washington, DC 20447.

Although the remaining jurisdictions have chosen not to participate in the process, entities that meet the eligibility requirements of the program are still eligible to apply for a grant even if a State, Territory, Commonwealth, etc. does not have a SPOC. Therefore, applicants from these jurisdictions, or for projects administered by federally-recognized Indian Tribes, need take no action in regard to E.O. 12372.

The official list, including addresses, of the jurisdictions elected to participate in E.O. 12372 can be found on the following URL: *http://www.whitehouse.gov/omb/grants/spoc.html.*

*5. Funding Restrictions*

Grant awards will not allow reimbursement of pre-award costs.

Construction is not an allowable activity or expenditure under this solicitation.

*6. Other Submission Requirements*

*Submission by Mail:* An applicant must provide an original application with all attachments, signed by an authorized representative and two copies. Please see Section IV.3 for an explanation of due dates. Applications should be mailed to: c/o The Dixon Group, Inc. ATTN: ACF/Children's Bureau, Attention: ACYF Operations Center, 118 Q St., NE., Washington, DC 20002–2132.

*Hand Delivery:* An applicant must provide an original application with all attachments signed by an authorized representative and two copies. The application must be received at the address below by 4:30 p.m. eastern time on or before the closing date. Applications that are hand delivered will be accepted between the hours of 8 a.m. to 4:30 p.m. eastern time, Monday through Friday. Applications should be delivered to: c/o The Dixon Group, Inc. ATTN: ACF/Children's Bureau, Attention: ACYF Operations Center, 118 Q St., NE., Washington, DC 20002–2132.

*Electronic Submission: http://www.Grants.gov* Please see Section IV.2 for guidelines and requirements when submitting applications electronically.

## V. Application Review Information

*The Paperwork Reduction Act of 1995 (Pub. L. 104–13)*

Public reporting burden for this collection of information is estimated to average 40 hours per response, including the time for reviewing instructions, gathering and maintaining the data needed and reviewing the collection information.

The project description is approved under OMB control number 0970–0139 which expires April 30, 2007.

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.

1. Criteria

The following are instructions and guidelines on how to prepare the ''project summary/abstract'' and ''full project description'' sections of the application. Under the evaluation criteria section, note that each criterion is preceded by the generic evaluation requirement under the ACF Uniform Project Description (UPD).

Purpose

The project description provides a major means by which an application is evaluated and ranked to compete with other applications for available assistance. The project description should be concise and complete and should address the activity for which Federal funds are being requested. Supporting documents should be included where they can present information clearly and succinctly. In preparing your project description, information responsive to each of the requested evaluation criteria must be provided. Awarding offices use this and other information in making their funding recommendations. It is important, therefore, that this information be included in the application in a manner that is clear and complete.

General Instructions

ACF is particularly interested in specific project descriptions that focus on outcomes and convey strategies for achieving intended performance. Project descriptions are evaluated on the basis of substance and measurable outcomes, not length. Extensive exhibits are not required. Cross-referencing should be used rather than repetition. Supporting information concerning activities that will not be directly funded by the grant or information that does not directly pertain to an integral part of the grant funded activity should be placed in an appendix. Pages should be numbered and a table of contents should be included for easy reference.

Introduction

Applicants required to submit a full project description shall prepare the project description statement in accordance with the following instructions while being aware of the specified evaluation criteria. The text options give a broad overview of what your project description should include while the evaluation criteria identifies the measures that will be used to evaluate applications.

Project Summary/Abstract

Provide a summary of the project description (a page or less) with reference to the funding request.

Objectives and Need for Assistance

Clearly identify the physical, economic, social, financial, institutional, and/or other problem(s) requiring a solution. The need for assistance must be demonstrated and the principal and subordinate objectives of the project must be clearly stated; supporting documentation, such as letters of support and testimonials from concerned interests other than the applicant, may be included. Any relevant data based on planning studies should be included or referred to in the endnotes/footnotes. Incorporate demographic data and participant/beneficiary information, as needed. In developing the project description, the applicant may volunteer or be requested to provide information on the total range of projects currently being conducted and supported (or to be initiated), some of which may be outside the scope of the program announcement.

Approach

Outline a plan of action that describes the scope and detail of how the proposed work will be accomplished. Account for all functions or activities identified in the application. Cite factors that might accelerate or decelerate the work and state your reason for taking the proposed approach rather than others. Describe any unusual features of the project such as design or technological innovations, reductions in cost or time, or extraordinary social and community involvement.

Provide quantitative monthly or quarterly projections of the accomplishments to be achieved for each function or activity in such terms as the number of people to be served and the number of activities accomplished.

If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any ''collection of information that is conducted or sponsored by ACF.'' List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

When accomplishments cannot be quantified by activity or function, list them in chronological order to show the schedule of accomplishments and their target dates.

If any data is to be collected, maintained, and/or disseminated, clearance may be required from the U.S. Office of Management and Budget (OMB). This clearance pertains to any ''collection of information that is conducted or sponsored by ACF.''

List organizations, cooperating entities, consultants, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Organizational Profiles

Provide information on the applicant organization(s) and cooperating partners, such as organizational charts, financial statements, audit reports or statements from CPAs/Licensed Public Accountants, Employer Identification Numbers, names of bond carriers, contact persons and telephone numbers, child care licenses and other documentation of professional accreditation, information on compliance with Federal/State/local government standards, documentation of experience in the program area, and other pertinent information. If the applicant is a non-profit organization, submit proof of non-profit status in its application.

The non-profit agency can accomplish this by providing: (a) A reference to the applicant organization's listing in the Internal Revenue Service's (IRS) most recent list of tax-exempt organizations described in the IRS Code; (b) a copy of a currently valid IRS tax exemption certificate, (c) a statement from a State taxing body, State attorney general, or other appropriate State official certifying that the applicant organization has a non-profit status and that none of the net earnings accrue to any private shareholders or individuals; (d) a certified copy of the organization's certificate of incorporation or similar document that clearly establishes non-profit status, (e) any of the items immediately above for a State or national parent organization and a statement signed by the parent organization that the applicant organization is a local non-profit affiliate.

Budget and Budget Justification

Provide a budget with line item detail and detailed calculations for each budget object class identified on the Budget Information form. Detailed calculations must include estimation methods, quantities, unit costs, and other similar quantitative detail sufficient for the calculation to be duplicated. Also include a breakout by the funding sources identified in Block 15 of the SF–424.

Provide a narrative budget justification that describes how the categorical costs are derived. Discuss the necessity, reasonableness, and allocability of the proposed costs.

General

Use the following guidelines for preparing the budget and budget justification. Both Federal and non-Federal resources shall be detailed and justified in the budget and narrative

justification. ''Federal resources'' refers only to the ACF grant for which you are applying. ''Non-Federal resources'' are all other Federal and non-Federal resources. It is suggested that budget amounts and computations be presented in a columnar format: first column, object class categories; second column, Federal budget; next column(s), non-Federal budget(s), and last column, total budget. The budget justification should be a narrative.

Personnel

*Description:* Costs of employee salaries and wages.

*Justification:* Identify the project director or principal investigator, if known. For each staff person, provide the title, time commitment to the project (in months), time commitment to the project (as a percentage or full-time equivalent), annual salary, grant salary, wage rates, etc. Do not include the costs of consultants or personnel costs of delegate agencies or of specific project(s) or businesses to be financed by the applicant.

Fringe Benefits

*Description:* Costs of employee fringe benefits unless treated as part of an approved indirect cost rate.

*Justification:* Provide a breakdown of the amounts and percentages that comprise fringe benefit costs such as health insurance, FICA, retirement insurance, taxes, etc.

Travel

*Description:* Costs of project-related travel by employees of the applicant organization (does not include costs of consultant travel).

*Justification:* For each trip, show the total number of traveler(s), travel destination, duration of trip, per diem, mileage allowances, if privately owned vehicles will be used, and other transportation costs and subsistence allowances. Travel costs for key staff to attend ACF-sponsored workshops should be detailed in the budget.

Equipment

*Description:* ''Equipment'' means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of (a) the capitalization level established by the organization for the financial statement purposes, or (b) $5,000. (Note: Acquisition cost means the net invoice unit price of an item of equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in-transit insurance, freight, and installation shall be included in or excluded from acquisition cost in accordance with the organization's regular written accounting practices.)

*Justification:* For each type of equipment requested, provide a description of the equipment, the cost per unit, the number of units, the total cost, and a plan for use on the project, as well as use or disposal of the equipment after the project ends. An applicant organization that uses its own definition for equipment should provide a copy of its policy or section of its policy which includes the equipment definition.

Supplies

*Description:* Costs of all tangible personal property other than that included under the Equipment category.

*Justification:* Specify general categories of supplies and their costs. Show computations and provide other information which supports the amount requested.

Contractual

*Description:* Costs of all contracts for services and goods except for those that belong under other categories such as equipment, supplies, construction, etc. Include third party evaluation contracts (if applicable) and contracts with secondary recipient organizations, including delegate agencies and specific project(s) or businesses to be financed by the applicant.

*Justification:* Demonstrate that all procurement transactions will be conducted in a manner to provide, to the maximum extent practical, open and free competition. Recipients and subrecipients, other than States that are required to use Part 92 procedures, must justify any anticipated procurement action that is expected to be awarded without competition and exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000).

Recipients might be required to make available to ACF pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc.

**Note:** Whenever the applicant intends to delegate part of the project to another agency, the applicant must provide a detailed budget and budget narrative for each delegate agency, by agency title, along with the required supporting information referred to in these instructions.

Other

Enter the total of all other costs. Such costs, where applicable and appropriate, may include but are not limited to insurance, food, medical and dental costs (noncontractual), professional services costs, space and equipment rentals, printing and publication, computer use, training costs, such as tuition and stipends, staff development costs, and administrative costs.

*Justification:* Provide computations, a narrative description and a justification for each cost under this category.

Indirect Charges

*Description:* Total amount of indirect costs. This category should be used only when the applicant currently has an indirect cost rate approved by the Department of Health and Human Services (HHS) or another cognizant Federal agency.

*Justification:* An applicant that will charge indirect costs to the grant must enclose a copy of the current rate agreement. If the applicant organization is in the process of initially developing or renegotiating a rate, upon notification that an award will be made, it should immediately develop a tentative indirect cost rate proposal based on its most recently completed fiscal year, in accordance with the cognizant agency's guidelines for establishing indirect cost rates, and submit it to the cognizant agency. Applicants awaiting approval of their indirect cost proposals may also request indirect costs. When an indirect cost rate is requested, those costs included in the indirect cost pool should not also be charged as direct costs to the grant. Also, if the applicant is requesting a rate which is less than what is allowed under the program, the authorized representative of the applicant organization must submit a signed acknowledgement that the applicant is accepting a lower rate than allowed.

Non-Federal Resources

*Description:* Amounts of non-Federal resources that will be used to support the project as identified in Block 15 of the SF–424.

*Justification:* The firm commitment of these resources must be documented and submitted with the application so the applicant is given credit in the review process. A detailed budget must be prepared for each funding source.

Total Direct Charges, Total Indirect Charges, Total Project Costs

*Evaluation Criteria:*

The following evaluation criteria appear in weighted descending order. The corresponding score values indicate the relative importance that ACF places on each evaluation criterion; however, applicants need not develop their

applications precisely according to the order presented. Application components may be organized such that a reviewer will be able to follow a seamless and logical flow of information (*i.e.*, from a broad overview of the project to more detailed information about how it will be conducted).

In considering how applicants will carry out the responsibilities addressed under this announcement, competing applications for financial assistance will be reviewed and evaluated against the following criteria:

Approach 50 points

In reviewing the approach, the following factors will be considered: (50 points)

1. The extent to which there is a sound timeline for effectively implementing the proposed project, including major milestones and target dates. The extent to which the proposed project would complete all the activities described in this funding announcement within the 5 year project time frame.

2. The extent to which the overall design and strategies to be used by the proposed QIC demonstrate an understanding of issues in the child welfare system and in child welfare service privatization, and the characteristics, needs and services currently available to children and families brought to the attention of the child welfare system.

3. The extent to which the plan for conducting the needs assessment is: (a) Appropriate and feasible; (b) likely to result in the development of a comprehensive description and evaluation of the current state of child welfare privatization; and (c) likely to identify knowledge gaps and barriers to the effective privatization of child welfare services.

4. The extent to which the strategy for refining the focus for the QIC during the planning year will involve input from a wide range of stakeholders, including key national, regional, State, and local agencies and organizations.

5. The extent to which the Phase I plan presents a feasible and appropriate method for conducting a comprehensive review of the literature that includes the identification of best practices and promising approaches in child welfare service privatization.

6. The extent to which the applicant's preliminary design for Phase II–Version A:

a. Demonstrates that the implementation plan would be developed in a manner which is likely to result in the timely production of a plan that is feasible and appropriate, and includes input from a wide range of relevant sources.

b. Presents a viable conceptual framework or logic model describing the linkages between and among the (1) attributes of the populations, problems, conditions, and systems that are the target of the interventions; (2) resources; (3) traditional and innovative services to be provided; and (4) short- and long-term outcomes.

c. Presents an appropriate and feasible approach for creating an administrative structure for announcing the availability of funding, and reviewing and awarding sub-grants, including program description, agency eligibility, funding levels, application evaluation criteria, and selection process.

d. Presents an appropriate and feasible plan for providing technical assistance to prospective sub-grantees to assist them in designing initiatives that meet the standards for research and demonstration projects funded under this initiative.

e. Presents an appropriate and feasible plan for providing support, guidance and technical assistance to sub-grantees to assist them in project implementation, data collection and evaluation.

f. Presents an appropriate and feasible plan constructing an administrative and management structure for ensuring that sub-grantee projects are implemented within 90-days of the award of their funding by the QIC, monitoring and managing sub-grants funded under this initiative, including appropriate plans for fiscal accountability from the sub-grantee projects.

g. Presents a feasible and appropriate approach to the formation of a consortium and information-sharing network consisting of partnerships with and among sites awarded grants sponsored by the QIC.

h. Presents a feasible and appropriate methodology for evaluating and conducing a cost analysis of sub-grantee research and demonstration projects, including ensuring that appropriate qualitative and quantitative process and outcome data are collected by sub-grantee sites and participating agencies and organizations.

i. Presents feasible and appropriate strategies for information dissemination, including fostering and strengthening communication and coordination activities with National Resource Centers and Clearinghouses including the National Data Archive on Child Abuse and Neglect and the National Clearinghouse on Child Abuse and Neglect Information.

j. Identifies and addresses the conceptual, management and logistical issues involved in developing and implementing the QIC-sponsored research and demonstration projects.

k. Presents a clear and comprehensive vision of how the proposed QIC would operate once sub-grants are awarded.

7. The extent to which there will be an effective administrative and organizational interface between the applicant and key partners. The extent to which the application includes appropriate letters of commitment from these partner organizations.

8. The extent to which the project's evaluation plan would address both the entire project, and each of its sub-parts. The extent to which the evaluation would measure achievement of project objectives, customer satisfaction, acquisition of competencies, effectiveness of program services and project strategies, the efficiency of the implementation process, the effect of privatizing services on outcomes for children and family in the child welfare system, the cost-effectiveness of privatized services, and the impact of the project. The extent to which the methods of evaluation would provide performance feedback, support periodic assessment of program progress and provide a sound basis for program adjustments. The extent to which the proposed evaluation plan would be likely to yield useful findings or results about effective strategies, and contribute to and promote evaluation research and evidence-based practices that could be used to guide replication or testing in other settings. The extent to which applicants that do not have the in-house capacity to conduct an objective, comprehensive evaluation of the project present a sound plan for contracting with a third-party evaluator specializing in social science or evaluation, or a university or college to conduct the evaluation.

9. The extent to which there is a sound plan for documenting project activities and results, including the development of a data collection infrastructure that is sufficient to support a methodologically sound and rigorous evaluation. The extent to which relevant data would be collected. The extent to which there is a sound plan for collecting these data, securing informed consent and implementing an Institutional Review Board (IRB) review, if applicable.

10. The extent to which there is a sound plan for developing useful products during the proposed project and a reasonable schedule for developing these products. The extent to which the intended audience (*e.g.*, researchers, policymakers, and practitioners) for product dissemination

is comprehensive and appropriate. The extent to which the dissemination plan includes appropriate mechanisms and forums that would effectively convey the information and support successful replication by other interested agencies.

Organizational Profiles 20 points

In reviewing the organizational profiles, the following factors will be considered: (20 points)

(1) The extent to which the application evidences sufficient experience and expertise in administration, development, implementation, management, and evaluation of similar projects. The extent to which each participating organization (including partners and/or subcontractors) possesses the organizational capability to fulfill their assigned roles and functions effectively (if the application involves partnering and/or subcontracting with other agencies/organizations).

(2) The extent to which the proposed project director and key project staff possess sufficient relevant knowledge, experience and capabilities to implement and manage a project of this size, scope and complexity effectively (*e.g.*, resumes). The extent to which the role, responsibilities and time commitments of each proposed project staff position, including consultants, subcontractors and/or partners, are clearly defined and appropriate to the successful implementation of the proposed project.

(3) The extent to which there is a sound management plan for achieving the objectives of the proposed project on time and within budget, including clearly defined responsibilities, for accomplishing project tasks and ensuring quality. The extent to which the plan clearly describes the effective management and coordination of activities carried out by any partners, subcontractors and consultants (if appropriate). The extent to which there would be a mutually beneficial relationship between the proposed project and other work planned, anticipated or underway with Federal assistance by the applicant.

Objectives and Need for Assistance 20 points

In reviewing the objectives and need for assistance, the following factors will be considered: (20 points)

1. The extent to which the applicant demonstrates an understanding of the goals and objectives of this Quality Improvement Center on Privatization of Child Welfare Services initiative. The extent to which the application presents a clear vision for the proposed project to be developed and implemented. The extent to which the applicant makes a clear statement of the goals (end products of an effective project) and objectives (measurable steps for reaching these goals) of the proposed project. The extent to which these goals and objectives closely relate to objectives of this funding announcement. The extent to which the applicant demonstrates how the proposed project would contribute to achieving these goals and objectives.

2. The extent to which the application demonstrates an understanding of the Child Welfare System and applicable laws, and Federal policies regarding the contracting of Child Welfare services.

3. The extent to which the applicant demonstrates an understanding the challenges facing the child welfare system and the current status of existing services.

4. The extent to which the application demonstrates a thorough understanding of the need for developing and disseminating knowledge about child welfare privatization. The extent to which the applicant clearly describes and documents the types and extent of barriers to privatizing child welfare services; and the potential benefits of child welfare service privatization.

5. The extent to which the applicant demonstrates a clear and concise vision of the role of the QIC in implementing the proposed project.

6. The extent to which the application demonstrates a thorough understanding of the challenges of privatizing child welfare services. The extent to which the application demonstrates a thorough understanding of the challenges that the proposed project will have in developing knowledge about child welfare service privatization. The extent to which the applicant provides a sound plan explaining how the project would successfully overcome these challenges.

7. The extent to which the proposed QIC, if successfully implemented, would build the knowledge base about best practices in child welfare service privatization.

8. The extent to which the application presents a thorough review of the relevant literature that reflects a clear understanding of the research on best practices and promising approaches as it relates to the child welfare system and privatization of child welfare services. The extent to which the review includes a description of the cultural, financial, legal, bureaucratic and other types of barriers to the efficient and effective privatization of child welfare services. The extent to which the review of the literature sets a sound context and rationale for the project. The extent to which it provides evidence that the proposed project is innovative and, if successfully implemented and evaluated, likely to contribute to the knowledge base on child welfare service privatization.

9. The extent to which the proposed QIC would build an infrastructure of collaborative partnerships and information networks that will promote research and innovative demonstration projects that will contribute to increased knowledge or understanding of the problems, issues, and effective strategies and practices in the field of child welfare service privatization.

10. The extent to which the proposed QIC, if successfully implemented, would be likely to yield findings or results that may be used by other agencies and organizations interested in privatization of child welfare services. The extent to which the lessons learned through the proposed project would benefit policy, practice and theory development related to privatization of child welfare services.

11. The extent to which the proposed QIC, if successfully implemented, is likely to develop strategies and sponsor research and demonstration projects that can be replicated by other regions and/or agencies addressing the same or similar problems and, as appropriate, the potential for implementation in a variety of settings.

Budget and Budget Justification 10 points

In reviewing the budget and budget justification, the following factors will be considered: (10 points)

(1) The extent to which the costs of the proposed project are reasonable and appropriate, in view of the activities to be conducted and expected results and benefits. The extent to which the applicant will provide the required match (see Section III.2).

(2) The extent to which the applicant's fiscal controls and accounting procedures would ensure prudent use, proper and timely disbursement and accurate accounting of funds received under this program announcement.

2. Review and Selection Process

Since ACF will be using non-Federal reviewers in the review process, applicants have the option of omitting from the application copies (not the original) of specific salary rates or amounts for individuals specified in the application budget.

No grant award will be made under this announcement on the basis of an incomplete application.

A panel of at least three reviewers (primarily experts from outside the Federal government) will use the evaluation criteria described in this announcement to evaluate each application. The reviewers will determine the strengths and weaknesses of each application, provide comments about the strengths and weaknesses and give each application a numerical score.

The results of the competitive review are a primary factor in making funding decisions. In addition, Federal staff conducts administrative reviews of the applications and, in light of the results of the competitive review, will recommend applications for funding to the ACYF Commissioner. ACYF reserves the option of discussing applications with other funding sources when this is in the best interest of the Federal government. ACYF may also solicit and consider comments from ACF Regional Office staff in making funding decisions. ACYF may take into consideration the involvement (financial and/or programmatic) of the private sector, national, or State or community foundations; a favorable balance between Federal and non-Federal funds for the proposed project; or the potential for high benefit from low Federal investment. ACYF may elect not to fund any applicants having known management, fiscal, reporting, programmatic, or other problems which make it unlikely that they would be able to provide effective services or effectively complete the proposed activity.

With the results of the peer review and the information from Federal staff, the Commissioner of ACYF makes the final funding decisions. The Commissioner may give special consideration to applications proposing services of special interest to the Government and to achieve geographic distributions of grant awards. Applications of special interest may include, but are not limited to, applications focusing on underserved or inadequately served clients or service areas and programs addressing diverse ethnic populations.

*Available Funds.* Applicants should note that grants to be awarded under this program announcement are subject to the availability of funds.

Approved but Unfunded Applications

Applications that are approved but unfunded may be held over for funding in the next funding cycle, pending the availability of funds, for a period not to exceed one year.

3. Anticipated Announcement and Award Dates

Applications will be reviewed in the summer of 2005. Grant awards will have a start date no later than September 30, 2005.

**VI. Award Administration Information**

*1. Award Notices*

The successful applicants will be notified through the issuance of a Financial Assistance Award document which sets forth the amount of funds granted, the terms and conditions of the grant, the effective date of the grant, the budget period for which initial support will be given, the non-Federal share to be provided, and the total project period for which support is contemplated. The Financial Assistance Award will be signed by the Grants Officer and transmitted via postal mail.

Organizations whose applications will not be funded will be notified in writing.

*2. Administrative and National Policy Requirements*

Grantees are subject to the requirements in 45 CFR Part 74 (non-governmental) or 45 CFR Part 92 (governmental).

Direct federal grants, sub-award funds, or contracts under this program shall not be used to support inherently religious activities such as religious instruction, worship, or proselytization. Therefore, organizations must take steps to separate, in time or location, their inherently religious activities from the services funded under this program. Regulations pertaining to the prohibition of Federal funds for inherently religious activities can be found on the HHS web site at *http://www.os.dhhs.gov/fbci/waisgate21.pdf*

Special Terms and Conditions

None.

*3. Reporting Requirements*

*Program Progress Reports:* Semi-annually.

*Financial Reports:* Semi-annually.

Grantees will be required to submit program progress and financial reports (SF–269) throughout the project period. Program progress and financial reports are due 30 days after the reporting period. In addition, final programmatic and financial reports are due 90 days after the close of the project period.

Performance Indicator Data, Programmatic Reports and Financial Reports are required semi-annually. All required reports will be submitted in a timely manner, in recommended formats (to be provided), and the final report will also be submitted on disk or electronically using a standard word-processing program.

Within 90 days of project end date, the applicant will submit a copy of the final report and any program products to the National Clearinghouse on Child Abuse and Neglect Information, 330 C Street, SW., Washington, DC 20447. This is in addition to the standard requirement that the final program and evaluation report must also be submitted to the Grants Management Specialist and the Federal Project Officer.

**II. Agency Contacts**

*Program Office Contact:* Jan Shafer, Administration for Children and Families, Children's Bureau, 330 C Street, SW., Washington, DC 20447, phone: 202–205–8172, e-mail: *jshafer@acf.hhs.gov.*

*Grants Management Office Contact:* Peter Thompson, Grants Officer, Administration for Children and Families, Children's Bureau, 330 C Street, SW. Room 2070, Washington, DC 20447, phone: 202–401–4608, e-mail: *pathompson@acf.hhs.gov.*

**VIII. Other Information**

*Notice:* Beginning with FY 2006, the Administration for Children and Families (ACF) will no longer publish grant announcements in the **Federal Register**. Beginning October 1, 2005 applicants will be able to find a synopsis of all ACF grant opportunities and apply electronically for opportunities via: *http://www.Grants.gov.* Applicants will also be able to find the complete text of all ACF grant announcements on the ACF Web site located at: *http://www.acf.hhs.gov/grants/index.html.*

Additional information about this program and its purpose can be located on the following Web sites: *http://www.acf.hhs.gov/programs/cb/.*

For general questions regarding this announcement please contact: ACYF Operations Center, The Dixon Group ATTN: Children's Bureau, 118 Q Street, NE., Washington DC 20002–2132, Telephone: 866–796–1591.

Applicants will not be sent acknowledgements of received applications.

Dated: May 25, 2005.

**Susan Orr,**

*Acting Commissioner, Administration on Children, Youth and Families.*

[FR Doc. 05–11197 Filed 6–3–05; 8:45 am]

BILLING CODE 4184–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 2005D–0203]**

### Draft Guidance for Industry on Safety Testing of Drug Metabolites; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Safety Testing of Drug Metabolites.'' This draft guidance provides recommendations on the safety assessment of unique or major human metabolites of small molecule (nonbiologic) therapeutic products under development. This draft guidance is intended to serve as a resource for general testing considerations as well as provide recommendations on the timing of these studies in relation to the clinical development.

**DATES:** Submit written or electronic comments on the draft guidance by August 5, 2005. General comments on agency guidance documents are welcome at any time.

**ADDRESSES:** Submit written requests for single copies of the draft guidance to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send one self-addressed adhesive label to assist that office in processing your requests. Submit written comments on the draft guidance 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*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

**FOR FURTHER INFORMATION CONTACT:** Aisar Atrakchi, Center for Drug Evaluation and Research (HFD–120), Food and Drug Administration, 1451 Rockville Pike, Rockville, MD 20852, 301–594–2850.

**SUPPLEMENTARY INFORMATION:**

### I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Safety Testing of Drug Metabolites.'' There are quantitative and qualitative differences in metabolic profiles across species. These differences become important when exposure parameters of a drug in a nonclinical species are used to assess safety in humans during risk assessment. In the past, contribution of metabolites to the overall toxicological potential of the parent drug was generally unknown or not considered; analytical technologies to identify and measure metabolites have only become available over the past decade.

Although in general there is adequate correlation in metabolic profiles between humans and those obtained in standard nonclinical safety studies, there are, however, cases when these studies do not adequately evaluate clinically relevant and/or biologically active metabolites. This may be due to such metabolites being unique to humans or present at very low levels in the animal species used in the standard toxicity studies. As a result, FDA has developed a draft guidance to provide recommendations on the safety assessment of unique or major human metabolites of small molecule (nonbiologic) therapeutic products. These recommendations should help applicants conduct adequate safety assessments of metabolites.

This draft guidance provides general testing considerations for unique or major drug metabolites including study design, identification of metabolites, structure activity relationship, and types of nonclinical studies needed to assess metabolite toxicity. It also addresses the timing of these studies in relation to the clinical development.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on safety testing of drug metabolites. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

### II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding the document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

### III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm* or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: May 27, 2005.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 05–11205 Filed 6–3–05; 8:45 am]

BILLING CODE 4160–01–S

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[USCG–2005–21322]**

### Collection of Information Under Review by Office of Management and Budget (OMB): OMB Control Number: 1625–0015

**AGENCY:** Coast Guard, DHS.

**ACTION:** Request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the Coast Guard intends to seek the approval of OMB for the renewal of one Information Collection Request (ICR). The ICR is for 1625–0015, Bridge Permit Application Guide. Before submitting the ICR to OMB, the Coast Guard is inviting comments on it as described below.

**DATES:** Comments must reach the Coast Guard on or before August 5, 2005.

**ADDRESSES:** To make sure that your comments and related material do not enter the docket [USCG–2005–21322] more than once, please submit them by only one of the following means:

(1) By mail to the Docket Management Facility, U.S. Department of Transportation (DOT), room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001.

(2) By delivery 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. The telephone number is 202–366–9329.

(3) By fax to the Docket Management Facility at 202–493–2251.

(4) Electronically through the Web site for the Docket Management System at *http://dms.dot.gov.*

The Docket Management Facility maintains the public docket for this notice. Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, will become part

of this docket and will be available for inspection or copying at 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. You may also find this docket on the Internet at *http://dms.dot.gov.*

Copies of the complete ICR are available through this docket on the Internet at *http://dms.dot.gov,* and also from Commandant (CG–611), U.S. Coast Guard Headquarters, room 6106 (Attn: Ms. Barbara Davis), 2100 Second Street, SW., Washington, DC 20593–0001. The telephone number is 202–267–2326.

**FOR FURTHER INFORMATION CONTACT:** Ms. Barbara Davis, Office of Information Management, telephone 202–267–2326, or fax 202–267–4814, for questions on these documents; or telephone Ms. Andrea M. Jenkins, Program Manager, Docket Operations, 202–366–0271, for questions on the docket.

**SUPPLEMENTARY INFORMATION:**

## Public Participation and Request for Comments

We encourage you to respond to this request for comments by submitting comments and related materials. We will post all comments received, without change, to *http://dms.dot.gov,* and they will include any personal information you have provided. We have an agreement with DOT to use the Docket Management Facility. Please see the paragraph on DOT's ''Privacy Act Policy'' below.

## Submitting Comments

If you submit a comment, please include your name and address, identify the docket number for this request for comment [USCG–2005–21322], indicate the specific section of this document to which each comment applies, and give the reason for each comment. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change the documents supporting this collection of information or even the underlying requirements in view of them.

## Viewing Comments and Documents

To view comments, as well as documents mentioned in this notice as being available in the docket, go to *http://dms.dot.gov* at any time and conduct a simple search using the docket number. You may also visit the Docket Management Facility in 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.

## Privacy Act

Anyone can search the electronic form of all comments received in 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 Privacy Act Statement of DOT in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov.*

## Information Collection Request

*Title:* Bridge Permit Application Guide.

*OMB Control Number:* 1625–0015.

*Summary:* The collection of information is a request for a bridge permit submitted as an application for approval by the Coast Guard of any proposed bridge project. An applicant must submit to the Coast Guard a letter of application along with letter-size drawings (plans) and maps showing the proposed project and its location.

*Need:* 33 U.S.C. 401, 491, 525, and 535 authorize the Coast Guard to approve plans and locations for all bridges and causeways that go over navigable waters of the United States.

*Respondents:* Public and private owners of bridges over navigable waters of the United States.

*Frequency:* On occasion.

*Burden Estimate:* The estimated burden has been decreased from 4,000 hours to 2,240 hours a year.

Dated: May 26, 2005.

**Nathaniel Heiner,**

*Acting, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.*

[FR Doc. 05–11169 Filed 6–3–05; 8:45 am]

**BILLING CODE 4910–15–P**

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# DEPARTMENT OF THE INTERIOR

## Office of the Secretary

## Notice of Final Changes to Procedures

**AGENCY:** Department of the Interior.

**ACTION:** Notice of final changes to procedures.

**SUMMARY:** These changes to procedures modify the Departmental Manual at 516 DM 2.5, Cooperating Agencies (40 CFR 1501.6). These procedures clarify the responsibility of managers to offer this status to qualified agencies and governments, and to respond to requests for this status. These procedures also make clear the role of cooperating agencies in the implementation of the Department's National Environmental Policy Act (NEPA) compliance process. With this publication of these procedures they will be added to the Electronic Library of Interior Policies (ELIPS). ELIPS is located at: *http://elips.doi.gov/.*

The changes to the procedures are necessary to emphasize the importance of working with Federal and State agencies and Tribal and local governments through cooperating agency relationships in preparing environmental impact statements under NEPA.

**FOR FURTHER INFORMATION CONTACT:** Vijai N. Rai, Team Leader, Natural Resources Management, Office of Environmental Policy and Compliance; 1849 C Street, NW., Washington, DC 20240. Telephone: 202–208–6661. e-mail: *vijai_rai@ios.doi.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week.

**SUPPLEMENTARY INFORMATION:** This section provides general information, background, a summary of comments and responses, and procedural requirements.

*General Information:* In an Executive Order (EO 13352) on Facilitation of Cooperative Conservation, the President seeks to ensure that certain Federal agencies, including the Department of the Interior, implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation. The EO emphasizes appropriate local participation in Federal decision-making, in accordance with agencies' respective agency missions, policies, and regulations.

In an effort to carry out the intent of EO 13352, the Department of the Interior is strengthening its National Environmental Policy Act (NEPA) implementing procedures which appear in part 516 of the Departmental Manual (DM) at 516 DM 2.5 on Cooperating Agencies. Consistent with both EO 13352 and the Secretary of the Interior's ''4C's'' policy, that is, Conservation through Communication, Consultation, and Cooperation, these revised

procedures will reinforce existing bureau procedures that encourage the types of cooperation envisioned in the EO 13352. The Department of the Interior has long promoted, and successfully implemented, partnerships with States, Tribes, local governments, and private landowners to advance conservation. Such partnerships serve to preserve open space, restore habitat for wildlife, and protect endangered species, among other things.

The changes provide Department-wide direction to proactively engage States, Tribes and local governments in the development of all environmental impact statements.

We also wish to clarify here the invitation requirement for scoping at 516 DM 2.6A. There the manual provides that the invitation requirement in Section 40 CFR 1501.7(a)(1) may be satisfied by including such an invitation in the Notice of Intent. Under the revised procedures for cooperating agencies, bureaus do not need to invite eligible governmental entities separately for purposes of scoping as long as prior to scoping they have complied fully with the provisions at 516 DM 2.5D.

In accordance with 1507.3 of the CEQ Regulations, this Department submitted these final revisions to CEQ for their review and approval. In a letter, CEQ approved these procedures for final publication. The remaining sections of supplementary information will provide background, a synopsis of comments and responses, and procedural requirements. Following the supplementary information is the text of the final procedures.

*Background:* On March 18, 2005, the Department published proposed changes to modify the Departmental Manual at 516 DM 2.5, Cooperating Agencies (40 CFR 1501.6) in the **Federal Register** (70 FR 13203) and requested public comments. The purpose of the proposed changes to the Department's Manual is to provide further guidance to implement the President's Executive Order (EO 13352) on Facilitation of Cooperative Conservation.

All comments received to date have been read, analyzed, and considered during the revision process. No changes have been made to the proposed procedures as published on March 18, 2005. The procedures have been circulated in the Department for final clearance by each assistant secretary. In some cases, responses to public comments have been further revised during the final, internal review and clearance process. No additional changes have been made to the proposed procedures as published as a part of the final, internal review and clearance process.

*Comments and Responses:* The Department received, reviewed, and considered twelve items of correspondence from the public on the March 18, 2005, **Federal Register** notice. In general, the comments support the proposed changes to procedures at 516 DM 2.5. Some comments focused on specific concerns regarding implementation of the proposed procedures and expressed the need for further clarification of certain points and the definition of terms to eliminate any ambiguities. A discussion of these issues follows and is presented topically with similar comments grouped together for ease of analysis and discussion.

One commenter expressed concern that the current proposed procedures do not contain adequate safeguards to prevent delays. Such delays could result from a lack of timeframes for governmental entities to respond to the invitation to participate or, after declining an opportunity to participate, to change their position and later seek to participate. The commenter seeks to have timeframes included in the procedures to ensure against delays and suggests further that the Department should take this opportunity to make improvements to the NEPA process by adopting fully all the recommendations of the National Academy of Sciences (NAS) regarding improvements to NEPA contained in its report on Hardrock Mining on Federal Lands.

The Department believes that timeframes and milestones are not applicable. Milestones and timeframes are generally included in the administrative record of an environmental review process and therefore provide a safeguard to prevent unnecessary and unreasonable delay. Alternatively, timeframes for compliance can be incorporated into the documents offering the opportunity to become a cooperator or, in the case of production milestones, to include timeliness requirements in a Memorandum of Understanding (MOU) that is prepared when Cooperating Agency status is established. The Department believes these procedures improve interagency coordination as recommended in the NAS report. However, other recommendations in the NAS report are beyond the scope of these procedural changes.

Three commenters noted that the proposed changes to the procedures take the form of guidance not regulation. The concern is that guidance can be changed by future Secretaries of the Interior; moreover, guidance instead of regulation, leaves the policy more vulnerable and less enforceable than it would be if it were a regulation. The commenters cite the recently completed Bureau of Land Management (BLM) rulemaking on the same subject as a reason that the Department should do likewise. One commenter has suggested that the Department needs to provide for more permanency to the process through rulemaking. The stated reasons are that local governments, once they are assured of the ability to participate, will plan accordingly. State agencies, once they know their participation is needed and wanted, will develop the necessary expertise to participate in the process. State agencies must know they will be treated as partners in the process before they commit the resources to develop this partnership. Secondly, a process made permanent through rulemaking would demonstrate to the Department's employees that State and local governments are expected to participate and become cooperators in the process. Local input, the commenter asserts, is currently discouraged instead of encouraged. Establishing a rule would convey a greater level of importance to the field offices.

BLM's planning regulations cover more than NEPA compliance and reflect land management requirements specified under Statutes such as the Federal Land Policy Management Act and others. However, unlike the BLM, the Department has not issued a specific planning rule. The implementing regulations under the provisions of NEPA are issued by the Council on Environmental Quality (CEQ), and the Department issues guidance and procedures under those regulations. Like any revision to a regulation, Departmental guidance and procedures involving NEPA are subject to review and comment by the public and the CEQ. Therefore, any future revision to Departmental NEPA guidance and procedures will also undergo public review and comment.

The same commenters also seek a better definition of the level of ''collaboration'' that is likely to be applied or which may occur in the field. It may be helpful, they claim, for the guidance to further define the terms ''collaboration'' and ''the fullest extent practicable,'' to ensure that consistent expectations are achieved for all parties throughout the process.

To more precisely define these terms would serve only to place arbitrary limits, constraints, and requirements on a process that, by its very nature, is designed to be a consultative, consensus building, and cooperative endeavor.

The one commenter asserts that proposed subsection D needs

clarification because it appears to be inconsistent. The commenter questions the rationale for the Federal agency to approve or deny a request to become a cooperating agency and states that if the Federal agency is required to invite qualified State, Tribal, and local governments to participate as cooperating agencies, there is no need for the qualified agency to have to make a request to participate.

A review of the entire subsection D reveals no inconsistency among the statements. The Department believes that the lead Federal agency should be able to deny cooperating agency status when the requester does not have jurisdiction by law or special expertise as specified in the CEQ's regulations implementing NEPA. However, to ensure that the process is open and transparent, the Federal agency is required to respond in writing to the requestor and provide a summary of the request and the reasons for such denial within the environmental impact statement. In addition, this section provides a mechanism to a prospective qualified agency to request to become a cooperating agency if for any reason the Federal agency did not invite the qualified agency to become a cooperating agency.

A commenter recommended that the proposed procedures be applied to Environmental Assessments (EA), in addition to Environmental Impact Statements (EIS). As noted by the commenter, this recommendation is related to the CEQ regulations implementing NEPA at 40 CFR 1501.6 which refer to cooperating agencies in conjunction with EISs.

Although the CEQ regulations do not specifically limit the establishment of cooperating agency relationships to the preparation of EISs, the Department (and NEPA practitioners in general) has generally not employed cooperating agencies in the preparation of EAs. Considerable thought was given to requiring the Department's bureaus to extend the cooperating agency invitation to appropriate governmental entities for the preparation of EAs when the proposed changes to the procedures at 516 DM 2.5 were being formulated. However, the number of EAs prepared annually by the Department's bureaus is huge (several thousands). The process of establishing cooperating agencies for the many EAs that are prepared would unduly encumber that phase of the NEPA process for all affected stakeholders. Also, most EAs are prepared for actions that may not be expected to have significant environmental impacts and usually result in the issuance of a finding of no significant impact (FONSI). To require Federal agencies to invite various entities to become cooperating agencies on proposed actions that have no significant impact would become a major impediment to most agency actions and would make the NEPA process highly inefficient and ineffective. This procedure is directed to ensure that Federal agencies invite all qualified government entities to become cooperating agencies with respect to any proposed action that would have significant impact on the quality of the human environment.

One commenter expressed the concern that the proposed procedures would allow bureaus to reject a request by a cooperating agency to participate in the preparation of an EIS. The commenter suggested that if such a request to be a cooperating agency were rejected, it might be prudent to have provisions that allow for an appeal of that decision. Also, the power to reject such requests should be narrow and limited.

Appeal rights are outside the scope of the proposed procedures. The objective of strengthening the requirement for bureaus to extend the cooperating agency invitation to a broad range of potentially affected governmental entities is to provide a more inclusive and collaborative NEPA framework and environmental review process. It is the intent that rejections of requests for cooperating agency status would be few, limited, and only for good reason.

One individual commenter expressed the concern that allowing non-Federal entities to have such a strong participatory role in the preparation of NEPA documents carries the risk that the analysis is likely to be biased and the integrity of the document compromised. The commenter is concerned that the process will reduce the public's trust in the information and analysis in the document.

The Department has NEPA compliance oversight responsibility and is ultimately accountable for the integrity, scientific accuracy and reliability of the analysis in its EIS. The decision to invite, and subsequently grant, another governmental entity a role in the NEPA process as a cooperating agency does not alter the role and responsibility of the lead agency to ensure that the information and the scientific analysis contained in the EIS are valid and uncompromised.

Another commenter suggests that the procedural change is an attempt by the agency to make secret of what goes on at this Department.

The Department takes a different view that this procedural change will make the process more open and transparent.

*Procedural Requirements:* The following list of procedural requirements has been assembled and addressed to contribute to this open review process. Today's publication is a notice of final, internal Departmental action and not a rulemaking. However, we have addressed the various procedural requirements that are generally applicable to proposed and final rulemaking to show how they would affect this notice if it were a rulemaking.

**Regulatory Planning and Review**

Under Executive Order 12866 (58 FR 51735, October 4, 1993) it has been determined that this action is the implementation of policy and procedures applicable only to the Department of the Interior and not a significant regulatory action. These policies and procedures would not impose a compliance burden on the general economy.

**Administrative Procedures Act**

This document is not subject to prior notice and opportunity to comment because it is a general statement of policy and procedure [(5 U.S.C. 553(b)(A)]. However, notice and opportunity to comment is required by the CEQ Regulations [40 CFR 1507.3(a)].

**Regulatory Flexibility Act**

This document is not subject to notice and comment under the Administrative Procedures Act, and, therefore, is not subject to the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This document provides the Department with policy and procedures under NEPA and does not compel any other party to conduct any action.

**Small Business Regulatory Enforcement Fairness Act**

These policies and procedures do not comprise a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The document will not have an annual effect on the economy of $100 million or more and is expected to have no significant economic impacts. Further, it 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 impose no additional regulatory restraints in addition to those already in operation. Finally, the document does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability

of United States 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 document will not significantly or uniquely affect small governments. A Small Government Agency Plan is not required. The document does not require any additional management responsibilities. Further, this document will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a significant regulatory action under the Unfunded Mandates Reform Act. These policies and procedures are not expected to have significant economic impacts nor will they impose any unfunded mandates on other Federal, State, or local government agencies to carry out specific activities.

**Federalism**

In accordance with Executive Order 13132, this document does not have significant federalism effects; and, therefore, a federalism assessment is not required. The policies and procedures will not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. However, this policy will likely improve, and enhance, State and local relationships with Federal agencies. No intrusion on State policy or administration is expected, roles or responsibilities of Federal or State governments will not change, and fiscal capacity will not be substantially, directly affected. Therefore, the document does not have significant effects or implications on federalism.

**Paperwork Reduction Act**

This document does not require information collection as defined under the Paperwork Reduction Act. Therefore, this document does not constitute a new information collection system requiring Office of Management and Budget (OMB) approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

**National Environmental Policy Act**

The Council on Environmental Quality does not direct agencies to prepare a NEPA analysis or document before establishing agency procedures that supplement the CEQ regulations for implementing NEPA. Agency NEPA procedures are internal procedural guidance to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action.

**Essential Fish Habitat**

We have analyzed this document in accordance with section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and determined that issuance of this document will not affect the essential fish habitat of Federally managed species; and, therefore, an essential fish habitat consultation on this document is not required.

**Consultation and Coordination With Indian Tribal Governments**

In accordance with Executive Order 13175 of November 6, 2000, and 512 DM 2, we have assessed this document's impact on Tribal trust resources and have determined that it does not directly affect Tribal resources since it describes the Department's procedures for its compliance with NEPA.

**Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use**

Executive Order 13211 of May 18, 2001, requires a Statement of Energy Effects for significant energy actions. Significant energy actions are actions normally published in the **Federal Register** that lead to the promulgation of a final rule or regulation and may have any adverse effects on energy supply, distribution, or use. We have explained above that this document is an internal Departmental Manual part which only affects how the Department conducts its business under the National Environmental Policy Act. This manual part is not a rulemaking; and, therefore, not subject to Executive Order 13211.

**Actions To Expedite Energy-Related Projects**

Executive Order 13212 of May 18, 2001, requires agencies to expedite energy-related projects by streamlining internal processes while maintaining safety, public health, and environmental protections. Today's publication is in conformance with this requirement as it promotes early collaboration and cooperation amongst agencies with jurisdiction or expertise in activities requiring an environmental impact study (including some energy-related projects).

**Government Actions and Interference With Constitutionally Protected Property Rights**

In accordance with Executive Order 12630 (March 15, 1988) and Part 318 of the Departmental Manual, the Department has reviewed today's notice to determine whether it would interfere with constitutionally protected property rights. Again, we believe that as internal instructions to bureaus on the implementation of the National Environmental Policy Act, this publication would not cause such interference.

**Authority:** NEPA, the National Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*); E.O. 11514, March 5, 1970, as amended by E.O. 11991, May 24, 1977; and CEQ Regulations 40 CFR 1507.3

**P. Lynn Scarlett,**

*Assistant Secretary for Policy, Management and Budget.*

**Department of the Interior**

**Departmental Manual**

Effective Date:

Series: Environmental Quality.

Part 516: National Environmental Policy Act of 1969.

Chapter 2: Initiating the NEPA Process.

Originating Office: Office of Environmental Policy and Compliance.

**516 DM 2**

2.5 Cooperating Agencies (40 CFR 1501.6 and 1508.5).

A. Upon the request of a bureau, the OEPC will assist bureaus in determining cooperating agencies and coordinating requests from non-Interior agencies.

B. Bureaus will inform the OEPC of any requests to become a cooperating agency or any declinations to become a cooperating agency pursuant to 40 CFR 1501.6(c).

C. Upon the request of the lead agency, any Federal agency that is qualified to participate in the development of an environmental impact statement as provided for in 40 CFR 1501.6 and 1508.5 by virtue of its jurisdiction by law, as defined in 40 CFR 1508.15, shall be a cooperating agency. In addition, upon request of the lead agency, any Federal agency that is qualified to participate in the development of an environmental impact statement by virtue of its specialized expertise, as defined in 40 CFR 1508.26, may be a cooperating agency. Any non-Federal agency (State, Tribal, or local) with similar qualifications may by agreement be a cooperating agency. Bureaus will consult with the Solicitor's Office in cases where such non-Federal agencies are also applicants before the Department to determine relative lead/cooperating agency responsibilities.

D. An agency meeting the requirements of 516 DM 2.5 C is defined as an eligible governmental entity.

E. Bureaus will invite eligible governmental entities to participate as cooperating agencies when the bureau is developing an environmental impact statement in accordance with the requirements of NEPA and the CEQ regulations. Bureaus will also consider any requests by eligible governmental entities to participate as a cooperating agency with

respect to a particular environmental impact statement, and will either accept or deny such requests. If such a request is denied, bureaus will state in writing, within the environmental impact statement, the reasons for such denial.

F. Throughout the development of the environmental impact statement, the bureau will collaborate, to the fullest extent practicable, with all cooperating agencies, concerning those issues relating to their jurisdiction and/or special expertise. Collaboration will be to:

(1) Identify issues to be addressed in the environmental impact statement;

(2) arrange for the collection and/or assembly of necessary resource, environmental, social, economic, and institutional data;

(3) analyze data;

(4) develop alternatives; (1) Evaluate alternatives and estimate the effects of implementing each alternative; and

(6) carry out any other task necessary for the development of the environmental impact statement.

G. Bureaus and eligible governmental entities are required to express in a memorandum of understanding their respective roles, assignment of issues, schedules, and staff commitments so that the NEPA process remains on track and within the time schedule.

[FR Doc. 05–11129 Filed 6–3–05; 8:45 am]

**BILLING CODE 4310–R6–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### Notice of Availability of a Draft Environmental Assessment/Habitat Conservation Plan and Receipt of a Permit Application (Reyna) for Incidental Take of the Houston Toad

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability and 60-day public comment period.

**SUMMARY:** Jesus Reyna (Applicant) has applied for an incidental take permit (TE–104765–0) pursuant to Section 10(a) of the Endangered Species Act (Act). The requested permit would authorize incidental take of the endangered Houston toad. The proposed take would occur as a result of the construction and occupation of a primary residence and detached garage, guest house and detached garage, workshop, well pump house, and three septic systems on an approximately 16.545-acre (6.68-hectare) tract of land located on Felix Road, Bastrop County, Texas.

**DATES:** To ensure consideration, written comments must be received on or before August 5, 2005.

**ADDRESSES:** Persons wishing to review the application may obtain a copy by writing to the Regional Director, U.S. Fish and Wildlife Service, P.O. Box 1306, Room 4102, Albuquerque, New Mexico 87103. Persons wishing to review the draft Environmental Assessment/Habitat Conservation Plan (EA/HCP) may obtain a copy by contacting Clayton Napier, U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, Texas 78758 (512/490–0057). Documents will be available for public inspection by written request, by appointment only, during normal business hours (8 a.m. to 4:30 p.m.) at the U.S. Fish and Wildlife Service office, Austin, Texas. Written data or comments concerning the application and EA/HCP should be submitted to the Supervisor, U.S. Fish and Wildlife Service, Austin, Texas, at the above address. Please refer to permit number TE–104765–0 when submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Clayton Napier at the U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, Texas 78758 (512/490–0057).

**SUPPLEMENTARY INFORMATION:** Section 9 of the Act prohibits the ''taking'' of endangered species such as the Houston toad. However, the Fish and Wildlife Service (Service) may issue permits to take endangered wildlife species, if the take is incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for endangered species are at 50 CFR 17.22.

The Service has prepared the draft EA/HCP for the incidental take application. A determination of jeopardy or non-jeopardy to the species and a decision pursuant to the National Environmental Policy Act (NEPA) will not be made until at least 60 days after the date of publication of this notice. This notice is provided pursuant to Section 10(c) of the Act and NEPA regulations (40 CFR 1506.6).

*Applicant:* Jesus Reyna plans to construct a primary residence and detached garage, guest house and detached garage, workshop, well pump house, and three septic systems on an approximately 16.545-acre (6.68-hectare) tract of land located on Felix Road, Bastrop County, Texas. This action will eliminate 0.5 acres of Houston toad habitat and result in indirect impacts. The Applicant proposes to compensate for incidental take of the Houston toad by providing $3,000.00 to the Houston Toad Conservation Fund at the National Fish and Wildlife Foundation for the specific purpose of land acquisition and management within Houston toad habitat and by complying with other mitigation measures found in the incidental take permit.

**Joy E. Nicholopoulos,**

*Acting Regional Director, Region 2, Albuquerque, New Mexico.*

[FR Doc. 05–11151 Filed 6–3–05; 8:45 am]

**BILLING CODE 4510–55–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### Temporary Concession Contract for Great Smoky Mountains National Park, TN

**ACTION:** Notice of proposed award.

**SUMMARY:** Public notice is hereby given that the National Park Service (NPS) proposes to award a temporary concession contract that requires the operation of horseback riding stables and vending machine sales of soft drinks and bottled water, and authorizes limited souvenir sales in the Sugarlands region of the Great Smoky Mountains National Park near Gatlinburg, Tennessee for a term not to exceed October 31, 2006.

**EFFECTIVE DATE:** June 27, 2005.

**FOR FURTHER INFORMATION CONTACT:** Henry Benedetti, Chief, Commercial Services, National Park Service, Southeast Region, 404–562–3112, extension 661.

**SUPPLEMENTARY INFORMATION:** The temporary concession contract is being awarded to Smoky Mountain Stables, Inc., a qualified person, as that term is defined in 36 CFR 51.3. The NPS terminated the prior concession contract at Sugarlands on May 2, 2005, has taken all reasonable and necessary steps to consider alternatives to avoid further interruption of visitor services, and has determined that this award is necessary to avoid further interruption of visitor services.

This action is issued pursuant to 36 CFR 51.24(a). This is not a request for proposals and no prospectus is being issued at this time. The Director intends to issue a prospectus in 2006 to allow the competitive award of a long-term concession contract that will be effective prior to the 2007 operation season at Sugarlands. You may be placed on a mailing list for receiving information regarding the prospectus by sending a written request to the above address.

Dated: May 16, 2005.

**Patricia A. Hooks,**

*Regional Director, Southeast Region, National Park Service.*

[FR Doc. 05–11145 Filed 6–3–05; 8:45 am]

BILLING CODE 4312–53–P

## DEPARTMENT OF THE INTERIOR

### National Park Service

### General Management Plan, Final Environmental Impact Statement, Colorado National Monument, CO

**AGENCY:** National Park Service, Department of the Interior.

**ACTION:** Notice of availability of the Final Environmental Impact Statement for the General Management Plan, Colorado National Monument.

**SUMMARY:** Pursuant to National Environmental Policy Act of 1969, 42 U.S.C. 4332(C), the National Park Service announces the availability of a Final Environmental Impact Statement for the General Management Plan, Colorado National Monument, Colorado.

**DATES:** The National Park Service will execute a Record of Decision (ROD) no sooner than 30 days following publication by the Environmental Protection Agency of the Notice of Availability of the Final Environmental Impact Statement.

**ADDRESSES:** Information will be available for public inspection in the office of the Superintendent, and at the following locations:

Colorado National Monument Visitor Center/Headquarters, Bruce Noble, Superintendent, 7 miles east of Fruita on Rim Rock Drive, Fruita, CO 81521–0001, Tel: (970) 858–3617, ext. 300.

Fruita Branch Mesa County Public Library District, 324 East Aspen Avenue, Fruita, CO 81521, Tel. (970) 858–7703.

Mesa County Central Library, 530 Grand Avenue, Grand Junction, Co 81502–5019, Tel. (970) 243–4442.

Internet Address: *http://planning.nps.gov/plans.cfm.*

**FOR FURTHER INFORMATION CONTACT:** Contact Superintendent Bruce Noble, Colorado National Monument, Fruita, CO 81521–0001; Tel: (970) 858–3617, ext. 300; FAX: (970) 858–0372; e-mail: *bruce noble@nps.gov.*

Dated: April 27, 2005.

**Michael D. Snyder,**

*Acting Director, Intermountain Region, National Park Service.*

[FR Doc. 05–11142 Filed 6–3–05; 8:45 am]

BILLING CODE 4312–CP–M

## DEPARTMENT OF THE INTERIOR

### National Park Service

### Final Environmental Impact Statement/ General Management Plan, Crater Lake National Park, Douglas, Jackson and Klamath Counties, OR; Notice of Availability

*SUMMARY:* Pursuant to § 102(2)(C) of the National Environmental Policy Act of 1969 (Pub. L. 91–190, as amended), and the Council on Environmental Quality Regulations (40 CFR part 1500–1508), the National Park Service, Department of the Interior, has prepared a final general management plan (GMP) and environmental impact statement (EIS) for Crater Lake National Park, Oregon. The final EIS identifies and analyzes four GMP alternatives which respond to both NPS planning requirements and to the issues identified during the public scoping process. The ''no-action'' alternative (Alternative 1) describes the existing conditions and trends of park management and serves as a baseline for comparison in evaluating the other alternatives. The three ''action'' alternatives variously address visitor use, natural and cultural resource management, and park development. Alternative 2, the preferred alternative, emphasizes increased opportunities in recreational diversity, resource preservation, research and resource education. Under Alternative 3 visitors would experience a greater range of natural and cultural resources through recreational opportunities and education. The focus of Alternative 4 would be on preservation and restoration of natural processes.

*Background:* Public meetings and newsletters have been used to keep the public informed and involved in the conservation planning and environmental impact analysis process for the GMP. A mailing list was compiled that consisted of members of government agencies, nongovernmental groups, businesses, legislators, local governments, and interested citizens. The Notice of Intent to prepare an EIS was published in the **Federal Register** on May 25, 2001. A newsletter issued January 2001 introduced the GMP planning process (a total of 72 written comments were received in response). Public meetings were held during April 2001 in Klamath Falls, Medford, Roseburg, and Salem and were attended by 96 people. A second newsletter issued in July 2001 summarized all comments received in the meetings and in response to newsletter 1. These comments were used to complete the park purpose and significance statements that serve as the foundation for the rest of the GMP planning (and were referred to throughout development of the GMP).

A third newsletter distributed in the spring of 2002 described the draft alternative concepts and management zoning proposed for managing the park (a total of 95 comments were received in response). In general, opinions were fairly divided in support of individual alternatives and potential ways to address issues. A number of letters favored continued snowmobile use, while other people favored eliminating snowmobiles in the park. Opinions were also divided regarding ways to manage traffic congestion on Rim Drive—maintaining current two-way traffic, converting part of the road to one-way traffic, using shuttles, or closure of the road to traffic. Most respondents favored use of shuttles. A number of people who opposed partnering with private industry were concerned with potential for large-scale commercialization within the park.

The Notice of Availability for the Draft EIS and GMP was printed August 3, 2004. The public comment period was open until October 6, 2004. A total of 646 comments were received. Forty-seven letters and e-mails were sent in by individuals. Four agencies responded. Three different form letters accounted for the remaining 599 comments. The most common comment issues were snowmobiles (24 letters/e-mails and all 3 form letters), road closure (15 letters/e-mails and 2 of 3 form letters), shuttles (7 letters/e-mails and 1 of 3 form letters), and snow coachers (4 letters/e-mails and 1 of 3 form letters). Comments and representative letters received on the Draft document have been incorporated into the Final EIS and GMP.

*Proposed Plan and Alternatives:* Alternative 1 is the ''no action'' alternative and represents continuation of the current management direction and approach at the park. It is a way of evaluating the proposed actions of the other three alternatives. Existing buildings and facilities in the park would remain; some historic structures would be adaptively used. Munson Valley would continue to serve as the center of NPS administration, maintenance, and housing. The existing road access and circulation system within the park would continue, and visitor recreational opportunities and interpretive programs in the park would continue.

Alternative 2 is the ''agency preferred'' alternative and has also been determined to be the ''environmentally

preferred'' alternative. Management of the park would emphasize increased opportunities for recreational diversity and research and education. Most recreational opportunities would remain, but new opportunities along Rim Drive would allow visitors to directly experience the primary resource of Crater Lake in ways other than driving. Any new uses around the rim would be non-motorized and low impact. Research and educational opportunities would be enhanced. A new science and learning center would form the core of the new research. The park would expand and encourage partnerships with universities, scientists, and educational groups. The information gathered would be disseminated throughout the park to rangers, interpretive staff, and visitors.

Alternative 3 emphasizes enjoyment of the natural environment. This alternative would allow visitors to experience a greater range of natural and cultural resources significant and unique to the park through recreational opportunities and education. A wider range of visitor experiences would reach out to greater diversity of visitor groups. Recreational programs, which would focus on minimizing impact, would provide the focus for interpretation and education. Resources would be managed to permit recreation while protecting the resources. Opportunities for recreation would be viewed in a regional context, where the park could serve as a source of information for regional recreational opportunities. Use of most current facilities would continue. News trails, new interpretive signs and other media, and expanded tour programs would be possible in Alternative 3.

In Alternative 4, park management would be focused on resource preservation and restoration. The park would be an active partner in a regional conservation strategy that would include other agencies and environmental groups. Most park operations and visitor contact facilities would be outside the park and shared with other agencies and communities. Areas that have been altered would be restored to their natural conditions. Cultural resources would be preserved at the highest level possible. The visitor experience would stress activities that have low environmental impacts on and are harmonious with the resources. More emphasis would be placed on self-guided and discovery education, and interpretive programs would focus on stewardship. Vehicular transportation would be altered to reinforce the visitor experience. The Rim Road would be closed between Cleetwood Cove and Kerr Notch. Winter use of the park would change to allow natural processes to proceed with fewer disturbances than current management practices allow. Winter plowing of the road to the rim would stop, except for spring opening. Snowmobiling along North Junction Road would no longer be allowed. Facilities that are not historic and not essential to park functions would be removed and the area rehabilitated. Functions that are, by necessity park-based, would be retained in the park.

*Public Review:* The Final EIS/GMP is now available. Interested persons and organizations wishing to express any concerns or provide relevant information are encouraged to obtain the document from the Superintendent, Crater Lake National Park, P.O. Box 7, Highway 62, Crater Lake, Oregon, or via telephone at (541) 594–3001. The document may also be viewed at area libraries, or obtained electronically via the park's Web site at *http://www.planning.nps.gov*. Please note that names and addresses of people who comment become part of the public record. If individuals commenting request that their name or\and address be withheld from public disclosure, it will be honored to the extent allowable by law. Such requests must be stated prominently in the beginning of the comments. There also may be circumstances wherein the NPS will withhold from the record a respondent's identity, as allowable by law. As always: The NPS will make available to public inspection all submissions from organizations or businesses and from persons identifying themselves as representatives or officials of organizations and businesses; and, anonymous comments may not be considered.

*Decision:* Following release of the Final EIS/GMP, a Record of Decision (ROD) will be prepared and approved not sooner than 30 days after the EPA has published its notice of filing of the document in the **Federal Register**. A notice of the approved ROD would be similarly published, as well as announced through local and regional press media. As a delegated EIS, the official responsible for the decision is the Regional Director, Pacific West Region, National Park Service; subsequently the official responsible for implementing the approved GMP is the Superintendent, Crater Lake National Park.

Dated: April 4, 2005.

**Jonathan B. Jarvis,**

*Regional Director, Pacific West Region.*

[FR Doc. 05–11144 Filed 6–3–05; 8:45 am]

**BILLING CODE 4312–52–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### The Transportation Plan/Draft Environmental Impact Statement, Grand Teton National Park, WY

**AGENCY:** National Park Service, Department of the Interior.

**ACTION:** Notice of availability of the draft environmental impact statement for the Transportation Plan, Grand Teton National Park.

**SUMMARY:** Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(c), the National Park Service announces the availability of draft Environmental Impact Statement for the Transportation Plan, Grand Teton National Park, Wyoming.

**DATES:** The National Park Service will accept comments from the public on the Draft Environmental Impact Statement for 60 days after publication of this notice. No public meetings are scheduled at this time, but may be announced at a later date.

**ADDRESSES:** Information will be available for public review and comment at the Park Headquarters Visitor Center in Moose, Wyoming and the Reference Desk of the Teton County Library in Jackson, Wyoming. It will also be available online at both *http://parkplanning.nps.gov* and *http://www.nps.gov/grte/plans/planning.htm*.

**FOR FURTHER INFORMATION CONTACT:** Mary Gibson Scott, Superintendent, Grand Teton National Park, PO Drawer 170, Moose, Wyoming 83012–0170, (370) 739–3410.

**SUPPLEMENTARY INFORMATION:** If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to Superintendent Office, P.O. Drawer 170, Moose, Wyoming 83012–0170, Attention: Transportation Plan. You may also comment via the e-mail to *http://parkplanning.nps.gov*, choose ''Grand Teton National Park'' or *''Plan/Documents Open for Comment''* and then click *''Comment on Document''*. Finally, you may hand-deliver comments to the Grand Teton Visitor Center, Moose, Wyoming. Our practice is to make comments, including names and home addresses of respondents, available for public review during business hours. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable law. There also may be circumstances in which we would withhold from the 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. 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.

Dated: April 29, 2005.

**Michael D. Snyder,**

*Acting Regional Director, Intermountain Region, National Park Service.*

[FR Doc. 05–11143 Filed 6–3–05; 8:45 am]

BILLING CODE 4312–CX–P

## DEPARTMENT OF THE INTERIOR

### National Park Service

### General Management Plan and Environmental Impact Statement, Effigy Mounds National Monument, IA

**AGENCY:** National Park Service, Department of the Interior.

**ACTION:** Notice of intent to prepare an environmental impact statement for the general management plan, Effigy Mounds National Monument.

**SUMMARY:** Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(C), the National Park Service (NPS) is preparing an environmental impact statement for a general management plan for Effigy Mounds National Monument, Iowa. The environmental impact statement will be approved by the Director, Midwest Region.

The general management plan will prescribe the resource conditions and visitor experiences that are to be achieved and maintained in the monument over the next 15 to 20 years. The clarification of what must be achieved according to law and policy will be based on review of the monument's purpose, significance, special mandates, and the body of laws and policies directing park management. Based on determinations of desired conditions, the general management plan will outline the kinds of resource management activities, visitor activities, and development that would be appropriate in the future. A range of reasonable management alternatives will be developed through this planning process and will include, at a minimum, no-action and the preferred alternative.

Major issues to be addressed in the plan include: Cultural and natural resources of the park, visitor use of facilities and programs, staff access for resource patrols and visitor protection, trail development, vegetation control, management of threatened and endangered species, management of the Yellow River, and land protection.

**DATES:** Any comments on the scope of issues to be addressed in the EIS should be received no later than December 30, 2005. Public meetings regarding the general management plan will be held during the scoping period. Specific dates, times, and locations will be made available in the local media, on the Effigy Mounds National Monument Web site (*http://www.nps.gov/efmo*), on the NPS Planning, Environment and Public Comment (PEPC) Web site (*parkplanning.nps.gov/publicHome.cfm*), or by contacting the Superintendent.

**ADDRESSES:** Information on the planning process and copies of newsletters will be available from the office of the Superintendent, 151 Highway 76, Harpers Ferry, Iowa 52146–7519.

**FOR FURTHER INFORMATION CONTACT:** Superintendent Phyllis Ewing, Effigy Mounds National Monument, 151 Highway 76, Harpers Ferry, Iowa 52146–7519, telephone 563–873–3491.

**SUPPLEMENTARY INFORMATION:** If you wish to comment on any issues associated with the plan, you may submit your comments by any one of several methods. You may mail comments to: Effigy Mounds National Monument, 151 Highway 76, Harpers Ferry, Iowa 52146–7519. You may also comment via e-mail to *efmo_superintendent@nps.gov*. Please submit e-mail comments as a text file avoiding the use of special characters and any form of encryption. Be sure to include your name and return street address in your Internet message. You may provide comments electronically by entering them into the PEPC Web site at the address above. Finally, you may hand-deliver comments to the monument headquarters located three miles north of Marquette, Iowa, on Highway 76.

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 record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your 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 inspection in their entirety.

Dated: April 29, 2005.

**Ernest Quintana,**

*Director, Midwest Region.*

[FR Doc. 05–11140 Filed 6–3–05; 8:45 am]

BILLING CODE 4310–70–P

## DEPARTMENT OF THE INTERIOR

### National Park Service

### Notice of Receipt of Application for Telecommunication Site

**AGENCY:** National Park Service, Theodore Roosevelt National Park.

**ACTION:** Notice of receipt of application for telecommunication site.

**SUMMARY:** (Authority: 47 U.S.C. 332 (Telecommunications Act of 1996); 16 U.S.C. 5; other applicable authorities and Director's Order 53).

Theodore Roosevelt National Park (THRO) has received an application from Verizon Wireless to rebuild the THRO's South Unit radio tower near Medora, North Dakota to accommodate Verizon Wireless equipment. The location of the proposed telecommunication site is Township 140 North, Range 102 West, W½ of the NW¼ of Section 16, Billings County, North Dakota. The proposed site may include a rebuilt tower not to exceed 180 feet in height, a 12′ x 30′ equipment building, and necessary utilities. The staff at THRO is currently evaluating the proposal and conducting a review and analysis pursuant to the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), the Telecommunications Act of 1996, and National Park Service (NPS) requirements, policy and regulations. Once completed, the NEPA analysis, including the effects, if any, on cultural resources, will be available for public review at: *http://www.nps.gov/thro*, and at the NPS Planning, Environment, and Public Comment (PEPC) Web site at: *http://parkplanning.nps.gov/publicHome.cfm*. This Web site allows the public to review and comment directly on this document.

*Comments:* Comments on the proposal may be mailed to Theodore Roosevelt National Park, P.O. Box 7, Medora, North Dakota 58645, Attention Wireless Telecommunications Facility; by e-mail to *thro_forum@nps.gov*, or directly through the PEPC Web site.

**DATES:** Review and analysis pursuant to the NEPA and the NHPA are currently being conducted in the THRO and will

be completed after June 2005. Once the analysis is complete, the NPS will make its findings available to the public and will notify the public, as appropriate, of additional steps they can take.

**FOR FURTHER INFORMATION CONTACT:** Superintendent, Theodore Roosevelt National Park; telephone 701–623–4466.

**SUPPLEMENTARY INFORMATION:** Copies of the NEPA analysis will be available at the Office of the Superintendent, Theodore Roosevelt National Park, online at the Theodore Roosevelt National Park Web site (*http://www.nps.gov/thro*), at the NPS Planning, Environment, and Public Comment (PEPC) Web site at: *http://parkplanning.nps.gov/publicHome.cfm*, or can be requested by writing to the Superintendent, Theodore Roosevelt National Park, P.O. Box 7, Medora, North Dakota 58645.

Dated: May 5, 2005.

**Ernest Quintana,**

*Regional Director, Midwest Region.*

[FR Doc. 05–11141 Filed 6–3–05; 8:45 am]

**BILLING CODE 4310–70–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### Flight 93 National Memorial Advisory Commission

**AGENCY:** National Park Service.

**ACTION:** Notice of June 25, 2005, meeting.

**SUMMARY:** This notice sets forth the date of the June 25, 2005, meeting of the Flight 93 Advisory Commission.

**DATES:** The public meeting of the Advisory Commission will be held on June 25, 2005 from 1 p.m. to 4 p.m. Additionally, the Commission will attend the Flight 93 Memorial Task Force meeting the same day from 8:30 a.m. to 11 a.m., which is also open to the public.

*Location:* The meeting will be held at the Somerset County Courthouse, Courtroom #1; 2nd floor, 111 East Union Street, Somerset, Pennsylvania, 15501. The Flight 93 Memorial Task Force meeting will be held in the same location.

*Agenda:*

The June 25, 2005 meeting will consist of:

(1) Opening of Meeting and Pledge of allegiance.

(2) Review and Approval of Minutes from April 16, 2005.

(3) Reports from the Flight 93 Memorial Task Force and National Park Service. Comments from the public will be received after each report and/or at the end of the meeting.

(4) Old Business.

(5) New Business.

(6) Public Comments.

(7) Closing Remarks.

**FOR FURTHER INFORMATION CONTACT:** Joanne M. Hanley, Superintendent, Flight 93 National Memorial, 109 West Main Street, Somerset, PA 15501, 814.443.4557.

**SUPPLEMENTARY INFORMATION:** The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning agenda items. The statement should be addressed to the Flight 93 Advisory Commission, 109 West Main Street, Somerset, PA 15501.

Dated: May 10, 2005.

**Joanne M. Hanley,**

*Superintendent, Flight 93 National Memorial.*

[FR Doc. 05–11139 Filed 6–3–05; 8:45 am]

**BILLING CODE 4310–WH–M**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### Wekiva River System Advisory Management Commission Meeting

**AGENCY:** National Park Service, Department of the Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice announces a June 28, 2005, meeting of the Wekiva River System Advisory Management Commission.

**DATES:** The meeting will be held Tuesday, June 28, 2005, at 7 p.m.

**ADDRESSES:** The meeting will be held at the Sylvan Lake Park, 845 Lake Markham Rd., Sanford, FL 32771. Sylvan Lake Park is located off Interstate 4 at Exit 51 (SR 46). Take SR 46 West to Lake Markam Rd. Turn left on Lake Markham Rd and continue one mile to Sylvan Lake Park on the left. Call (407) 322–6567 or visit *http://www.seminolecountyfl.gov/lls/parks/parkInfo.asp?id=20* for additional on this facility.

**FOR FURTHER INFORMATION CONTACT:** Jamie Fosburgh, Rivers Program Manager, Northeast Region—Boston, 15 State Street, Boston, MA 02109, telephone (617) 223–5191.

**SUPPLEMENTARY INFORMATION:** The Meeting will be open to the public. The agenda will include: Welcome & Introductions; Election of Officers; Presentations on Existing Management Plans and River-Related Issues & Gaps; Next Steps in Plan Development; Consideration of The Nature Conservancy Membership Request; Updates on Operating Logistics and Related Topics; and Closing Summary/Next Steps. Any member of the public may file with the Commission a written statement concerning agenda items. The statement should be addressed to the Wekiva River System Advisory Management Commission, National Park Service, 15 State Street, Boston, MA 02109.

The Wekiva River System Advisory Management Commission was established by Public Law 106–299 to assist in the development of the comprehensive management plan for the Wekiva River System and provide advice to the Secretary in carrying out management responsibilities of the Secretary under the Wild and Scenic Rivers Act (16 U.S.C. 1274).

Dated: May 25, 2005.

**Jamie Fosburgh,**

*Rivers Program Manager.*

[FR Doc. 05–11146 Filed 6–3–05; 8:45 am]

**BILLING CODE 4312–52–M**

## INTERNATIONAL TRADE COMMISSION

**[USITC SE–05–022]**

### Government in the Sunshine Act Meeting Notice

**AGENCY HOLDING THE MEETING:** International Trade Commission.

**TIME AND DATE:** June 14, 2005, at 11 a.m.

**PLACE:** Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:**

1. Agenda for future meetings: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 701–TA–381 and 382 and 731–TA–797–804 (Review) (Certain Stainless Steel Sheet and Strip from France, Germany, Italy, Japan, Korea, Mexico, Taiwan, and the United Kingdom)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before June 27, 2005.)
5. Inv. No. AA1921–129 (Second Review) (Polychloroprene Rubber from Japan)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before June 27, 2005.)
6. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission:

Issued: June 1, 2005.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 05–11213 Filed 6–2–05; 9:21 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[USITC SE–05–023]**

### Government in the Sunshine Act Meeting Notice

**AGENCY HOLDING THE MEETING:** International Trade Commission.

**TIME AND DATE:** June 16, 2005, at 2 p.m.

**PLACE:** Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:**

1. Agenda for future meetings: none.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 731–TA–1084–1087 (Final) (Purified Carboxymethylcellulose from Finland, Mexico, Netherlands, and Sweden)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before June 27, 2005.)
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission:

Issued: June 1, 2005.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 05–11214 Filed 6–2–05; 9:21 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

**[Docket No. OLP 100]**

### Criminal History Background Checks; Request for Comments

**AGENCY:** Department of Justice.

**ACTION:** Notice.

**SUMMARY:** Section 6403 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108–458, 118 Stat. 3638, 3758–60 (2004) requires the Attorney General to report to Congress on statutorily required criminal history record checks conducted by the Department of Justice. As part of this report, the Attorney General is required to make certain recommendations to Congress for improving, standardizing, and consolidating the existing statutory authorizations, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes, such as licensing and employment. In developing this report, the Attorney General must consult with representatives of state criminal history repositories, the National Crime Prevention and Privacy Compact Council, appropriate representatives of private industry, and representatives of labor. Therefore, to provide a means of input to these named parties, and to allow for broader public input on the issues that will be addressed in the report, the Department of Justice is publishing this notice seeking public comment on the development of the required report.

**DATES:** All comments must be received no later than August 5, 2005.

**ADDRESSES:** Comments may be mailed to Richard A. Hertling, Deputy Assistant Attorney General, Office of Legal Policy, 4234 Robert F. Kennedy Building, 950 Pennsylvania Avenue, NW., Washington, DC 20530. To ensure proper handling, please reference OLP Docket No. 100 on your correspondence. You also may comment via the Internet to the Justice Department's Office of Legal Policy (OLP) at *olpregs@usdoj.gov*. When submitting comments electronically, you must include ''OLP Docket No. 100'' as the sole heading in the subject box.

**SUPPLEMENTARY INFORMATION:** On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (hereinafter the ''Act''), Pub. L. 108–458, 118 Stat. 3638 (2004). Section 6403 of the Act requires the Attorney General to report to Congress on a number of matters associated with record checks using Department of Justice-maintained criminal history information. For example, the Act requires the Department of Justice to provide information regarding the number of criminal history record checks requested, the type of information requested, the usage of different terms and definitions regarding criminal history information, and the variation in fees charged for such information and who pays such fees.

In addition, the Department of Justice also is required to ''make recommendations to Congress for improving, standardizing, and consolidating the existing statutory authorizations, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes.'' Section 6403(d), 118 Stat. 3638, 3759 (2004). Pursuant to section 6403(d) of the Act, the Department of Justice is to consider the following fifteen factors in making the recommendations:

(1) The effectiveness and efficiency of utilizing commercially available databases as a supplement to IAFIS [the Integrated Automated Fingerprint Identification System] criminal history information checks;

(2) Any security concerns created by the existence of these commercially available databases concerning their ability to provide sensitive information that is not readily available about law enforcement or intelligence officials, including their identity, residence, and financial status;

(3) The effectiveness of utilizing State databases;

(4) Any feasibility studies by the Department of Justice of the resources and structure of the Federal Bureau of Investigation to establish a system to provide criminal history information;

(5) Privacy rights and other employee protections, including—

(A) Employee consent;

(B) Access to the records used if employment was denied;

(C) The disposition of the fingerprint submissions after the records are searched;

(D) An appeal mechanism; and

(E) Penalties for misuse of the information;

(6) The scope and means of processing background checks for private employers utilizing data maintained by the Federal Bureau of Investigation that the Attorney General should be allowed to authorize in cases where the authority for such checks is not available at the State level;

(7) Any restrictions that should be placed on the ability of an employer to charge an employee or prospective employee for the cost associated with the background check;

(8) Which requirements should apply to the handling of incomplete records;

(9) The circumstances under which the criminal history information should be disseminated to the employer;

(10) The type of restrictions that should be prescribed for the handling of criminal history information by an employer;

(11) The range of Federal and State fees that might apply to such background check requests;

(12) Any requirements that should be imposed concerning the time for responding to such background check requests;

(13) Any infrastructure that may need to be developed to support the processing of such checks, including—

(A) The means by which information is collected and submitted in support of the checks; and

(B) The system capacity needed to process such checks at the Federal and State level;

(14) The role that States should play; and

(15) Any other factors that the Attorney General determines to be relevant to the subject of the report.

Congress has instructed the Department of Justice to consult with certain parties in developing the report. In accordance with section 6403(e) of the Act, the Department of Justice must consult with representatives of State criminal history record repositories, the National Crime Prevention and Privacy Compact Council, appropriate representatives of private industry, and representatives of labor, as determined appropriate by the Attorney General.

**Comments Sought**

The Department of Justice seeks public comment on all of the reporting requirements described in section 6403 of the Act. In particular, the Department is seeking comments responsive to the fifteen factors it must consider when making recommendations to Congress. The Department welcomes comments not just from the specific parties identified in section 6403(e) of the Act, but from any person who may be able to provide responsive information that the Department may consider when drafting the report.

Dated: May 31, 2005.

**Rachel Brand,**

*Acting Assistant Attorney General.*

[FR Doc. 05–11147 Filed 6–3–05; 8:45 am]

**BILLING CODE 4410–02–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

### Submission for OMB Review: Comment Request

May 27, 2005.

The Department of Labor (DOL) has submitted the following public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation, may be obtained by contacting Darrin King on 202–693–4129 (this is not a toll-free number) or e-mail: *king.darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Employee Benefits Security Administration (EBSA), Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

*Agency:* Employee Benefits Security Administration.

*Type of Review:* Extension of currently approved collection.

*Title:* Procedure for Application for Exemption from the Prohibited Transaction Provisions of Section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA).

*OMB Number:* 1210–0060.

*Frequency:* On occasion.

*Type of Response:* Reporting and Third party disclosure.

*Affected Public:* Business or other for-profit; Not-for-profit institutions; and Individuals or households.

*Number of Respondents:* 84.

*Number of Annual Responses:* 143.

*Estimated Time Per Response:* Varies from 15 hours for an attorney to prepare and application to 2 minutes for a clerical person to notify interested parties.

*Total Burden Hours:* 0.

*Total Annualized Capital/Startup Costs:* $0.

*Total Annual Costs (Operating/Maintaining Systems or Purchasing Services):* $372,581.

*Description:* Section 408(a) of ERISA authorizes the Secretary of Labor to grant exemptions from the prohibited transaction sections of 406 and 407(a) of ERISA and directs the Secretary to establish a procedure with respect to such provisions. This regulation provides a procedure that requires applications for exemption to make certain disclosures to the Department of Labor and to participants and beneficiaries.

*Agency:* Employee Benefits Security Administration.

*Type of Review:* Extension of currently approved collection.

*Title:* Application for EFAST–1 Electronic Signature and Codes for EFAST Transmitters and Software Developers.

*OMB Number:* 1210–0117.

*Frequency:* On occasion.

*Type of Response:* Reporting.

*Affected Public:* Business or other for-profit; Not-for-profit institutions; and Individuals or households.

*Number of Respondents:* 5,200.

*Number of Annual Responses:* 5,200.

*Estimated Time Per Response:* 20 minutes.

*Total Burden Hours:* 1,716.

*Total Annualized Capital/Startup Costs:* $0.

*Total Annual Costs (Operating/Maintaining Systems or Purchasing Services):* $1,976.

*Description:* The information provided by the applicants on EFAST–1, combined with the codes supplied to the applicants by the program, allow EFAST to verify a filer, transmitter, or software developer's standing as a qualified participant in the EFAST electronic filing program for the Form 5500 and 5500–EZ. EFAST–1 information also establishes a means of contact between the EFAST program and filers, transmitters, and software developers for information exchange.

*Agency:* Employee Benefits Security Administration.

*Type of Review:* Extension of currently approved collection.

*Title:* Consent to Receive Employee Benefit Plan Disclosure Electronically.

*OMB Number:* 1210–0121.

*Frequency:* On occasion.

*Type of Response:* Recordkeeping and Third party disclosure.

*Affected Public:* Business or other for-profit; Not-for-profit institutions; and Individuals or households.

*Number of Respondents:* 41,000.

*Number of Annual Responses:* 41,000.

*Estimated Time Per Response:* Varies from 2 hours for an attorney to develop

disclosure materials to 1 minute for clerical staff to photocopy materials.

*Total Burden Hours:* 683.

*Total Annualized Capital/Startup Costs:* $0.

*Total Annual Costs (Operating/Maintaining Systems or Purchasing Services):* $716,000.

*Description:* Regulations at 29 CFR 2520.104b-1 and 2520.107–1 govern the use of electronic technologies to satisfy information disclosure and recordkeeping requirements under title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Generally, consent is required to be obtained prior to providing disclosures electronically to participants and beneficiaries at a location other than the workplace.

**Ira L. Mills,**

*Departmental Clearance Officer.*

[FR Doc. 05–11148 Filed 6–3–05; 8:45 am]

**BILLING CODE 4510–29–P**

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### Meeting of the National Museum and Library Services Board

**AGENCY:** Institute of Museum and Library Services.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice sets forth the agenda of a forthcoming meeting of the National Museum and Library Services Board. This notice also describes the function of the Board. Notice of this meeting is required under the Sunshine in Government Act.

*Time/Dates:* 9 a.m. to 12:30 p.m. on Wednesday, June 22, 2005.

*Agenda:* Committee Meetings of the Fifth Meeting of the National Museum and Library Service Board.

9 a.m.–10:30 a.m.—Executive Session (Closed to the Public).

11 a.m.–12:30 p.m.—Policy and Planning Committee (Open to the Public).

I. Staff Reports.

II. Other Business.

11 a.m.–12:30 p.m.—Partnerships and Government Affairs Committee (Open to the Public).

I. Staff Reports.

II. Other Business.

**ADDRESSES:** The Allerton Crowne Plaza, 701 N. Michigan Avenue, Chicago, IL, (212) 440–1500.

*Time/Dates:* 9 a.m. to 12:30 p.m. on Thursday, June 23, 2005.

*Agenda:* Fifth Meeting of the National Museum and Library Service Board (Open to the Public).

I. Welcome.

II. Approval of Minutes.

III. Programs Reports.

IV. Committee Reports.

V. Board program: Strategic Imperatives for Libraries.

VI. Other Business.

VII. Adjourn.

**ADDRESSES:** The Allerton Crowne Plaza, 701 N. Michigan Avenue, Chicago, IL, (212) 440–1500.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Lyons, Special Assistant to the Director, Institute of Museum and Library Services, 1800 M Street, NW., 9th Floor, Washington, DC 20036—(202) 653–4676.

**SUPPLEMENTARY INFORMATION:** The National Museum and Library Services Board is established under the Museum and Library Services Act, 20 U.S.C. 9101 *et seq.* The Board advises the Director of the Institute on general policies with respect to the duties, powers, and authorities related to Museum and Library Services. The executive session from 9 a.m. to 10:30 a.m. on Wednesday, June 22, 2005, will be closed pursuant to subsections (c)(4) and (c)(6) of section 552b of Title 5, United States Code because the Board will consider information that may disclose: Trade secrets and commercial or financial information obtained from a person and privileged or confidential; and information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The meetings from 10 a.m. until 12:30 p.m. on Wednesday, June 22, 2005, and the meeting from 9 a.m. to 12:30 p.m. on Thursday, June 23, 2005, are open to the public. If you need special accommodations due to a disability, please contact: Institute of Museum and Library Services, 1100 Pennsylvania Avenue, NW., Washington, DC 20506—(202) 653–4657—TDD (202) 653–4699 at least seven (7) days prior to the meeting date.

Dated: June 1, 2005.

**Teresa LaHaie,**

*Administrative Officer, National Foundation on the Arts and the Humanities, Institute of Museum and Library Services.*

[FR Doc. 05–11259 Filed 6–2–05; 11:10 am]

**BILLING CODE 7036–01–M**

## NUCLEAR REGULATORY COMMISSION

### Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

**AGENCY:** U.S. Nuclear Regulatory Commission (NRC).

**ACTION:** Notice of the OMB review of information collection and solicitation of public comment.

**SUMMARY:** The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

1. *Type of submission, new, revision, or extension:* Revision.

2. *The title of the information collection:* 10 CFR Part 100, ''Reactor Site Criteria''.

3. *The form number if applicable:* Not applicable.

4. *How often the collection is required:* As necessary in order for NRC to assess the adequacy of proposed seismic design bases and the design bases for other geological hazards for nuclear power and test reactors constructed and licensed in accordance with 10 CFR parts 50 and 52 and the Atomic Energy Act of 1954, as amended.

5. *Who will be required or asked to report:* Applicants and licensees for nuclear power and test reactors.

6. *An estimate of the number of annual responses:* 2.

7. *The estimated number of annual respondents:* .33 (1 respondent every 3 years).

8. *An estimate of the total number of hours needed annually to complete the requirement or request:* 8,711.

9. *An indication of whether section 3507(d), Pub. L. 104–13 applies:* Not applicable.

10. *Abstract:* 10 CFR part 100, ''Reactor Site Criteria,'' establishes approval requirements for proposed sites for the purpose of constructing and operating stationary power and testing reactors pursuant to the provisions of 10 CFR parts 50 or 52. These reactors are required to be sited, designed, constructed, and maintained to withstand geologic hazards, such as faulting, seismic hazards, and the maximum credible earthquake, to protect the health and safety of the public and the environment. Non-seismic siting criteria must also be evaluated. Non-seismic siting criteria include such factors as population density, the proximity of man-related hazards, and site atmospheric dispersion characteristics. NRC uses the information required by 10 CFR part 100 to evaluate whether natural phenomena and potential man-made hazards will be

appropriately accounted for in the design of nuclear power and test reactors.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC Worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html*. The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by July 6, 2005. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

John A. Asalone, Office of Information and Regulatory Affairs (3150–0093), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *John_A._Asalone@omb.eop.gov* or submitted by telephone at (202) 395–4650.

The NRC Clearance Officer is Brenda Jo. Shelton, 301–415–7233.

Dated in Rockville, Maryland, this 31st day of May, 2005.

For the Nuclear Regulatory Commission.

**Brenda Jo. Shelton,**

*NRC Clearance Officer, Office of Information Services.*

[FR Doc. E5–2867 Filed 6–3–05; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

**AGENCY:** U. S. Nuclear Regulatory Commission (NRC).

**ACTION:** Notice of the OMB review of information collection and solicitation of public comment.

**SUMMARY:** The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a current valid OMB control number.

1. *Type of submission, new, revision, or extension:* Revision.

2. *The title of the information collection:* 10 CFR Part 20—Standards for Protection Against Radiation.

3. *The form number if applicable:* Not applicable.

4. *How often the collection is required:* Annually for most reports and at license termination for reports dealing with decommissioning.

5. *Who will be required or asked to report:* NRC licensees, including those requesting license termination.

6. *An estimate of the number of responses:* 5,019 (507 plus 4,512 recordkeepers).

7. *The estimated number of annual respondents:* 4,512.

8. *An estimate of the number of hours needed annually to complete the requirement or request:* 128,669 hours (4,909 hours for reporting [9.68 hours per response] plus 123,760 hours for recordkeeping [27.43 hours per recordkeeper]).

9. *An indication of whether section 3507(d), Pub. L. 104–13 applies:* Not applicable.

10. *Abstract:* 10 CFR part 20 establishes standards for protection against ionizing radiation resulting from activities conducted under licenses issued by the NRC. These standards require the establishment of radiation protection programs, maintenance of radiation records, recording of radiation received by workers, reporting of incidents which could cause exposure to radiation, submittal of an annual report to NRC of the results of individual monitoring, and submittal of license termination information. These mandatory requirements are needed to protect occupationally exposed individuals from undue risks of excessive exposure to ionizing radiation and to protect the health and safety of the public.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F23, Rockville, MD 20852. OMB clearance requests are available at the NRC World Wide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by July 6, 2005.

Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

John Asalone, Office of Information and Regulatory Affairs (3150–0014), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *John_A._Asalone@omb.eop.gov* or submitted by telephone at (202) 395–4650.

The NRC Clearance Officer is Brenda Jo. Shelton, 301–415–7233.

Dated in Rockville, Maryland, this 27th day of May, 2005.

For the Nuclear Regulatory Commission.

**Brenda Jo. Shelton,**

*NRC Clearance Officer, Office of Information Services.*

[FR Doc. E5–2868 Filed 6–3–05; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 030–36120]**

### Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment for the Department of Health and Human Services, Food and Drug Administration, Center for Food Safety and Applied Nutrition

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of availability.

**FOR FURTHER INFORMATION CONTACT:** Betsy Ullrich, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania, 19406, telephone (610) 337–5040, fax (610) 337–5269; or by e-mail: *exu@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

The Nuclear Regulatory Commission (NRC) is issuing a license amendment to the Department of Health and Human Services, Food and Drug Administration, Center for Food Safety and Applied Nutrition (FDA/CFSAN) for Materials License No. 19–30771–01, to authorize release of its facility in Washington, DC for unrestricted use. NRC has prepared an Environmental Assessment (EA) in support of this action in accordance with the requirements of 10 CFR part 51. Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate. The amendment will be issued following the publication of this Notice.

### II. EA Summary

The purpose of the action is to authorize the release of the licensee's,

Washington, DC, facility for unrestricted use. The FDA/CFSAN was authorized by NRC from 1965 to use radioactive materials for research and development purposes at the site. On January 31, 2005, the FDA/CFSAN requested that NRC release the facility for unrestricted use. The FDA/CFSAN has conducted surveys of the facility and provided information to the NRC to demonstrate that the site meets the license termination criteria in subpart E of 10 CFR part 20 for unrestricted use.

The NRC staff has prepared an EA in support of the license amendment. The facility was remediated and surveyed prior to the licensee requesting the license amendment. The NRC staff has reviewed the information and final status survey submitted by the FDA/CFSAN. Based on its review, the staff has determined that there are no additional remediation activities necessary to complete the proposed action. Therefore, the staff considered the impact of the residual radioactivity at the facility and concluded that since the residual radioactivity meets the requirements in subpart E of 10 CFR part 20, a Finding of No Significant Impact is appropriate.

## III. Finding of No Significant Impact

The staff has prepared the EA (summarized above) in support of the license amendment to release the facility for unrestricted use. The NRC staff has evaluated the FDA/CFSAN's request and the results of the surveys and has concluded that the completed action complies with the criteria in subpart E of 10 CFR part 20. The staff has found that the radiological environmental impacts from the action are bounded by the impacts evaluated by NUREG–1496, Volumes 1–3, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licensed Facilities'' (ML042310492, ML042320379, and ML042330385). The staff has also found that the non-radiological impacts are not significant. On the basis of the EA, the NRC has concluded that the environmental impacts from the action are expected to be insignificant and has determined not to prepare an environmental impact statement for the action.

## IV. Further Information

Documents related to this action, including the application for the license amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are: The Environment Assessment (ML051430302), Final Status Survey Report, Federal Building 8, 200 C Street, SW., Washington, DC, December 22, 2004, Final Report (ML050340555). 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 (800) 397–4209 or (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

Documents related to operations conducted under this license not specifically referenced in this Notice may not be electronically available and/or may not be publicly available. Persons who have an interest in reviewing these documents should submit a request to NRC under the Freedom of Information Act (FOIA). Instructions for submitting a FOIA request can be found on the NRC's Web site at *http://www.nrc.gov/reading-rm/foia/foia-privacy.html.*

Dated in King of Prussia, Pennsylvania, this 27th day of May, 2005.

For The Nuclear Regulatory Commission.

**James Dwyer,**

*Chief, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I.*

[FR Doc. E5–2866 Filed 6–3–05; 8:45 am]

**BILLING CODE 7590–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51755; File No. 4–208]**

## Intermarket Trading System; Notice of Filing of the Twenty First Amendment to the ITS Plan Relating to the Recognition of the Automatic Generation of Outgoing ITS Commitments

May 27, 2005.

Pursuant to Section 11A of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 11Aa3–2 thereunder,[2] notice is hereby given that on April 27, 2005, the Intermarket Trading System Operating Committee (''ITSOC'') submitted to the Securities and Exchange Commission (''Commission'') a proposed amendment (''Twenty First Amendment'') to the restated ITS Plan.[3] The purpose of the proposed amendment is to recognize the automatic generation of outgoing ITS commitments in circumstances where members in the Participants' markets send such commitments contemporaneously with trading at inferior prices, disseminating a locking bid/offer in their own market, or a block trade.

### I. Description of the Proposed Amendment

The ITSOC proposes to amend the restated ITS Plan to recognize the automatic generation of outgoing ITS commitments in circumstances where members in the Participants' markets send such commitments contemporaneously with trading at inferior prices, disseminating a locking bid/offer in their own market, or a block trade.

The ITSOC proposes to amend the restated ITS Plan to add a new paragraph (G) to section 6(a)(ii). Proposed new language is *italicized.*

*(G) Description Applicable to Contemporaneous Automatic Formatting and Sending Commitments*

*Notwithstanding the descriptions set forth in section 6(a)(ii)(A), (B), (D) and (F) above, a Participant (and, in the case of the NASD, ITS/CAES Market Makers) may automatically format and automatically send a commitment to trade to one or more other Participants, under the following circumstances: Each such commitment is sent contemporaneously with: (i) One or more transactions on the market of the sending Participant that, absent the commitment(s), would be considered an Exchange trade-through(s) or a third market participating market center trade-through(s) (both as defined in Exhibit B); (ii) the dissemination by the sending Participant of a locking bid (offer) (as defined in Exhibit B); or (iii) a block trade (as defined in Exhibit C). The term ''one or more transactions on the market of the sending Participant'' used in clause (i) in the preceding*

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[1] 15 U.S.C. 78k–1.

[2] 17 CFR 240.11Aa3–2.

[3] The ITS Plan is a National Market System (''NMS'') plan, which was designed to facilitate intermarket trading in exchange-listed equity securities based on current quotation information emanating from the linked markets. *See* Securities Exchange Act Release No. 19456 (January 27, 1983), 48 FR 4938 (February 3, 1983).

The ITS Participants include the American Stock Exchange LLC (''Amex''), the Boston Stock Exchange, Inc. (''BSE''); the Chicago Board Options Exchange, Inc. (''CBOE''); the Chicago Stock Exchange (''CHX''), Inc., the Cincinnati Stock Exchange, Inc. (''CSE''), the National Association of Securities Dealers, Inc. (''NASD''), the New York Stock Exchange, Inc. (''NYSE''), the Pacific Exchange, Inc. (''PCX''), and the Philadelphia Stock Exchange, Inc. (''Phlx'') (''Participants'').

*sentence means, in addition to the transaction that would be priced lower than superior priced bid(s) or higher than superior priced offer(s) of another Participant(s), those one or more transactions priced at such superior priced bid(s) or offer(s).*

The ITSOC provided the following example that demonstrates the functioning of clause (i) in subsection G, utilizing the CHX as the sending Participant:

a. CHX Receives Order: Buy 2000 at-the-market. Member handling execution of order determines to complete order at 45.56, necessitating satisfaction of superior priced offers on other Participant markets.

NBBO: N—45.50, 45.53; B—5x2.

| Mkt | Bid | Offer | Size |
|---|---|---|---|
| B ..... | 45.30 | 45.53 | 1x2 |
| T ..... | 45.30 | 45.54 | 3x3 |
| N ..... | 45.50 | 45.55 | 5x5 |
| X ..... | 45.25 | 45.59 | 2x5 |
| P ..... | 45.20 | 45.60 | 1x1 |
| M ..... | 45.40 | 45.65 | 1x1 |

b. CHX Executions: Customer buying/member selling as principal 2000 shares: 200 at 45.53; 300 at 45.54; 500 at 45.55; 1000 at 45.56.

c. CHX Computer Generated Commitments: Member buying to partially off-set sales on CHX: M to B—Buy—200 at 45.53; M to T—Buy—300 at 45.54; M to N—Buy—500 at 45.55.

*A. Governing or Constituent Documents*

Not applicable.

*B. Implementation of Amendment*

The Participants have manifested their approval of the proposed amendment to the Plan by means of their execution of the proposed amendments. The proposed amendment would become effective upon the Commission's approval of the amendment.

*C. Development and Implementation Phases*

Not applicable.

*D. Analysis of Impact on Competition*

The Participants believe that the proposed amendment does not impose any burden on competition.

*E. Written Understanding or Agreements relating to Interpretation of, or Participation in, Plan*

Not applicable.

*F. Approval by Sponsors in Accordance with Plan*

Under section 4(c) of the restated ITS Plan, the requisite approval of the amendment is achieved by execution of the amendment on behalf of each ITS Participant and by Commission approval. The amendment is so executed.

*G. Description of Operation of Facility Contemplated by the Proposed Amendment*

Not applicable.

**II. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed Plan amendment 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 No. 4–208 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 No. 4–208. 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 Plan amendment that are filed with the Commission, and all written communications relating to the proposed Plan amendment 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 ITS. 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 No. 4–208 and should be submitted on or before June 27, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2872 Filed 6–3–05; 8:45 am]

**BILLING CODE 8010–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51734; File No. SR–BSE–2005–13]**

## Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to Its Membership Dues Fee

May 24, 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 April 29, 2005, the Boston Stock Exchange (''BSE'' 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 May 12, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The BSE proposes to amend its Membership Dues fee. The text of the proposed rule change 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.

**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 BSE included statements concerning the

[4] 17 CFR 200.30–3(a)(27).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 added a sentence to clarify the purpose for the fee change. The effective date of the original proposed rule change is April 29, 2005, and the effective date of the amendment is May 12, 2005. For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on May 12, 2005, the date on which the Exchange submitted Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

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 BSE 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 proposes to amend its Membership and Other Fees fee schedule by increasing its Membership Dues fee from $750 per quarter to $1,000 per quarter. These fees will be used to fund the ongoing administration of Membership Services. This change will also better reflect the current value of a seat on the Boston Stock Exchange.

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 it provides for the equitable allocation of reasonable dues, fees, and other charges among its members.

*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 proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act[6] and subparagraph (f)(2) of Rule 19b–4 thereunder,[7] because it establishes or changes a due, fee, or other charge imposed by the BSE. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[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, as amended, 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–2005–13 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–2005–13. 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 offices 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–2005–13 and should be submitted on or before June 27, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2876 Filed 6–3–05; 8:45 am]

BILLING CODE 8010–01–P

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A)(ii).

[7] 17 CFR 240.19b–4(f)(2).

[8] *See supra* note 3.

[9] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51746; File No. SR-CBOE–2005–32]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Relating to Remote Market-Maker Transaction Fees

May 26, 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 April 20, 2005, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the CBOE. On May 18, 2005, the CBOE submitted Amendment No. 1 to the proposed rule change.[3] The CBOE has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the CBOE under Section 19(b)(3)(A)(ii) of the Act,[4] and Rule 19b-4(f)(2) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend its Fees Schedule to (i) establish transaction fees for Remote Market-Makers (''RMMs''), (ii) amend its Designated Primary Market-Maker (''DPM'') and Electronic DPM (''e-DPM'') fixed annual fee program to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, the Exchange: (1) clarified how the fixed annual fee alternative for DPMs and e-DPMs would be applied when an entity that has elected the fixed annual fee alternative merges or combines operations with an entity that has not elected the fixed annual fee alternative; and (2) revised the date of the Fees Schedule.

[4] 15 U.S.C. 78s(b)(3)(A)(ii).

[5] 17 CFR 240.19b–4(f)(2).

include a fixed fee alternative for RMM transaction fees, and (iii) explain how DPM or e-DPM consolidations will affect the fixed annual fee. Below is the text of the proposed rule change, as amended. Proposed new language is *italicized*; proposed deletions are in [brackets].

## CHICAGO BOARD OPTIONS EXCHANGE, INC.—FEES SCHEDULE

[MARCH 2] *MAY 18*, 2005

| | Per contract (cents) |
|---|---|
| 1. OPTIONS TRANSACTION FEES (1)(3)(4)(7): | |
| EQUITY OPTIONS (13): | |
| I. CUSTOMER | .00 |
| II. MARKET-MAKER (MM) (standard rate)(10) | .22 |
| III. MEMBER FIRM PROPRIETARY:(11) | |
| FACILITATION OF CUSTOMER ORDER | .20 |
| NON-FACILITATION ORDER | .24 |
| IV. BROKER-DEALER | .25 |
| V. NON-MEMBER MARKET MAKER | .26 |
| VI. DESIGNATED PRIMARY MARKET-MAKER (DPM) (10)(14) | .12 |
| VII. ELECTRONIC DPM (e-DPM) (14) | .25 |
| VIII. LINKAGE ORDERS (8) | .24 |
| *IX. REMOTE MARKET-MAKER (14)* | *.26* |
| QQQQ and SPDR OPTIONS: | |
| I. CUSTOMER: | |
| QQQQ | .00 |
| SPDR | .15 |
| II. MARKET-MAKER (MM) AND DPM (standard rate)(10) | .24 |
| III. MEMBER FIRM PROPRIETARY: (11). | |
| FACILITATION OF CUSTOMER ORDER | .20 |
| NON-FACILITATION ORDER | .24 |
| IV. BROKER-DEALER | .25 |
| V. NON-MEMBER MARKET MAKER | .26 |
| VI. LINKAGE ORDERS (8) | .24 |
| *VII. REMOTE MARKET-MAKER* | *.26* |
| INDEX OPTIONS: | |
| I.–VIII. Unchanged. | |

2. MARKET-MAKER, e-DPM & DPM MARKETING FEE (in option classes in which a DPM has been appointed)(6) Unchanged.

3. FLOOR BROKERAGE FEE (1)(5): Unchanged.

4. RAES ACCESS FEE (RETAIL AUTOMATIC EXECUTION SYSTEM) (1)(4): Unchanged.

**Notes:** (1)–(13) Unchanged.

(14) [Effective October 1, 2004, DPMs and e-DPMs may elect to pay a fixed annual fee of $1.75 million instead of being assessed transaction fees on a per contract basis for their DPM and e-DPM transactions only in all equity option classes. The fixed fee does not cover any floor brokerage fees. DPMs electing to pay the fixed fee will neither be charged CBOE transaction fees for CBOE transactions related to such outgoing P/A orders, nor will they receive the credit back for such fees as set forth in Section 21 of this Fee Schedule. However, pursuant to the second phase of linkage fee set forth in Section 21 of this Fee Schedule, all CBOE DPMs, including those electing the fixed annual fee, who pay transaction fees at other exchanges to execute P/A orders there, will receive a credit of up to 50% of CBOE DPM transaction charges for each such order (currently up to $.06 per contract, with the total of such credits not to exceed the total amount of inbound linkage transaction fees received by CBOE) to help offset the transaction fees of other exchanges that CBOE DPMs incur in filling P/A orders at those exchanges.] *Please see Section 23 for details of the Fixed Annual Fee Alternative for DPMs and e-DPMs.*

(15) Unchanged.

5.–21. Unchanged.

*22. Reserved.*

*23. FIXED ANNUAL FEE ALTERNATIVE FOR DPMs and e-DPMs*

*Effective October 1, 2004, DPMs and e-DPMs may elect to pay a fixed annual fee of $1.75 million instead of being assessed transaction fees on a per contract basis for their DPM and e-DPM transactions only in all equity option classes. The fixed fee does not cover any floor brokerage fees. DPMs electing to pay the fixed fee will neither be charged CBOE transaction fees for CBOE transactions related to outgoing P/A orders, nor will they receive the credit back for such fees as set forth in Section 21 of this Fee Schedule. However, pursuant to the second phase of linkage fee relief set forth in Section 21 of this Fee Schedule, all CBOE DPMs, including those electing the fixed annual fee, who pay transaction fees at other exchanges to execute P/A orders there, will receive a credit of up to 50% of CBOE DPM transaction charges for each such order (currently up to $.06 per contract, with the total of such credits not to exceed the total amount of inbound linkage transaction fees received by CBOE) to help offset the transaction fees of other exchanges that CBOE DPMs incur in filling P/A orders at those exchanges. Effective July 1, 2005, DPMs and e-DPMs who elect the fixed annual fee alternative described above may elect to pay an RMM fixed annual fee of $250,000 instead of being assessed transaction fees on a per contract basis for their RMM transactions only in all equity options.*

*If a DPM or e-DPM who has elected the fixed annual fee alternative merges or combines operations with a DPM or e-DPM who has not elected the fixed annual fee alternative, then the fixed annual fee will be increased and assessed to the surviving DPM/e-DPM entity. The amount of the increase will be based on the number of contracts traded and transaction fees paid during*

*the previous twelve months by the DPM or e-DPM organization who had not previously elected the fixed annual fee alternative. The amount of the increase will be prorated based on the amount of time remaining in the then current year of the fixed annual fee program. If two DPMs or e-DPMs who elected the fixed annual fee alternative merge or combine operations, the fixed fee paid to CBOE by these two organizations will be unaffected. No adjustments or refunds will be made to either entity.*

* * * * *

**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 CBOE 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 CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend its Fees Schedule to (i) establish transaction fees for RMMs, (ii) amend its DPM and e-DPM fixed annual fee program to include a fixed fee alternative for RMM transaction fees, and (iii) explain how DPM or e-DPM consolidations will affect the fixed annual fee.

*RMM Transaction Fees*

The Commission approved the Exchange's RMM program on March 14, 2005.[6] An RMM is an individual member or member organization registered with the Exchange that makes transactions as a dealer-specialist from a location other than the physical trading station for the subject option class.

The Exchange proposes to set transaction fees for RMMs in equity, QQQQ and SPDR options at $.26 per contract. The Exchange believes the proposed RMM transaction fee is appropriately set higher than those of on-floor market-makers because the Exchange will incur additional systems and other logistical costs both initially and on an ongoing basis in order to establish and maintain the infrastructure needed to enable market participation as an RMM.

*RMM Fixed Fee Alternative*

On October 1, 2004, the Exchange implemented a fixed annual fee program for DPMs and e-DPMs.[7] The program offers DPMs and e-DPMs the alternative of choosing a fixed annual fee of $1.75 million instead of being assessed transaction fees on a per contract basis for its DPM and e-DPM transactions in equity options classes.[8]

The Exchange proposes to amend the program to permit DPMs and e-DPMs who elect the fixed annual fee alternative to pay an additional fixed annual fee of $250,000 as an alternative to being assessed transaction fees on a per contract basis for their RMM transactions. Like the existing program, the RMM fixed fee alternative would apply only to equity options transactions. Since trading by RMMs will not commence until sometime in the second quarter of 2005, the Exchange proposes to begin the RMM fixed fee alternative program on July 1, 2005 and prorate the amount of the fixed annual fee to $125,000 for calendar year 2005. The amount of the RMM fixed annual fee and the option to elect the fixed fee will be reviewed annually and may change from year to year. Any changes to the RMM fixed annual fee would be required to be filed with the Commission.

The Exchange proposes to create a new Section 23 in the Fees Schedule that describes the DPM and e-DPM fixed annual fee program (by adding to it the text from Note 14 of the Fees Schedule) and the RMM fixed annual fee alternative. Note 14 is revised to delete the current text and to add a cross reference to Section 23.

*Effect of DPM or e-DPM Consolidations on the Fixed Annual Fee*

The Exchange also proposes to add to Section 23 of the Fees Schedule an explanation of how the fixed annual fee would be affected when a DPM or e-DPM organization merges or combines operations with another DPM or e-DPM. Specifically, if a DPM or e-DPM who has elected the fixed annual fee alternative merges or combines operations with a DPM or e-DPM who has not elected the fixed annual fee alternative, the fixed annual fee will be increased and assessed to the surviving DPM/e-DPM entity. The amount of the increase will be based on the number of contracts traded and transaction fees paid during the previous twelve months by the DPM or e-DPM organization who had not previously elected the fixed annual fee alternative. For example, if in the previous twelve months a DPM or e-DPM organization who had not previously elected the fixed annual fee alternative traded 4 million equity option contracts and paid $500,000 in transaction fees, the surviving DPM or e-DPM entity would be assessed an increase to their fixed annual fee in the amount of $500,000.

The amount of the increase will be prorated based on the amount of time remaining in the then current year of the fixed annual fee program. For example, if the firms in the example above merge six months into the then current year of the program, the surviving DPM or e-DPM entity would be assessed an increase to their fixed annual fee in the amount of $250,000 to cover the remaining six months of the year. The Exchange notes that in any subsequent year of the program, the surviving entity will pay just one fixed annual fee (*i.e.*, the fixed annual fee that is then in effect).

If two DPMs or e-DPMs who elected the fixed annual fee alternative merge or combine operations, the fixed fee paid to the CBOE by these two organizations will be unaffected. No adjustments or refunds will be made to either entity.

2. Statutory Basis

The CBOE believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(4) of the Act,[10] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The CBOE does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were solicited or received with respect to the proposed rule change.

[6] See Securities Exchange Act Release No. 51366 (March 14, 2005), 70 FR 13217 (March 18, 2005).

[7] *See* Securities Exchange Act Release No. 50058 (July 22, 2004), 69 FR 45861 (July 30, 2004).

[8] *See* CBOE Fees Schedule, Note 14.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and subparagraph (f)(2) of Rule 19b–4 thereunder.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[13]

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. 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–CBOE–2005–32 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–CBOE–2005–32. 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 CBOE. 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–CBOE–2005–32 and should be submitted on or before June 27, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2870 Filed 6–3–05; 8:45 am]

BILLING CODE 8010–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(2).

[13] *See* 15 U.S.C. 78s(b)(3)(C). 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 the period to commence on May 18, 2005, the date on which the Exchange submitted Amendment No. 1.

[14] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51754; File No. SR–FICC–2005–07]**

## Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving Proposed Rule Change To Establish a Firm Deadline by which Members of the Government Securities Division Must Satisfy Clearing Fund Deficiencies

May 27, 2005.

### I. Introduction

On March 18, 2005, the Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–FICC–2005–07 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposal was published in the **Federal Register** on April 21, 2005.[2] No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

### II. Description

FICC is establishing a firm deadline by which members of FICC's Government Securities Division (''GSD'') must satisfy clearing fund deficiencies. Currently, GSD's rules provide a deadline for a member's satisfaction of a clearing fund deficiency of two hours after GSD has issued a notice of deficiency to that member. Under current practice, GSD issues its clearing fund deficiency notices by telephone calls typically at 8:30 a.m. eastern time and by a facsimile containing (i) a cover letter summarizing the deficiency status and (ii) a detailed report reflecting the firm's current clearing fund requirement and collateral on deposit. Therefore, deficiency calls typically must be satisfied by approximately 10:30 a.m. eastern time.

Notwithstanding GSD's issuance of clearing fund calls, each member has the ability to access a report each day detailing its clearing fund balances and any deficiency thereof generally by 12:30 a.m. eastern time.

Taking into account members' ready access to clearing fund deficiency information, the rule change establishes a firm deadline of 10:30 a.m. eastern time to ensure the timely satisfaction of clearing fund deficiency calls and to eliminate current provisions which correlate the timing of the deadline to the issuance of the notice by FICC.[3] As a result, it will be incumbent upon members to access directly the appropriate report detailing their clearing fund deposit requirements so they might satisfy any deficiencies.

### III. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency for which it is responsible.[4] The Commission finds that FICC's proposed rule change is consistent with this requirement because it will promote timely satisfaction of clearing fund deficiency calls and will reduce the amount of risk to FICC and its members.

### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[5] that the proposed rule change (File No. SR–

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 51550 (April 15, 2005), 70 FR 20781.

[3] Under GSD's rule, FICC may extend this deadline if operational or systems difficulties arise that reasonably prevent members from satisfying the 10:30 a.m. eastern time deadline.

[4] 15 U.S.C. 78q-1(b)(3)(F).

[5] 15 U.S.C. 78s(b)(2).

FICC–2005–07) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[6]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2874 Filed 6–3–05; 8:45 am]

BILLING CODE 8010–01–P

[6] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51754; File No. SR-FICC–2005–07]**

## Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving Proposed Rule Change To Establish a Firm Deadline by Which Members of the Government Securities Division Must Satisfy Clearing Fund Deficiencies

May 27, 2005.

### I. Introduction

On March 18, 2005, the Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–FICC–2005–07 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposal was published in the **Federal Register** on April 21, 2005.[2] No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

### II. Description

FICC is establishing a firm deadline by which members of FICC's Government Securities Division (''GSD'') must satisfy clearing fund deficiencies. Currently, GSD's rules provide a deadline for a member's satisfaction of a clearing fund deficiency of two hours after GSD has issued a notice of deficiency to that member. Under current practice, GSD issues its clearing fund deficiency notices by telephone calls typically at 8:30 a.m. Eastern Time and by a facsimile containing (i) a cover letter summarizing the deficiency status and (ii) a detailed report reflecting the firm's current clearing fund requirement and collateral on deposit. Therefore, deficiency calls typically must be satisfied by approximately 10:30 a.m. Eastern Time.

Notwithstanding GSD's issuance of clearing fund calls, each member has the ability to access a report each day detailing its clearing fund balances and any deficiency thereof generally by 12:30 a.m. Eastern Time.

Taking into account members' ready access to clearing fund deficiency information, the rule change establishes a firm deadline of 10:30 a.m. Eastern Time to ensure the timely satisfaction of clearing fund deficiency calls and to eliminate current provisions which correlate the timing of the deadline to the issuance of the notice by FICC.[3] As a result, it will be incumbent upon members to access directly the appropriate report detailing their clearing fund deposit requirements so they might satisfy any deficiencies.

### III. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.[4] The Commission finds that FICC's proposed rule change is consistent with this requirement because it will promote timely satisfaction of clearing fund deficiency calls and will reduce the amount of risk to FICC and its members.

### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[5] that the proposed rule change (File No. SR–FICC–2005–07) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[6]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2875 Filed 6–3–05; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 51550 (April 15, 2005), 70 FR 20781.

[3] Under GSD's rule, FICC may extend this deadline if operational or systems difficulties arise that reasonably prevent members from satisfying the 10:30 a.m. Eastern Time deadline.

[4] 15 U.S.C. 78q-1(b)(3)(F).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51753; File No. SR–NSCC–2005–02]**

## Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving Proposed Rule Change To Enhance Automated Customer Account Transfer Service To Permit the Automated Notification of Changes to the Broker-Dealer of Record for Applicable Insurance Products

May 27, 2005.

### I. Introduction

On April 4, 2005, the National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') and on April 12, 2005, amended proposed rule change SR–NSCC–2005–02 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposal was published in the **Federal Register** on April 20, 2005.[2] No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

### II. Description

NSCC is enhancing its Automated Customer Account Transfer Service (''ACAT Service'') to permit the automated notification of changes to the broker-dealer of record for applicable insurance products.

Information regarding the broker-dealer of record for an annuity or life insurance product is maintained by the insurance company that is the issuer of the product. Currently there is no mechanism within the ACAT Service that can automate notification of changes to the broker-dealer of record. Annuity and life insurance products have a manually-intensive processing stream connected with account transfers relative to the automated processing of assets such as equity and debt securities and mutual fund shares.

Under the proposed rule, the delivering and receiving broker-dealers for annuities or life insurance products will be able to communicate information regarding the change of broker-dealer of record through the ACAT Service. The ACAT Service will communicate the information through a link to a new product of NSCC's Insurance Processing Services (''IPS'') called Inforce Transactions (''IFT''). IFT

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 51541 (April 13, 2005), 70 FR 20609 (April 20, 2005).

will relay the information to the issuer insurance company and will also provide a means of communicating to the ACAT Service whether the insurance company has confirmed, rejected, or requested a modification of the change. NSCC will not debit or credit a delivering or receiving broker-dealer for the value of any applicable insurance product that is part of a customer account transfer.

In order for the receiving and delivering broker-dealers and the issuer insurance company to be able to effect an account change through the ACAT Service, the insurance company must participate in IPS, the receiving broker-dealer must participate in the ACAT Service and IPS, and the delivering broker-dealer must participate in the ACAT Service.

NSCC is also making certain technical changes to Rule 50, which governs the ACAT Service. For purposes of bringing efficiencies to the financial marketplace, NSCC's Rule 50 will cover all asset types regardless of whether NSCC has the operational capability to effect the transfer of such assets. NSCC either will undertake to cause the asset transfer or asset reregistration to occur or will issue a document evidencing each delivering firm's obligation and each receiving firm's entitlement that will result from the transfer. Such instructions, regardless of their form, are commonly referred to as receive and deliver instructions. NSCC is adding a definition, ''ACAT Receive and Deliver Instruction,'' [3] relating to these instructions. NSCC also is making certain technical changes to the ACATS rule.

## III. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions.[4] The Commission finds that NCCC's proposed rule change is consistent with this requirement because by automating and facilitating the change in broker-dealer of record for eligible insurance products associated with account transfers, the enhancements to the ACAT Service and the new IFT product should reduce processing errors and delays that are typically associated with manual processing.

## IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–NSCC–2005–02) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2873 Filed 6–3–05; 8:45 am]

**BILLING CODE 8010–01–P**

[3] As defined in NSCC Rule 1:

The term ''ACAT Receive and Deliver Instruction'' shall mean such document, form, file, report or other information issued by the Corporation [NSCC] to a Member or to a QSD (as defined in Rule 50), on behalf of such QSD's participants, which identifies Automated Customer Account Transfer receive and deliver obligations.

[4] 15 U.S.C. 78q–1(b)(3)(F).

[5] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–51759; File No. SR–Phlx–2004–91]**

## Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Thereto To Establish a Directed Order Process for Orders Delivered to the Phlx Via AUTOM

May 27, 2005.

## I. Introduction

On December 9, 2004, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] to establish a directed order process for orders delivered to the Exchange via the Automated Options Market (''AUTOM''). The proposed rule change was published for comment in the **Federal Register** on December 22, 2004.[3] The Commission received three comment letters on the proposal.[4] On January 18, 2005, the Phlx sent a response to the comment letters.[5]

On April 27, 2005, the Phlx filed Amendment No. 1 to the proposed rule change.[6] This order approves the proposed rule change and simultaneously provides notice of filing and grants accelerated approval of Amendment No. 1.

## II. Description of the Proposed Rule Change

The Phlx proposes to establish, for a one-year pilot period, rules that permit Exchange specialists, Streaming Quote Traders (''SQTs''), and Remote Streaming Quote Traders (''RSQTs'') assigned in options trading on the Phlx XL system (''Streaming Quote Options'') to receive directed orders. The Phlx proposes to define the term ''Directed Order'' to mean any customer order to buy or sell that has been directed to a particular specialist, SQT, or RSQT by an Order Flow Provider (''OFP'').[7] The Phlx also proposes to establish a trade algorithm for electronically executed and allocated trades involving Directed Orders, which would provide a participation guarantee to the Directed Specialist, SQT, or RSQT (collectively ''Phlx directed participants'').

To qualify as a Directed Order, an order must be delivered to the Exchange via AUTOM. AUTOM currently functions to provide automatic executions in Streaming Quote Options only when the Exchange's disseminated bid or offer is the National Best Bid or Offer (''NBBO''). Therefore, to participate in automatic executions of Directed Orders, Phlx directed participants would be required to be quoting the NBBO at the time the Directed Order is received.

Currently, an SQT or RSQT must quote continuous, two-sided markets in not less than 60% of the series in each Streaming Quote Option traded on Phlx XL in which such SQT or RSQT is assigned. A specialist must quote

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 50856 (December 14, 2004), 69 FR 76817.

[4] *See* letter from Michael J. Simon, General Counsel and Secretary, International Securities Exchange, Inc. (''ISE''), to Jonathan G. Katz, Secretary, Commission, dated January 13, 2005 (''ISE Letter''); letter from Philip D. DeFeo, Chairman and Chief Executive Officer, Pacific Exchange, Inc. (''PCX''), to Jonathan G. Katz, Secretary, Commission, dated March 22, 2005 (''PCX Letter''); and letter from Matthew Hinerfeld, Managing Director and Deputy General Counsel, Citadel Investment Group, L.L.C., on behalf of Citadel Derivatives Group LLC (''Citadel''), to Jonathan G. Katz, Secretary, Commission, dated April 6, 2005 (''Citadel Letter'').

[5] *See* letter from Richard S. Rudolph, Director and Counsel, Phlx, to Jonathan G. Katz, Secretary, Commission, dated January 18, 2005 (''Phlx Letter'').

[6] Amendment No. 1 added language to clarify the application of the allocation algorithm and to note that Phlx Rule 707, Just and Equitable Principles of Trade, would prohibit coordinated actions between a Phlx directed participant and an OFP involving Directed Orders.

[7] The term Order Flow Provider under proposed Phlx Rule 1080(l)(i)(B) would mean any member or member organization that submits, as agent, customer orders to the Exchange.

continuous, two-sided markets in not less than 100% of the series in each Streaming Quote Option in which such specialist is assigned.[8] Under the proposal, like specialists, Directed SQTs or RSQTs would be required to quote continuous, two-sided markets in not less than 100% of the series in each Streaming Quote Option in which they receive Directed Orders.

Directed Orders would first be allocated to customer limit orders resting on the limit order book at the execution price. Any remaining contracts would be allocated as follows:

- If the specialist were directed an order, it would be allocated a number of contracts that is the greater of: (1) Its size pro rata share; (2) the Enhanced Specialist Participation;[9] or (3) 40% of the contracts to be allocated.
- If an SQT or RSQT were directed an order, it would be allocated a number of contracts that is the greater of: (1) Its size pro rata share; or (2) 40% of the contracts to be allocated.
- After a specialist, SQT, or RSQT is allocated contracts, other market makers quoting at the disseminated price, and non-SQT Registered Options Traders (''ROTs'') that have placed limit orders on the limit order book via electronic interface would be allocated their size pro rata of the remaining contracts.
- If any contracts still remain, off-floor broker-dealers that have placed limit orders on the limit order book that represent the Exchange's disseminated price would be allocated contracts on a size pro rata basis.
- Finally, if the Directed Order is for a size that is greater than the Exchange's disseminated size, remaining contracts would be allocated manually in accordance with Phlx Rule 1014(g)(v), which sets forth the rules and contract allocation algorithm for trades that are executed in the trading crowd. A market maker directed an order would not be entitled to receive a number of contracts that is greater than the size associated with its quotation, nor would a ROT or off-floor broker-dealer be entitled to receive a number of contracts that is greater than the size associated with its limit order.

The allocation algorithm would apply to Directed Orders in lieu of the current allocation algorithm applicable to orders other than Directed Orders contained in Exchange Rule 1014(g)(vii). Specialists that are not Directed Specialists participating in trades involving a Directed SQT or a Directed RSQT would be entitled to receive a number of contracts as specified in proposed rule 1014(g)(viii), and would not be entitled to receive an Enhanced Specialist Participation on the remaining contracts.

## III. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change, comment letters, and the Phlx's response and finds that the proposed rule change is consistent with the requirements of section 6 of the Act[10] and the rules and regulations thereunder applicable to a national securities exchange[11] and, in particular, the requirements of Section 6(b)(5) of the Act.[12] section 6(b)(5) requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission received three comment letters regarding the proposal, all of which opposed the proposal.[13] The commenters criticized the proposal because they believe it would allow a Phlx directed participant a guarantee based solely on its relationships with order entry firms rather than on such Phlx directed participant's obligations.[14] The commenters assert that the proposal would reward a Phlx directed participant for its payment for order flow arrangements rather than the quality of its quotes, and therefore the proposal would have a negative impact on price competition.[15] In addition, two commenters note that the proposal would not limit the allocation entitlement to specialists, but extend it to SQTs and RSQTs, which have fewer obligations to the market.[16] Two commenters also believed that the proposal did not address the possibility of coordinated actions between a directed market maker and an OFP.[17]

The Commission has previously approved rules that guarantee a Phlx specialist a portion of each order when the specialist's quote is equal to the NBBO.[18] The Commission has closely scrutinized exchange rule proposals to adopt or amend a specialist guarantee where the percentage of specialist participation would rise to a level that could have a material adverse impact on quote competition within a particular exchange.[19] Because the proposal would not increase the overall percentage of an order that is guaranteed to the specialist beyond the currently acceptable threshold, but instead would allow SQTs and RSQTs to share in that guarantee, the Commission does not believe that the proposal will negatively impact quote competition on the Phlx. Under the proposal, the remaining portion of each order will still be allocated based on the competitive bidding of market participants.

In addition, a Phlx directed participant will have to be quoting at the NBBO at the time the order is received to capitalize on the guarantee. The Commission believes it is critical that the Phlx directed participant cannot step up and match the NBBO after it receives an order, but must be publicly quoting at that price when the order is received. In this regard, the Phlx's proposal prohibits from notifying a Phlx directed participant regarding its intention to submit a Directed Order so that such Phlx directed participant could change its quotation to match the NBBO immediately prior to submission of the preferenced order, and then fade its quote. In response to commenters' concerns that its proposal failed to protect against coordinated actions between a Phlx directed participant and an OFP, the Phlx stated it believes its Rule 707, Just and Equitable Principles of Trade, already provides the necessary protections against that type of conduct, and will proactively conduct surveillance for, and enforce against, such violations.[20]

[8] *See* Phlx Rule 1014(b)(ii)(B).

[9] *See* Phlx Rule 1014(g)(ii).

[10] 15 U.S.C. 78f.

[11] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78f(b)(5).

[13] *See supra* note 4.

[14] *See, e.g.*, ISE Letter, *supra* note 4 at 1–2; PCX Letter, *supra* note 4 at 1–2; Citadel Letter, *supra* note 4 at 2.

[15] *Id.*

[16] ISE Letter (''The Phlx proposal is not limited to specialist[s], and the Phlx does not attempt to justify this proposal other than as a way to reward market makers that attract order-flow to the Phlx.''), *supra* note 4 at 1, 3–4; Citadel Letter, *supra* note 4 at 2.

[17] ISE Letter, *supra* note 4 at 3; PCX Letter, *supra* note 4 at 2.

[18] *See* Securities Exchange Act Release No. 34606 (August 26, 1994), 59 FR 45741 (September 2, 1994) (SR–Phlx–94–12) (order approving the enhanced specialist participation in Phlx Rule 1014(g)(ii) for a one-year pilot basis); *see* Securities Exchange Act Release No. 41588 (July 1, 1999), 64 FR 37185 (July 9, 1999) (SR–Phlx–98–56) (order approving the enhanced specialist participation in Phlx Rule 1014(g)(ii) on a permanent basis).

[19] *See* Securities Exchange Act Release No. 43100 (July 31, 2000), 65 FR 48788 (August 9, 2000).

[20] *See* Amendment No. 1; letter from Edith Hallahan, Deputy General Counsel, and Edward

Continued

One commenter states that specialists currently receive participation entitlements based on their obligations to the market. The commenter believes that the proposal, by allowing any directed market maker quoting at the NBBO to receive a guaranteed percentage of an order without in turn increasing the market maker's obligations to the market, would ''eliminate the incentive to be a specialist, thereby potentially leaving the obligations of the specialist to the market unfulfilled.'' [21] The Commission does not believe that the proposal will result in the role of the specialist going unfulfilled, and notes that it recently approved an options exchange without specialists.[22] Moreover, specialists' obligations to the market have been reduced through other changes, including greater automation of functions previously handled manually by the specialist. While this proposal may reduce the incentive to be a specialist, the Commission does not believe that makes the proposal inconsistent with the Act. Finally, the Commission notes that Phlx specialists and Directed SQTs and RSQTs have greater quoting obligations than other Phlx market makers who cannot be Phlx directed participants. Specifically, Phlx specialists must submit continuous, two-sided quotations in 100% of the series of options in which it is assigned,[23] and a Directed SQTs or RSQTs must submit continuous, two-sided quotations in 100% of the series of options in which it receives Directed Orders. To receive an allocation under this rule filing, the Phlx directed participant must be quoting at the NBBO for the size of the allocation received.

Two commenters believe that the proposal is similar to facilitation guarantees and other directed order programs approved by the Commission.[24] However, unlike those programs, the commenters criticize that the instant proposal does not include certain protections for customers, such as providing the opportunity for price improvement, or limiting the program to a minimum number of contracts.[25]

The Commission believes that the proposal is more akin to current participation entitlements, for specialists, than the facilitation guarantee programs and other directed order programs cited by the commenters. Unlike exchange facilitation guarantee programs,[26] under the proposal, the Phlx directed participant would not be eligible for a participation entitlement unless it is publicly quoting at the NBBO at the time an order is received. Instead of changing its facilitation program rules, this proposal allows Phlx directed participants to share in the participation entitlement currently available only for specialists. The Commission believes this reallocation is consistent with the Act and will not affect the incentives of the trading crowd to compete aggressively for orders based on price.

The Commission emphasizes that approval of this proposal does not affect a broker-dealer's duty of best execution. A broker-dealer has a legal duty to seek to obtain best execution of customer orders, and any decision to preference a particular specialist, SQT, or RSQT must be consistent with this duty.[27] A broker-dealer's duty of best execution derives from common law agency principles and fiduciary obligations, and is incorporated in SRO rules and, through judicial and Commission decisions, the antifraud provisions of the federal securities laws.[28]

The duty of best execution requires broker-dealers to execute customers' trades at the most favorable terms reasonably available under the circumstances, *i.e.*, at the best reasonably available price.[29] The duty of best execution requires broker-dealers to periodically assess the quality of competing markets to assure that order flow is directed to the markets providing the most beneficial terms for their customer orders.[30] Broker-dealers must examine their procedures for seeking to obtain best execution in light of market and technology changes and modify those practices if necessary to enable their customers to obtain the best reasonably available prices.[31] In doing so, broker-dealers must take into account price improvement opportunities, and whether different markets may be more suitable for different types of orders or particular securities.[32]

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Deitzel, Vice President, Phlx, to John Roeser, Assistant Director, Division of Market Regulation, Commission, dated May 26, 2005.

[21] Citadel Letter, *supra* note 4 at 2.

[22] *See* Securities Exchange Act Release No. 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (SR–BSE–2002–15) (order approving trading rules for the Boston Options Exchange Facility).

[23] *See* Phlx Rule 1014(b)(ii)(B).

[24] ISE Letter (''There is no distinction between a broker 'facilitating' an order and a broker directing an order to a particular market maker for execution. * * *''), *supra* note 4 at 3–4; PCX Letter, *supra* note 4 at 2.

[25] ISE Letter, *supra* note 4 at 3–4; PCX Letter, *supra* note 4 at 2.

[26] *See* CBOE Rule 6.74(d); ISE Rule 716(d); Pacific Exchange, Inc. Rule 6.47(b); American Stock Exchange, Inc. Rule 950(d), Commentary .02(d); and Philadelphia Stock Exchange, Inc. Rule 1064, Commentary .02.

[27] 27 *See, e.g., Newton* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 269–70, 274 (3d Cir.), *cert. denied*, 525 U.S. 811 (1998); *Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 40900 (Jan. 11, 1999) (settled case) (citing *Sinclair* v. *SEC,* 444 F.2d 399 (2d Cir. 1971); *Arleen Hughes*, 27 SEC 629, 636 (1948), *aff'd sub nom. Hughes* v. *SEC*, 174 F.2d 969 (D.C. Cir. 1949)). *See also* Order Execution Obligations, Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290 (Sept. 12, 1996) (''Order Handling Rules Release'').

[28] Order Handling Rules Release, 61 FR at 48322. *See also Newton*, 135 F.3d at 270. Failure to satisfy the duty of best execution can constitute fraud because a broker-dealer, in agreeing to execute a customer's order, makes an implied representation that it will execute it in a manner that maximizes the customer's economic gain in the transaction. *See Newton*, 135 F.3d at 273 (''[T]he basis for the duty of best execution is the mutual understanding that the client is engaging in the trade—and retaining the services of the broker as his agent—solely for the purpose of maximizing his own economic benefit, and that the broker receives her compensation because she assists the client in reaching that goal.''); *Marc N. Geman*, Securities Exchange Act Release No. 43963 (Feb. 14, 2001) (citing *Newton*, but concluding that respondent fulfilled his duty of best execution). *See also* Payment for Order Flow, Securities Exchange Act Release No. 34902 (Oct. 27, 1994), 59 FR 55006, 55009 (Nov. 2, 1994) (''Payment for Order Flow Final Rules''). If the broker-dealer intends not to act in a manner that maximizes the customer's benefit when he accepts the order and does not disclose this to the customer, the broker-dealer's implied representation is false. *See Newton*, 135 F.3d at 273–274.

[29] *Newton,* 135 F.3d at 270. *Newton* also noted certain factors relevant to best execution—order size, trading characteristics of the security, speed of execution, clearing costs, and the cost and difficulty of executing an order in a particular market. *Id.* at 270 n. 2 (citing Payment for Order Flow, Securities Exchange Act Release No. 33026 (Oct. 6, 1993), 58 FR 52934, 52937–38 (Oct. 13, 1993) (Proposed Rules)). *See In re E.F. Hutton & Co.* (''Manning''), Securities Exchange Act Release No. 25887 (July 6, 1988). *See also* Payment for Order Flow Final Rules, 59 FR at 55008–55009.

[30] Order Handling Rules Release, 61 FR at 48322–48333 (''In conducting the requisite evaluation of its internal order handling procedures, a broker-dealer must regularly and rigorously examine execution quality likely to be obtained from different markets or market makers trading a security.''). *See also Newton,* 135 F.3d at 271; Market 2000: An Examination of Current Equity Market Developments V–4 (SEC Division of Market Regulation January 1994) (''Without specific instructions from a customer, however, a broker-dealer should periodically assess the quality of competing markets to ensure that its order flow is directed to markets providing the most advantageous terms for the customer's order.''); Payment for Order Flow Final Rules, 59 FR at 55009.

[31] Order Handling Rules, 61 FR at 48323.

[32] Order Handling Rules, 61 FR at 48323. For example, in connection with orders that are to be executed at a market opening price, ''[b]roker-dealers are subject to a best execution duty in executing customer orders at the opening, and should take into account the alternative methods in determining how to obtain best execution for their customer orders.'' Disclosure of Order Execution and Routing Practices, Securities Exchange Act Release No. 43590 (Nov. 17, 2000), 65 FR 75414, 75422 (Dec. 1, 2000) (adopting new Exchange Act Rules 11Ac1–5 and 11Ac1–6 and noting that alternative methods offered by some Nasdaq market

The Commission notes that the proposed rule change would be implemented on a pilot basis for one year. During this time, the Commission intends to evaluate the impact of the proposal on the options markets to determine whether it would be beneficial to customers and to the options markets as a whole before approving any request for permanent approval of the pilot program.

For these reasons, the Commission believes that the proposal is consistent with the requirements of Section 6(b)(5) of the Act,[33] and will not jeopardize market integrity or the incentive for market participants to post competitive quotes.[34]

## IV. Accelerated Approval of Amendment No. 1

Pursuant to Section 19(b)(2) of the Act,[35] the Commission may not approve any proposed rule change, or amendment thereto, prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding. The Commission hereby finds good cause for approving Amendment No. 1 to the proposal, prior to the 30th day after publishing notice of Amendment No. 1 in the **Federal Register**.

The Commission believes that it has received and fully considered meaningful comments with respect to the proposal, and that Amendment No. 1 does not raise any new regulatory issues that warrant further delay. In Amendment No. 1, the Exchange added language to clarify the application of the allocation algorithm. In addition, Amendment No. 1 added language to note that Phlx Rule 707, Just and Equitable Principles of Trade, prohibits coordinated actions between the Phlx directed participant and the OFP involving Directed Orders. The Commission believes that the addition of the language is appropriate to clarify the proposed Directed Order process.

## V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 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–Phlx–2004–91 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–Phlx–2004–91. 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, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. 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 publicly available. All submissions should refer to File Number SR–Phlx–2004–91 and should be submitted on or before June 27, 2005.

## VI. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[36] that the proposed rule change (SR–Phlx–2004–91) be, and hereby is, approved, and that Amendment No. 1 to the proposed rule change be, and hereby is, approved on an accelerated basis, for a pilot period to expire on May 27, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[37]

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5–2871 Filed 6–3–05; 8:45 am]

BILLING CODE 8010–01–P

centers for pre-open orders included the mid-point of the spread or at the bid or offer).

[33] 15 U.S.C. 78f(b)(5).

[34] Approval of this proposal is in no way an endorsement of payment for order flow by the Commission.

[35] 15 U.S.C. 78s(b)(2).

[36] 15 U.S.C. 78s(b)(2).

[37] 17 CFR 200.30–3(a)(12).

# DEPARTMENT OF VETERANS AFFAIRS

## Fund Availability Under the VA Homeless Providers Grant and Per Diem Program

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Department of Veterans Affairs (VA) is announcing the availability of funds for currently operational VA Per Diem Only Recipients (projects that were originally awarded in 2002, 2003, and 2004 that are currently providing services and receiving per diem payments as of May 15, 2005) to make reapplication for assistance for their existing project number under the Per Diem Only Grant Component of VA's Homeless Providers Grant and Per Diem (GPD) Program. The focus of this Notice of Funds Availability (NOFA) is to provide previous recipients that have demonstrated performance in the delivery of services to the homeless veteran population an opportunity to seek re-application. This Notice contains information concerning the program, re-application process, and the amount of funding available.

**DATES:** An original request for re-application letter, on agency letterhead for assistance under the VA's Homeless Providers Grant and Per Diem Program, must be received in the Grant and Per Diem Field Office, by 4 p.m. Eastern Time on October 5, 2005. Requests for re-application may not be sent by facsimile (FAX). In the interest of fairness to all competing applicants, this deadline is firm as to date and hour, and VA will treat as ineligible for consideration any request for re-application that is received after the deadline. Applicants should take this practice into account and make early submission of their material to avoid any risk of loss of eligibility brought about by unanticipated delays or other delivery-related problems.

*For a Copy of the Application Package:* An application package is not needed for this NOFA. Applicants submitting a letter requesting re-application on their agency's letterhead

agree to VA using their previously awarded Per Diem Only application for scoring purposes (*see* re-application requirements in this NOFA).

*Submission of Application:* An original and complete letter requesting re-application with project number (*see* re-application requirements in this NOFA) must be submitted to the following address: VA Homeless Providers Grant and Per Diem Field Office, 10770 N. 46th Street, Suite C–200, Tampa, FL, 33617. Letters of re-application must be received in the Grant and Per Diem Field office by the re-application deadline. Any additional materials arriving separately will not be included in the re-application package for consideration.

**FOR FURTHER INFORMATION CONTACT:** Guy Liedke, VA Homeless Providers Grant and Per Diem Program, Department of Veterans Affairs, 10770 N. 46th Street, Suite C–200, Tampa, FL, 33617; (toll-free) 1–877–332–0334.

**SUPPLEMENTARY INFORMATION:** This Notice announces the availability of funds for assistance under VA's Homeless Providers Grant and Per Diem Program for eligible currently operational programs that have previously received a VA Per Diem Only grant in 2002, 2003, and 2004 under VA's Homeless Providers Grant and Per Diem Program. The Final Rule, published in the **Federal Register**, September 26, 2003, secs. 61.0 through 61.82. Public Law 107–95, § 5(a)(1) the Homeless Veterans Comprehensive Assistance Act of 2001 codified at 38 U.S.C. 2011, 2012, 2061, and 2064 authorizes this program. Funding applied for under this Notice may be used for aid for service centers and supportive housing. Funding will be in the form of per diem payments issued to eligible entities beginning on 1/31/06 and will continue so long as the grantee meets the requirements of 38 CFR part 61. Per diem payments are also subject to availability of funds and will run concurrently with the reauthorization period of the Grant and Per Diem Program.

Capital grant recipients who received capital grant funding under VA's Homeless Providers Grant and Per Diem Program in 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, and 2003 for acquisition, renovation or new construction should not respond to this NOFA. Per diem for those portions of their programs that were created with capital grant funds is requested in the capital grant application and paid at the time of capital grant project completion and inspection.

VA is pleased to issue this NOFA for the Homeless Providers Grant and Per Diem Program. The Department expects to award approximately $38 million annually under this NOFA.

Funding available under this NOFA is being offered to help offset the operating expenses of existing state and local governments, Indian Tribal governments, faith-based, and community-based organizations that are capable of providing supported housing and/or supportive service center services for homeless veterans. It should be noted that VA payment is limited to the applicant's cost of care per eligible veteran minus other sources of payments to the applicant for furnishing services to homeless veterans up to the per day rate VA pays for State Home Domiciliary care, which is currently $27.44. Awardees will be required to support their request for per diem payment with adequate fiscal documentation as to program income and expenses.

It is important to be aware that VA places great emphasis on responsibility and accountability. VA has procedures in place to monitor services provided to homeless veterans and outcomes associated with the services provided in grant and per diem-funded programs. VA is also implementing new procedures to further this effort. Applicants should be aware of the following:

All awardees that are selected in response to *this NOFA* must meet the Life Safety Code of the National Fire and Protection Association as it relates to their specific facility. VA will conduct an inspection prior to awardees being able to submit a request for per diem payment under this NOFA to ensure this requirement is met.

**Note:** 2002 Per Diem Only awardees that have a project co-located at a facility that has been given an extension to meet the Life Safety Code by Public Law 107–95 have until December 21, 2006, to do so. If selected for refunding and the project does not meet the Life Safety Code by that date, per diem funding will be stopped as per the requirement set forth in Section 5(a)(1) of Public Law 107–95.

Per Diem Only programs that have received a ''Special Needs Grant'' in conjunction with their Per Diem Only Project are advised that ''Special Needs'' funding is also subject to reauthorization of the special need component and may not continue if not reauthorized.

Each per diem-funded program will have a liaison appointed from a nearby VA medical facility to provide oversight and monitor services provided to homeless veterans in the per diem-funded program.

Monitoring will include at least an annual review of each per diem program's progress toward meeting internal goals and objectives in helping veterans attain housing stability, adequate income support, and self sufficiency as identified in each per diem program's original application. Monitoring will also include a review of the agency's income and expenses as they relate to this project to ensure per diem payment is accurate.

Each per diem-funded program will participate in VA's national program monitoring and evaluation system administered by VA's Northeast Program Evaluation Center (NEPEC). It is the intention of VA to develop specific performance targets with respect to housing for homeless veterans. NEPEC's monitoring procedures will be used to determine successful accomplishment of these housing outcomes for each per diem-funded program.

*Authority:* VA's Homeless Providers Grant and Per Diem Program is authorized by Public Law 107–95, § 5(a)(1) the Homeless Veterans Comprehensive Assistance Act of 2001 codified at 38 U.S.C. 2011, 2012, 2061, 2064 and has been extended through Fiscal Year 2005. The program is implemented by the final rule codified at 38 CFR part 61.0. The final rule was published in the **Federal Register** on September 26, 2003, the regulations can be found in their entirety in 38 CFR, sec. 61.0 through 61.82. Funds made available under this notice are subject to the requirements of those regulations.

*Allocation:* Approximately $38 million annually is available for the per diem only award component of this program. This funding is expected to be available from 1/31/06 subject to the availability of funds and reauthorization of the program past September 30, 2005.

*Funding Priorities:* None.

Methodology: VA will review all previously awarded operational Per Diem Only grant recipients applications that request reapplication in response to this notice of funding availability. Applicants will then be ranked based on score and any ranking criteria set forth only if the applicant scores at least 500 cumulative points from paragraphs (b) (c) (d) (e) and (i) of 38 CFR 61.13.

The highest-ranked application for which funding is available, will be conditionally selected for eligibility to receive per diem payment in accordance with its ranked order until VA reaches the projected funding allowance for this NOFA.

*Reapplication Requirements:* The specific grant re-application requirements are: An original request for reapplication letter on agency letterhead for assistance under the VA's Homeless Providers Grant and Per Diem Program requesting that the previous Per Diem Only project number be considered for reapplication. Applicants that do not know or are not sure of their project number should contact the Grant and Per Diem Field Office (toll-free) at 1–877–332–0334 to obtain their existing project number.

*A new application package is not needed for this NOFA.* Applicants submitting a letter requesting reapplication on agency letterhead agree to VA using their previously awarded Per Diem Only application for scoring purposes. Selections will be made based on criteria described in the original application, final rule, and NOFA. Applicants who are selected will be notified of any additional information needed to confirm or clarify information provided in the reapplication. Applicants will then be notified of the deadline to submit such information. If an applicant is unable to meet any conditions for grant award within the specified time frame, VA reserves the right to not award funds and to use the funds available for other grant and per diem applicants.

Dated: May 31, 2005.

**R. James Nicholson,**

*Secretary of Veterans Affairs.*

[FR Doc. 05–11182 Filed 6–3–05; 8:45 am]

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# Corrections

Federal Register

Vol. 70, No. 107

Monday, June 6, 2005

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

## COMMODITY FUTURES TRADING COMMISSION

## 17 CFR Part 1

**RIN 3038–AC15**

## Investment of Customer Funds and Record of Investments

*Correction*

In rule document 05–9794 beginning on page 28190 in the issue of Tuesday, May 17, 2005, make the following correction:

**§ 1.25 [Corrected]**

On page 28201, § 1.25(b)(3)(i)(B) is corrected to read as follows:

''(B) An instrument that meets the requirements of paragraph (b)(3)(iv) of this section may provide for a cap, floor, or collar on the interest paid;

*provided, however,* that the terms of such instrument obligate the issuer to repay the principal amount of the instrument at not less than par value upon maturity.''

[FR Doc. C5–9794 Filed 6–3–05; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Monday,
June 6, 2005

# Part II

# Department of Labor

## Mine Safety and Health Administration

**30 CFR Part 57**

**Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners; Final Rule**

**DEPARTMENT OF LABOR**

**Mine Safety and Health Administration**

**30 CFR Part 57**

**RIN 1219–AB29**

## Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners

**AGENCY:** Mine Safety and Health Administration (MSHA), Labor.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises MSHA's existing standards addressing diesel particulate matter (DPM) exposure in underground metal and nonmetal (M/NM) mines. In this final rule, MSHA changes the interim concentration limit measured by total carbon (TC) to a comparable permissible exposure limit (PEL) measured by elemental carbon (EC), which renders a more accurate DPM exposure measurement. Also, this final rule increases flexibility of compliance for mine operators by requiring MSHA's longstanding hierarchy of controls for its other exposure-based health standards at M/NM mines, but retains the prohibition on rotation of miners for compliance. Furthermore, this final rule: Requires MSHA to consider economic as well as technological feasibility in determining if operators qualify for an extension of time in which to meet the final DPM limit; deletes the requirement for a control plan; and makes conforming changes to existing provisions concerning compliance determinations, environmental monitoring and recordkeeping.

**DATES:** *Effective Date:* The final rule is effective on July 6, 2005.

**FOR FURTHER INFORMATION CONTACT:** Office of Standards, Regulations, and Variances, MSHA, 1100 Wilson Blvd., Room 2350, Arlington, Virginia 22209–3939; 202–693–9440 (telephone); or 202–693–9441 (facsimile).

You may obtain copies of this final rule and the Regulatory Economic Analysis (REA) in alternative formats by calling 202–693–9440. The alternative formats available are either a large print version of these documents or electronic files that can be sent to you either on a computer disk or as an attachment to an e-mail. The documents also are available on the Internet at *http://www.msha.gov/REGSINFO.HTM.*

**SUPPLEMENTARY INFORMATION:**

### Outline of Preamble

This outline will assist the mining community in finding information in this preamble.

I. List of Common Terms
II. Rulemaking Background
  A. First Partial Settlement Agreement
  B. Second Partial Settlement Agreement
III. The Final PEL
IV. The 31-Mine Study
  A. Summary
  B. Subsequent Activities
V. Compliance Assistance
  A. Baseline Sampling
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VI. DPM Exposures and Risk Assessment
  A. Introduction
  B. DPM Exposures in Underground M/NM Mines
  C. Health Effects
  D. Significance of Risk
VII. Feasibility
  A. Background
  B. Technological Feasibility
  C. Economic Feasibility
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IX. Section-by-Section Analysis
X. Distribution Table
XI. Regulatory Impact Analysis
XII. References Cited

### I. List of Common Terms

Listed below are the common terms used in the preamble.

| | |
|---|---|
| *Commission* | Federal Mine Safety and Health Review Commission. |
| *CV* | coefficient of variation. |
| *DE* | diesel exhaust. |
| *DOCs* | diesel oxidation catalysts. |
| *DPF* | diesel particulate filter. |
| *DPM* | diesel particulate matter. |
| *EC* | elemental carbon. |
| *ETS* | environmental tobacco smoke. |
| *Filter Selection Guide* | Diesel Particulate Filter. Selection Guide for Diesel-powered Equipment in Metal and Nonmetal Mines. |
| *First Partial Settlement* Agreement | 66 FR 35518 (2001) & 66 FR 35521 (2001): basis for July 5, 2001 NPRM. |
| *HEI* | Health Effects Institute. |
| *HWE* | healthy worker effect. |
| *MARG* | Methane Awareness Resource Group. |
| *M/NM* | metal/non-metal. |
| *MSHA* | Mine Safety and Health Administration. |
| *NIOSH* | National Institute for Occupational Safety and Health. |
| *NTP* | National Toxicology Program. |
| *OC* | organic carbon. |
| *PAPR* | powered air-purifying respirator. |
| *PEL* | permissible exposure limit. |
| *PPM* | parts per million. |
| *QRA* | quantitative risk assessment. |
| *REA* | Regulatory Economic Analysis. |
| *Second Partial Settlement Agreement* | 67 FR 47296 (2002): basis for August 14, 2003 NPRM. |
| *SD* | standard deviation. |
| *SKC* | SKC, Inc. |
| *TC* | total carbon. |
| *USWA* | United Steelworkers of America. |
| $\mu g/cm^2$ | micrograms per square centimeter. |
| $\mu g/m^3$ | micrograms per cubic meter. |
| *2001 final rule* | January 19, 2001 DPM final rule. |
| *Amended 2001 final rule* | 2001 final rule amended on February 27, 2002. |
| *2002 final rule* | February 27, 2002 final rule. |
| *2002 ANPRM* | Advance Notice of Proposed Rulemaking published on September 25, 2002. |
| *2003 NPRM* | Notice of Proposed Rulemaking published on August 14, 2003. |

## II. Rulemaking Background

On January 19, 2001, MSHA published a final rule (2001 final rule) addressing DPM exposure in underground M/NM mines (66 FR 5706), amended on February 27, 2002 at 67 FR 9180 (2002 final rule). The 2001 final rule established new health standards for underground M/NM mines that use equipment powered by diesel engines. The effective date of the 2001 final rule was listed as March 20, 2001. On January 29, 2001, AngloGold (Jerritt Canyon) Corp. and Kennecott Greens Creek Mining Company filed a petition for review of the 2001 final rule in the District of Columbia Circuit Court of Appeals. On February 7, 2001, the Georgia Mining Association, the National Mining Association (NMA), the Salt Institute, and the Methane Awareness Resource Group (MARG) Diesel Coalition filed a similar petition in the Eleventh Circuit. On March 14, 2001, Getchell Gold Corporation petitioned for review of the rule in the District of Columbia Circuit. The three petitions were consolidated, and are pending in the District of Columbia Circuit. The United Steelworkers of America (USWA) intervened in the litigation.

While these challenges were pending, the AngloGold petitioners filed with MSHA an application for reconsideration and amendment of the 2001 final rule and for postponement of the effective date of the 2001 final rule pending judicial review. The Georgia Mining Association petitioners similarly filed with MSHA a request for an administrative stay or postponement of the effective date of the 2001 final rule. On March 15, 2001, MSHA delayed the effective date of the 2001 final rule until May 21, 2001, in accordance with a January 20, 2001 memorandum from the President's Chief of Staff (66 FR 15032). The delay was necessary to give Department of Labor officials the opportunity for further review and consideration of new regulations. On May 21, 2001 (66 FR 27863), MSHA published a document in the **Federal Register** delaying the effective date of the 2001 final rule until July 5, 2001. The purpose of this delay was to allow the Department of Labor the opportunity to engage in further negotiations to settle the legal challenges to the 2001 final rule.

### *A. First Partial DPM Settlement Agreement*

As a result of a partial settlement agreement with the litigants, MSHA published two documents in the **Federal Register** on July 5, 2001 addressing the 2001 final rule. One document (66 FR 35518) delayed the effective date of § 57.5066(b) regarding the tagging provision of the maintenance standard; clarified the effective dates of certain provisions of the 2001 final rule; and included correcting amendments.

The second document (66 FR 35521) proposed a rule to clarify § 57.5066(b)(1) and (b)(2) regarding maintenance and to add a new paragraph (b)(3) to § 57.5067 regarding the transfer of existing equipment between underground mines. MSHA published these changes as a final rule on February 27, 2002 (67 FR 9180) (2002 final rule), with an effective date of March 29, 2002.

Under the first partial settlement agreement, MSHA also conducted joint sampling with industry and labor at 31 underground M/NM mines to determine existing concentration levels of DPM; to assess the performance of the SKC, Inc., Eighty Four, PA (SKC) submicron dust sampler with the NIOSH Method 5040; to assess the feasibility of achieving compliance with the standard's concentration limits at the 31 mines; and to assess the impact of interferences on samples collected in the M/NM underground mining environment before the limits established in the final rule became effective. The final report was issued on January 6, 2003.

### *B. Second Partial Settlement Agreement*

Settlement negotiations continued on the remaining unresolved issues in the litigation. On July 15, 2002, the parties signed an agreement (second partial settlement agreement) that formed the basis for MSHA's August 14, 2003 proposed rule (68 FR 48668) (2003 NPRM). On July 18, 2002, MSHA published a document in the **Federal Register** (67 FR 47296) announcing, among other things, that the following provisions of the 2001 final rule would become effective on July 20, 2002:

- § 57.5060(a), Addressing the interim concentration limit of 400 micrograms of TC per cubic meter of air;
- § 57.5061, Compliance determinations; and
- § 57.5071, Environmental monitoring.

The document also announced that the following provisions of the rule would continue in effect:

- § 57.5065, Fueling practices;
- § 57.5066, Maintenance standards;
- § 57.5067, Engines;
- § 57.5070, Miner training; and
- § 57.5075, Diesel particulate records, as they relate to the requirements of the rule that went into effect on July 20, 2002.

The document also stayed the effectiveness of the following provisions pending completion of this final rule:

- § 57.5060(d), Permitting miners to work in areas where the level of DPM exceeds the applicable concentration limit with advance approval from the Secretary;
- § 57.5060(e), Prohibiting the use of personal protective equipment (PPE) to comply with the concentration limits;
- § 57.5060(f) Prohibiting the use of administrative controls to comply with the concentration limits; and
- § 57.5062, DPM control plan.

Finally, the July 18, 2002, document outlined the terms of the DPM settlement agreement and announced MSHA's intent to propose specific changes to the rule, as discussed below.

On September 25, 2002, MSHA published an Advance Notice of Proposed Rulemaking (2002 ANPRM) (67 FR 60199) to amend certain provisions of the 2001 DPM rule.

The comment period closed on November 25, 2002. MSHA received comments from underground M/NM mine operators, trade associations, organized labor, public interest groups and individuals. On August 14, 2003, MSHA published the 2003 NPRM in the **Federal Register** (68 FR 48668) recommending certain revisions to the DPM rule as part of a settlement agreement reached in response to a legal challenge to the DPM standard. Public hearings were held in Salt Lake City, Utah; St. Louis, Missouri; Pittsburgh, Pennsylvania; and Arlington, Virginia in September and October 2003. The comment period closed on October 14, 2003. On February 20, 2004, MSHA published a document in the **Federal Register** announcing a limited reopening of the comment period on the 2003 NPRM. This document reopened the comment period to obtain public input on three new documents related to the August 14, 2003 rulemaking (69 FR 7881). The three documents were as follows:

(1) United States (U.S.) Department of Health and Human Services, Center for Disease Control, National Institute of Occupational Safety and Health, ''The Effectiveness of Selected Technologies in Controlling Diesel Emissions in an Underground Mine—Isolated Zone Study at Stillwater Mining Company's Nye Mine,'' January 5, 2004.

(2) U.S. Department of Labor, Bureau of Labor Statistics, and U.S. Department of Health and Human Services, Center for Disease Control, National Institute of Occupational Safety and Health, ''Respirator Usage in Private Sector Firms, 2001,'' September, 2003.

(3) Chase, Gerald, ''Characterizations of Lung Cancer in Cohort Studies and a NIOSH Study on Health Effects of Diesel Exhaust in Miners,'' undated, received January 5, 2004.

The subsequent comment period closed on April 5, 2004. MSHA received and reviewed written and oral statements on the 2003 NPRM from all segments of the mining community.

MSHA informed the mining community in both its 2002 ANPRM and its 2003 NPRM of its intentions to incorporate into the record of the current rulemaking the existing rulemaking record, including the risk assessment to the 2001 final rule. Commenters were encouraged to submit additional evidence of new scientific data related to health risks to underground M/NM miners from exposure to DPM.

This final rule for DPM exposure at M/NM mines is based on consideration of the entire rulemaking record, including all written comments and exhibits received related to the 2001 final rule as well as all related data received to the close of this rulemaking record. To serve the interest of the mining community, MSHA is revising §§ 57.5060, 57.5061, 57.5071, and 57.5075 and republishing §§ 57.5065, 57.5066, 57.5067, and 57.5070 of the DPM standards at 30 CFR part 57 in order to present all sections in their entirety in this document. What follows is a discussion of the specific revisions to the 2001 DPM standard:

- § 57.5060(a) addressing the interim limit on concentration of DPM. MSHA has changed the 2001 final rule's interim concentration limit of 400 micrograms of TC per cubic meter of air ($400_{TC}$ μg/m$^3$) to a comparable permissible exposure limit of 308 micrograms of EC per cubic meter of air ($308_{EC}$ μ/m$^3$);
- § 57.5060(c) addressing application and approval requirements for an extension of time in which to reduce the final DPM limit. MSHA has changed the 2001 final rule by requiring MSHA to consider economic feasibility along with technological feasibility factors in weighing whether to grant special extensions; has deleted the limit on the number of special extensions that may be granted to each mine; has limited each extension to a period of one year; has allowed for annual renewals of special extensions; and has allowed the MSHA District Manager, rather than the Secretary, to grant extensions. This final rule retains the scope of the 2001 provision for operators to apply for extensions to the final DPM limit;
- § 57.5060(d) addressing certain exceptions to the concentration limits;
- § 57.5060(e) prohibiting use of PPE to comply with the concentration limits;
- § 57.5060(f) prohibiting use of administrative controls to comply with the concentration limits. MSHA has changed the 2001 final rule by implementing the current hierarchy of controls as adopted in MSHA's other exposure-based health standards for M/NM mines. MSHA's hierarchy includes primacy of engineering and administrative controls to the extent feasible to reduce a miner's exposure to the PEL, but MSHA continues to prohibit rotation of miners for compliance purposes. If a miner's exposure cannot be reduced to the PEL with use of feasible controls, controls are infeasible, or do not produce significant reductions in DPM exposures, the new final rule requires mine operators to supplement a miner's protection with respirators and implement a respiratory protection program. This respiratory protection program must meet the requirements in existing 30 CFR 57.5005, but miners may only use the respirator filters specified by MSHA for DPM in this section. Therefore, MSHA removes the 2001 prohibition against use of respiratory protection without approval by the Secretary and clarifies that use of administrative controls other than rotation of miners is allowed;
- § 57.5062, addressing the diesel particulate control plan. This final rule removes the existing requirement for a DPM control plan; and
- conforming changes to the following existing standards that were proposed on August 14, 2003:
  - § 57.5061, addressing compliance determinations;
  - § 57.5071, addressing exposure monitoring; and,
  - § 57.5075, addressing recordkeeping requirements.

This final rule does not include provisions for written procedures for administrative controls, a written respiratory protection program, medical examination of miners before they are required to wear respiratory protection, and medical transfer of miners who are unable to wear respiratory protection for medical and psychological reasons.

## III. The Final Concentration Limit

In the 2002 ANPRM, MSHA notified the mining community that this rulemaking would revise both the interim concentration limit of 400 micrograms per cubic meter of air and the final concentration limit of 160 micrograms per cubic meter of air under § 57.5060(a) and (b) of the 2001 final rule. Some commenters to the ANPRM recommended that MSHA propose separate rulemakings for revising the interim and final DPM limits to give MSHA an opportunity to gather further information to establish a final DPM limit. In the 2003 NPRM, MSHA agreed with these commenters and solicited other information from the mining community that would lead to an appropriate final DPM standard. Moreover, MSHA announced its intentions to publish a separate rulemaking to amend the existing final concentration limit in § 57.5060(b). To assist MSHA in achieving this purpose, MSHA requested comments on an appropriate final permissible exposure limit rather than a concentration limit; and asked for information on an appropriate surrogate for measuring miners' DPM exposures. MSHA concluded its request for information by clarifying that revisions to the final DPM concentration limit would not be a part of this rulemaking.

In their comments to the 2003 NPRM, organized labor requested that MSHA lower the final DPM limit below 160 micrograms based on feasibility data and the significance of the health risks from exposure to DPM. Industry trade associations and individual mine operators recommended that MSHA repeal the final limit based on issues related to health effects, inability of the mining industry to meet a lower limit than 400 micrograms per cubic meter of air, and the need for MSHA to have the results from the National Institute for Occupational Safety and Health/National Cancer Institute (NIOSH/NCI) study and exposure-response data.

MSHA believes that evidence in the current DPM rulemaking record is inadequate for MSHA to make determinations regarding revision to the final DPM limit.

## IV. The 31-Mine Study

### *A. Summary*

On January 19, 2001, MSHA published a final standard addressing exposure of underground metal and nonmetal miners to diesel particulate matter (DPM). The standard contained staggered effective dates for interim and final concentration limits. The standard was challenged by industry trade associations and several mining companies, and the United Steelworkers of America (USWA) intervened in the litigation. The parties agreed to resolve their differences through settlement negotiations with MSHA. Thereafter, MSHA delayed the effective date of certain provisions of the standard. As part of the settlement negotiations, MSHA agreed to conduct joint sampling with the litigants at 31 metal and

nonmetal underground mines covered by the standard to determine existing concentration levels of DPM in operating mines and to measure DPM levels in the presence of known or suspected interferences.

The goals of the study were to use the sampling results and related information to assess:

—The validity, precision and feasibility of the sampling and analysis method specified by the diesel standard (NIOSH Method 5040);

—The magnitude of interferences that occur when conducting enforcement sampling for total carbon as a surrogate for diesel particulate matter (DPM) in mining environments; and,

—The technological and economic feasibility of the underground metal and nonmetal (MNM) mine operators to achieve compliance with the interim and final DPM concentration limits.

—The parties developed a joint MSHA/Industry study protocol to guide sampling and analysis of DPM levels in 31 mines. The parties also developed four subprotocols to guide investigations of the known or suspected interferences, which included mineral dust, drill oil mist, oil mist generated during ammonium nitrate/fuel oil (ANFO) loading operations, and environmental tobacco smoke (ETS). The parties also agreed to study other potential sampling problems, including any manufacturing defects of the DPM sampling cassette. (Executive Summary, Report on the 31-Mine Study)

MSHA requested that NIOSH peer review the draft Report on the 31-Mine Study, and NIOSH's conclusions were as follows:

1. Most mines have DPM concentrations higher than $400_{TC}$ μg/m³.

2. The impactor was effective in eliminating mineral dust from collecting onto the filter analyzed for carbon by NIOSH Method 5040.

3. The ANFO data was inconclusive.

4. Oil mist from the stoper drill is a sub-micron aerosol and a potential interference. Oil mist contamination from the driller can be avoided by sampling upstream of stope or far enough downstream that the oil mist has been diluted enough to give minimal TC concentrations (if this type of sampling is possible).

5. No information about the interference of environmental tobacco smoke is present in this report.

6. The inter-laboratory comparison of the NIOSH method 5040 of paired punches from the same filter showed reasonable agreement between MSHA results and commercial laboratory results and excellent agreement between MSHA and NIOSH laboratory results. (Summary of Findings of this Report in ''NIOSH Comments and recommendations on the MSHA DRAFT report: Report on the Joint MSHA/Industry Study: Determination of DPM Levels in Underground Metal and Nonmetal Mines,'' dated June 3, 2002)

On January 6, 2003, MSHA issued its final report entitled, ''MSHA's Report on Data Collected During a Joint MSHA/Industry Study of DPM Levels in Underground Metal And Nonmetal Mines'' (Report on the 31-Mine Study). MSHA's major conclusions drawn from the study are as follows:

—The analytical method specified by the diesel standard gives an accurate measure of the TC content of a filter sample and the analytical method is appropriate for making compliance determinations of DPM exposures of underground metal and nonmetal miners.

—SKC satisfactorily addressed concerns over defects in the DPM sampling cassettes and availability of cassettes to both MSHA and mine operators.

—Compliance with both the interim and final concentration limits may be both technologically and economically feasible for metal and nonmetal underground mines in the study. MSHA, however, has limited in-mine documentation on DPM control technology. As a result, MSHA's position on feasibility does not reflect consideration of current complications with respect to implementation of controls, such as retrofitting and regeneration of filters. MSHA acknowledges that these issues may influence the extent to which controls are feasible. The Agency is continuing to consult with the National Institute of Occupational Safety and Health, industry and labor representatives on the availability of practical mine worthy filter technology.

—The submicron impactor was effective in removing the mineral dust, and therefore its potential interference, from DPM samples. Remaining interference from carbonate interference is removed by subtracting the 4th organic peak from the analysis. No reasonable method of sampling was found to eliminate interferences from oil mist or that would effectively measure DPM levels in the presence of ETS with TC as the surrogate * * * (Executive Summary, Report on the 31-Mine Study)

MSHA's complete report on the 31-Mine Study is contained in the rulemaking record.

MSHA and NIOSH have reviewed the performance characteristics of the SKC sampler, and are satisfied that it accurately measures exposures to DPM. NIOSH found in laboratory and field data that the SKC DPM cassette collected DPM efficiently. In a side protocol of the 31-Mine Study, MSHA tested the efficiency of the SKC DPM cassette to avoid mineral dust in four different mines and did not measure any mineral dust on the filter when the SKC DPM cassette was used. This was confirmed by laboratory results at NIOSH. (Noll, J. D., Timko, R. J., McWilliams, L., Hall, P., Haney, R., ''Sampling Results of the Improved SKC Diesel Particulate Matter Cassette,'' *JOEH,* 2005 Jan; 2(1):29–37.)

Results of the 31-Mine Study and the MSHA baseline compliance assistance sampling demonstrated that the SKC submicron impactor removed potential interferences from mineral dust from the collected sample.

Interference from drill oil mist was found on personal samples collected on the stoper and jackleg drillers and on area samples collected in the stope where drilling was being performed. Use of a dynamic blank did not eliminate drill oil mist interference. Tests to confirm whether oil mist from ANFO loading operations could be an interference were not conclusive. Blasting did not interfere with diesel particulate measurements. MSHA found no reasonable method of sampling to eliminate interferences from oil mist when TC is used as the surrogate.

No reliable marker was identified for confirming the presence of ETS in an atmosphere containing DPM. Use of the impactor does not remove the ETS as an interferent. No reasonable method of sampling was found that would effectively measure DPM levels in the presence of ETS with TC as the surrogate.

MSHA has found that the use of EC eliminates potential sampling interference from drill oil mist, tobacco smoke, and organic solvents, and that EC consistently represents DPM. In comparison to using TC as the DPM surrogate, using EC would impose fewer restrictions or caveats on sampling strategy (locations and durations), would produce a measurement much less subject to questions, and inherently would be more precise. Furthermore, NIOSH, the scientific literature, and the MSHA laboratory tests indicate that DPM, on average, is approximately 60 to 80% elemental carbon, firmly establishing EC as a valid surrogate for DPM.

As part of the 31-Mine Study, representatives from MSHA, NIOSH, and SKC met to address the following issues:

- The quality of manufactured SKC DPM cassettes;
- The feasibility of adding a dynamic blank filter to the SKC DPM cassette; and
- The possibility of putting a number on each SKC DPM cassette.

Also, in its October 16, 2001 letter, MSHA informed SKC about the problems that MSHA and the industry encountered using the SKC DPM sampling cassette with the submicron impactor. These problems included: dark flecks, alleged leaks, loose fitting nozzles and connectors, and difficulty in shipping the sampler. As discussed in the report on the 31-Mine Study, SKC was responsive in addressing those concerns.

*B. Subsequent Activities*

Some industry commenters continued to state that the sampling and analytical processes for DPM are too new for regulatory use. Other commenters questioned the availability and reliability of the SKC impactor.

MSHA moved expeditiously to help resolve the back-order and manufacturing delays for samplers reported in the 31-Mine Study. However, operators who sample alongside MSHA continued to request ample notice to have enough samplers available. MSHA purchased many of the initial production runs of these samplers to conduct its compliance assistance baseline sampling. Once the initial orders were filled, the sampler became more widely available.

Some commenters stated that SKC changed the impactor, and that NIOSH should test the new SKC sampler and evaluate its comparability to the model used in the 31-Mine Study. One of these commenters stated that the shelf life of the prior sampler affected TC measurements by adsorbing organic carbon (OC) from the polystyrene assembly onto the filter media and increasing TC measurement. These commenters questioned MSHA's changes to the SKC sampler following completion of the 31-Mine Study, and suggested that a defect to the sampler could have affected the results of the study. During the 31-Mine Study, MSHA observed that the deposit area of the SKC submicron impactor filter was not as consistent as those obtained for preliminary evaluation. This was attributed to inconsistent crimping of the aluminum foil cone on the filter capsule.

Prior to the 31-Mine Study, MSHA had determined the deposit area of the sample filter to be 9.12 square centimeters ($cm^2$) with a standard deviation of 3.1 percent (%). During the initial phases of the sampling analysis of the 31-Mine Study, it became apparent that the variability of the deposit area was greater than originally determined. The filter area is critical to the concentration calculation. The filter area (measured in $cm^2$) is multiplied by the results of the analysis (micrograms per $cm^2$) to get the total filter loading (micrograms). While individual filter areas could be measured, it is more practical to have a uniform deposit area for the calculations. As a result, NIOSH and MSHA consulted with SKC to develop an improved filter cassette design. With the cooperation of MSHA and the technical recommendations and extensive experimental verification by NIOSH, SKC was able to modify their cassette design to produce a consistent and regular DPM deposit area, satisfactorily resolving the problem. SKC, in cooperation with MSHA and NIOSH, then modified the DPM cassette following the 31-Mine Study.

The modification was limited to replacing the foil filter capsule with a 32 millimeter (32-mm) ring. This was done to give a more uniform deposit area (8.04 $cm^2$) with negligible variability, and to accommodate two 38-mm quartz fiber filters in tandem (double filters). These double filters are assembled into a single cassette along with the impactor. The 38-mm filters also eliminate cassette leakage around the filters. These modifications were completed and incorporated into units manufactured after November 1, 2002.

The results of this project were prepared into a scientific publication, ''Sampling Results of the Improved SKC Diesel Particulate Matter Cassette,'' referenced above. This paper has been peer reviewed and was published in January 2005. The following abstract was prepared for the study results:

> Diesel particulate matter (DPM) samples from underground metal/non-metal mines are collected on quartz fiber filters and measured for carbon content using National Institute for Occupational Safety and Health Method 5040. If size selective samplers are not used to collect DPM in the presence of carbonaceous ore dust, both the ore dust and DPM will collect on the quartz filters, causing the carbon attributed to DPM to be artificially high. Because the DPM particle size is much smaller than that of mechanically generated mine dust aerosols, it can be separated from the larger mine dust aerosol by a single stage impactor. The SKC DPM cassette is a single stage impactor designed to collect only DPM aerosols in the presence of carbonaceous mine ore aerosols, which are commonly found in underground nonmetal mines. However, there is limited data on how efficiently the SKC DPM cassette can collect DPM in the presence of ore dust. In this study, we investigated the ability of the SKC DPM cassette to collect DPM while segregating ore dust from the sample. We found that the SKC DPM cassette accurately collected DPM. In the presence of carbon-based ore aerosols having an average concentration of 8 $mg/m^3$, no ore dust was detected on SKC DPM cassette filters. We did discover a problem: the surface areas of the DPM deposits on SKC DPM cassettes, manufactured prior to August 2002, were inconsistent. To correct this problem, SKC modified the cassette. The new cassette produced, with 99% confidence, a range of DPM deposit areas between 8.05 and 8.28 $cm^2$, a difference of less than 3%.

Because the design of the inlet cyclone, impaction nozzles, and the impaction plate and the flow rate did not change, the modifications to the filter assembly did not alter the collection or separation performance of the impactor. Throughout the compliance baseline sampling, the impactor has been a consistent and reliable sampling cassette.

Tandem filters were used in the oil mist and ANFO interference evaluations during the 31-Mine Study. The top filter collects the sample and the bottom filter is a dynamic blank. The dynamic blank provides a unique field blank for each DPM cassette. The use of EC as a surrogate would resolve the commenter's concern about shelf life and OC out-gassing on the filter. Shelf life and OC out-gassing are issues relative to OC measurements. These two issues do not apply to an EC measurement. Once the cassettes have been preheated during manufacturing, there is no source, other than sampling, to add EC to the sealed cassette filters.

MSHA discussed in the preamble to the 2003 NPRM issues related to interferences, field blanks and the error factor. Some comments on the 2003 NPRM still expressed concerns on interferences and further stated that the MSHA industrial hygiene studies, conducted to verify the magnitude of the interference problem, were not published or peer reviewed and should be removed from the rulemaking record. However, MSHA, organized labor, and the mining industry, through the negotiations process, jointly developed the protocol for conducting the 31-Mine Study. All of the parties agreed on the protocol following numerous discussions among industry, labor, and government experts, and had an opportunity to comment and make changes to the document. Thereafter, MSHA conducted the study, following the agreed upon protocol, and published its results. Before publication, the report was peer reviewed by NIOSH. Industry was given an opportunity to publish their separate results simultaneously with the government. During this rulemaking, industry submitted to MSHA through the notice and comment process their conclusions on the 31-Mine Study in a report titled, ''Technical and Economic Feasibility of DPM Regulations.'' The industry report is contained in the rulemaking record, and was considered by MSHA in reaching determinations for this final rule.

(1) Interferences

In response to the question on whether there are interferences when EC is used as the surrogate, some commenters stated that interferences were thoroughly discussed in the preamble to the 2001 final rule, and that reasonable practices to avoid them were stipulated in the rule itself. According

to these commenters, this problem should not be revisited in this rulemaking.

Other commenters maintained that the 31-Mine Study did not contain the necessary protocols to address all potential interferences. Thus, in their view, MSHA does not have all the data required to answer this question. More specifically, some commenters stated that carbonaceous particulate in host rock has a smaller diameter than the impactor cut point and so, may contaminate EC samples. These commenters then concluded that MSHA should propose additional research and seek comments on the research before concluding that sampling EC with an impactor will eliminate all interference problems. However, no data were presented to support this claim or conclusion. Commenters submitted no new information relative to interferences in response to the 2003 NPRM.

(2) Field Blanks

A field blank is an unexposed control filter meant to account for background interferences and systematic contamination in the field, spurious effects due to manufacturing and storage of the filter, and systematic analytical errors. The tandem filter arrangement in the sample cassette provides a primary filter for collecting an air sample and a second filter, behind (after) the primary filter, which provides a separate control filter for each sample. This is a much more flexible method of sampling for the mining industry, since it eliminates the need to send a separate control filter to the analytical lab. MSHA informed the public of its intentions to adjust the EC result obtained for each sample by the result obtained for the corresponding media blank when MSHA measures for compliance purposes. When MSHA conducts compliance measurements, MSHA will adjust the result obtained for each corresponding sample by the field blank (tandem filter) result. No comments or information related to field blanks were submitted to MSHA in response to the 2003 NPRM.

In its comments on the 2002 ANPRM, NIOSH noted that two types of blanks, media and field, are normally used for quality assurance purposes. A media blank accounts for systematic contamination that may occur during manufacturing or storage. A field blank accounts for possible systematic contamination in the field. NIOSH does not recommend use of field blanks when EC is the surrogate. This is because EC measurements are not subject to sources of contamination in the field that would affect OC and TC results. Quartz-fiber filters are prone to OC vapor contamination in the field and to contamination by less volatile OC (such as oils) during handling. However, such contamination is irrelevant when EC is the surrogate.

(3) Error Factor

MSHA intends to cite a violation of the $DPM_{EC}$ exposure limit only when MSHA has valid evidence that a violation actually occurred. As with all other measurement-based M/NM compliance determinations, MSHA will issue a citation only if a measurement demonstrates noncompliance with at least 95% confidence. MSHA will achieve this 95% confidence level by comparing each EC measurement to the EC exposure limit multiplied by an appropriate error factor. Generally, an error factor is used to compensate for certain known inaccuracies in the sampling and analytical process, including such things as the reliability of sampling equipment and precision of analytical instrumentation. MSHA will continue to determine that an overexposure has occurred when a sample exceeds the interim limit times the error factor.

In this rulemaking, MSHA is discussing the procedure used to obtain the error factor. This procedure is further discussed on the MSHA web site at *www.msha.gov* under, ''Single Source Page for Metal and Nonmetal Diesel Particulate Matter Regulations.'' Error factors are based on sampling and analytic errors. The manufacturers of sampling devices thoroughly investigate and quantify the error factors for their devices. While MSHA does not frequently change an error factor, it retains that latitude should significant changes to either analytical or sampling technology occur.

The formula for the error factor was based on three factors involved in making an eight-hour equivalent full-shift measurement of EC concentration using NIOSH Method 5040: (1) Variability in air volume (*i.e.*, pump performance relative to the nominal airflow of 1.7 L/min); (2) variability of the deposit area of particles on the filter ($cm^2$); and (3) accuracy of the laboratory analysis of EC density within the deposit ($\mu g/cm^2$). Modifications made to the sampler since the time of the 31-Mine Study have no bearing on the first and third of these factors. Variability of the filter deposit area was represented by a 3.1% coefficient of variation, based on an experiment carried out before the foil filter capsule in the sampling cassette was replaced by a 32-mm ring. Measurements subsequent to introduction of the ring show that variability of the filter deposit area is now less than 3.1% (Noll, J. D., *et al*, ''Sampling Results of the Improved SKC Diesel Particulate Matter Cassette''). This change slightly reduces the error factor stipulated for EC measurements, but not by enough to be of any practical significance.

MSHA's error factor model accounts for the joint and related variability in laboratory analysis, and combines that variability with pump flow rate, sample collection size, and other sampling and analytic variables. MSHA was then able to determine the appropriate error factor for EC samples based on a statistically strong database.

The analytical method (NIOSH 5040) relies on a punch taken from inside the deposit area on the sample filter. In effect, the punch is a sample of the dust sample. To account for uniformity in the distribution of DPM deposited on the filter, as reflected by different possible locations at which a punch might be extracted, MSHA compared two punches taken from different locations on the same filter to evaluate the accuracy of the analytical method. Therefore, variability between punch results due to their location on the filter is also included in the error factor as calculated by MSHA.

Commenters to the 2003 NPRM further questioned whether the NIOSH Method 5040 has been commercially tested. As in the preamble to the 2003 NPRM, MSHA has discussed in detail its findings regarding the NIOSH Method 5040 in this section. NIOSH's peer review of the 31-Mine Study also concludes that the analytical method specified by the diesel standard gives an accurate measure of the TC content of a filter sample. NIOSH confirmed this position by letter of February 8, 2002, in which NIOSH stated that,

> MSHA is following the procedures of NIOSH Method 5040, based on our review of MSHA P13 (MSHA's protocol for sample analysis by NIOSH Method 5040) and a visit to the MSHA laboratory.

## V. Compliance Assistance

### *A. Baseline Sampling Summary*

Under the second partial DPM settlement agreement, MSHA agreed to provide compliance assistance to the M/NM underground mining industry for a one-year period from July 20, 2002 through July 19, 2003. As part of its compliance assistance activities, MSHA agreed to conduct baseline sampling of miners' personal exposures at every underground mine covered by the 2001 final rule.

Our baseline sampling began in October 2002 and continued through October 2003. During this period a total of 1,194 valid baseline samples were collected. A total of 183 underground M/NM mines are represented by this analysis. The number of samples per mine range from one to twenty. All 874 valid baseline sampling results in the analysis published in the preamble of the 2003 NPRM are included in this updated analysis. MSHA is including 320 additional valid samples because MSHA decided to continue to conduct baseline sampling after July 19, 2003 in response to mine operators' concerns. MSHA has analyzed all baseline samples, and updated its analysis. Some of these mines were either not in operation or were implementing major changes to ventilation systems during the original baseline period. MSHA is including supplementary samples from seasonal and intermittent mines, mines that were under-represented, and mines that were not represented in the analysis published in the preamble to the 2003 NPRM. Sixty mines included in the former analysis had additional samples taken during the extended assistance period. There are 12 mines in this updated analysis that were not represented in the 2003 analysis. The results of this sampling were used by MSHA in this preamble to estimate current DPM exposure levels in underground M/NM mines using diesel equipment. These sampling results also assist mine operators in developing compliance strategies based on actual exposure levels.

This section summarizes analytical results of personal sampling for DPM collected during compliance assistance. There are a total of 1,206 samples. However, 12 samples are invalid due to abnormal sample deposits, broken cassettes or filters, contaminated backup pads, instrument failure or pump failure. Table V–1 lists the frequencies of invalid samples within each commodity.

The mines that were sampled produce clay, sand, gypsum, copper, gold, platinum, silver, gem stones, dimension marble, granite, lead-zinc, limestone, lime, potash, molybdenum, salt, trona, and other miscellaneous metal or nonmetal ores. These commodities were grouped into four general categories for calculating summary statistics: Metal, stone, trona, and other nonmetal (N/M) mines. These categories were selected to be consistent with the categories used for analysis of data for the 31-Mine Study. Most commodities are well represented in this analysis with the average number of valid samples per mine ranging from 6.0 to 8.2 (average across all mines is 6.5 samples per mine). The average number of samples per mine classified as ''Gold Ore Mining, N.E.C.'' increased from an average of 2.0 samples per mine published in the 2003 NPRM preamble to an average of 4.6 samples in this data set. Approximately 79% of all mines sampled during the assistance period have four or more results from DPM sampling in this analysis. Table V–3 lists the number of samples for each category of specific commodity. Average number of samples for more general commodity groups is listed in Table V–2.

MSHA used the same sampling strategies for collecting baseline samples as it intends to use for collecting samples for enforcement purposes. These sampling procedures are described in the *Metal and Nonmetal Health Inspection Procedures Handbook (PH90–IV–4)*, Chapter A, ''Compliance Sampling Procedures'' and Draft Chapter T, ''Diesel Particulate Matter Sampling.'' Chapter A includes detailed guidelines for selecting and obtaining personal samples for various contaminants. All personal samples were collected in the miner's breathing zone and for the miner's full shift regardless of the number of hours worked. For the 1,194 valid personal samples, 85% were collected for at least eight hours. TC and EC levels, as well as DPM levels, are reported in units of micrograms per cubic meter for an 8-hour full shift equivalent.

MSHA collected DPM samples with SKC submicron dust samplers that use Dorr-Oliver cyclones and submicron impactors. The samples were analyzed either at MSHA's Pittsburgh Safety and Health Technology Center, Dust Division Laboratory or at the Clayton Laboratory using MSHA Method P–13 (NIOSH Analytical Method 5040, *NIOSH Manual of Analytical Methods (NMAM), Fourth Edition*, September 30, 1999) for determining the TC content. Each sample was analyzed for organic, elemental, and carbonaceous carbon and calculated TC. Raw analytical results from both laboratories as well as administrative information about the sample were stored electronically in MSHA's Laboratory Information Management System.

If a raw carbon result was greater than or equal to 30 μg/cm² of EC or 40 μg/cm² of TC from the exposed filter loading, then the analysis was repeated using a separate punch of the same filter. The results of these two analyses were then averaged. The companion tandem blank was also tested for the same analyses. Otherwise, an unexposed filter from the same manufacturer's lot was used to correct for background levels. In the event the initial TC result was greater than $100_{TC}$ μg/cm², a smaller punch of the same exposed filter (in duplicate and with the corresponding blank) was taken and used in the analysis. Blank-corrected averaged results were used in the analysis when the sample was tested in duplicate.

The equation used to calculate a 480-minute (8-hour) full shift equivalent (FSE) exposure of TC is Total Carbon Concentration =

$$\frac{[\mathrm{EC} \times 1.3] \text{ or } [\mathrm{OC}+\mathrm{EC}]\left(\mu\mathrm{g/cm^2}\right) \times \mathrm{A}\left(\mathrm{cm^2}\right) \times 1{,}000\left(\mathrm{L/m^3}\right)}{\text{Flow Rate}\left(\mathrm{Lpm}\right) \times 480 \text{ (minutes)}}$$

Where:

EC = The corrected elemental carbon concentration measured in the thermal/optical carbon analyzer, μg/cm²,

OC = The corrected organic carbon concentration measured in the thermal/optical carbon analyzer, μg/cm²,

A = The surface area of the deposit on the filter media used to collect the sample, cm²,

Flow Rate = Flow rate of the air pump used to collect the sample measured in Liters per minute, and

480 minutes = Standardized eight-hour work shift.

All levels of carbon or DPM are reported in 8-hour full shift equivalent TC concentrations measured in μg/m³.

Because personal sampling was conducted and no attempt was made to avoid interference from cigarette smoke or other OC sources, TC was also calculated using the formula prescribed in the second partial DPM settlement agreement:

Total Carbon Concentration = EC × 1.3.

MSHA agreed to use the lower of the two values (EC × 1.3 or EC + OC) for enforcement until a final rule is published reflecting EC as the surrogate.

The electronic records of the 1,194 samples available for analysis were reviewed for inconsistencies. Internally inconsistent or extreme values were questioned, researched, and verified. Although no samples were invalidated as a result of the administrative verification, 12 samples (1.0%) were removed from the data set for reasons unrelated to the values obtained. The reasons for invalidating these samples are listed in Table V–1. These samples were subjected to the same laboratory quality assessments as samples collected for compliance purposes. Accordingly, MSHA has included 1,194 samples from miners in the analyses. Table V–2 is a list of the number of valid samples by commodity group.

TABLE V–1.—REASONS FOR EXCLUDING SAMPLES.

| Reason for excluding from analysis | Metal | Stone | Trona | Other N/M | Total |
|---|---|---|---|---|---|
| Abnormal Sample Deposit | 0 | 1 | 0 | 0 | 1 |
| Cassette/Filter Broken | 0 | 2 | 0 | 1 | 3 |
| Contaminated Backup Pad | 1 | 0 | 0 | 0 | 1 |
| Instrument Failure | 1 | 1 | 0 | 0 | 2 |
| Pump Failed | 1 | 4 | 0 | 0 | 5 |
| Total | 3 | 8 | 0 | 1 | 12 |

TABLE V–2.—NUMBER OF MINES AND VALID SAMPLES, BY COMMODITY GROUP.

| Commodity group | Number of mines | Number of valid samples | Average number of valid samples by mine |
|---|---|---|---|
| Metal | 40 | 284 | 7.1 |
| Stone | 115 | 689 | 6.0 |
| Trona | 4 | 25 | 6.3 |
| Other N/M | 24 | 196 | 8.2 |
| Total | 183 | 1,194 | 6.5 |

Table V–3 lists the number of samples collected by specific commodities and sorted by average number of samples per mine. Although MSHA made efforts to sample all underground M/NM mines covered by this rulemaking within the specified time frame, several mines have few or no samples for DPM in this analysis. Some M/NM mining operations are seasonal in that they are operated intermittently or operate at less than full production during certain times. These types of variable production schedules limited efforts to collect compliance assistance samples. MSHA extended its period of baseline sampling especially to incorporate into its analysis those mines with a low sampling frequency or where no samples were collected as of March 26, 2003.

TABLE V–3.—NUMBER OF VALID SAMPLES PER MINE FOR SPECIFIC COMMODITIES

| Specific commodity | No. of mines | No. of samples | Average samples per mine |
|---|---|---|---|
| Gemstones Mining, N.E.C | 2 | 5 | 2.5 |
| Dimension Marble Mining | 3 | 9 | 3.0 |
| Limestone | 2 | 6 | 3.0 |
| Talc Mining | 1 | 3 | 3.0 |
| Uranium-Vanadium Ore Mining, N.E.C | 1 | 3 | 3.0 |
| Gold Ore Mining, N.E.C | 19 | 87 | 4.6 |
| Construction Sand & Gravel Mining, N.E.C | 1 | 5 | 5.0 |
| Crushed & Broken Sandstone Mining | 1 | 5 | 5.0 |
| Hydraulic Cement | 1 | 5 | 5.0 |
| Lime, N.E.C | 4 | 20 | 5.0 |
| Copper Ore Mining, N.E.C | 2 | 11 | 5.5 |
| Dimension Limestone Mining | 3 | 18 | 6.0 |
| Crushed & Broken Limestone Mining, N.E.C | 90 | 550 | 6.1 |
| Crushed & Broken Marble Mining | 4 | 25 | 6.3 |
| Trona Mining | 4 | 25 | 6.3 |
| Crushed & Broken Stone Mining, N.E.C | 4 | 28 | 7.0 |
| Gypsum Mining | 4 | 29 | 7.3 |
| Salt Mining | 14 | 122 | 8.7 |
| Clay, Ceramic & Refractory Minerals, N.E.C | 1 | 9 | 9.0 |
| Miscellaneous Metal Ore Mining, N.E.C | 1 | 9 | 9.0 |
| Lead-Zinc Ore Mining, N.E.C | 10 | 96 | 9.6 |
| Platinum Group Ore Mining | 2 | 20 | 10.0 |
| Potash Mining | 3 | 30 | 10.0 |
| Molybdenum Ore Mining | 2 | 22 | 11.0 |

TABLE V–3.—NUMBER OF VALID SAMPLES PER MINE FOR SPECIFIC COMMODITIES—Continued

| Specific commodity | No. of mines | No. of samples | Average samples per mine |
|---|---|---|---|
| Silver Ore Mining, N.E.C | 3 | 36 | 12.0 |
| Miscellaneous Nonmetallic Minerals, N.E.C | 1 | 16 | 16.0 |
| Average of all samples | 183 | 1,194 | 6.5 |

There are 63 different occupations in underground M/NM mines represented in this analysis. The most frequently sampled occupations are Blaster, Drill Operator, Front-end Loader Operator, Truck Driver, Scaling (Mechanical), and Mechanic. Table V–4 lists the number of valid samples by occupation and commodity group. Only occupations with 14 or more total samples are listed individually. Occupations with fewer samples were aggregated into a combined group for this table.

TABLE V–4.—VALID SAMPLES, BY OCCUPATION AND MINE CATEGORY.

| Occupation | Metal | Stone | Trona | Other N/M | Total |
|---|---|---|---|---|---|
| Truck Driver | 87 | 152 | 0 | 13 | 252 |
| Front-end Loader Operator | 40 | 149 | 6 | 19 | 214 |
| Blaster, Powder Gang | 12 | 98 | 0 | 24 | 134 |
| Scaling (mechanical) | 1 | 66 | 0 | 13 | 80 |
| Drill Operator, Rotary | 3 | 63 | 0 | 9 | 75 |
| Drill Operator, Jumbo Perc. | 10 | 19 | 0 | 9 | 38 |
| Mechanic | 7 | 15 | 0 | 12 | 34 |
| Complete Load-Haul-Dump | 7 | 2 | 0 | 23 | 32 |
| Utility Man | 6 | 4 | 15 | 4 | 29 |
| Scaling (hand) | 4 | 20 | 0 | 2 | 26 |
| Mucking Mach. Operator | 19 | 1 | 0 | 3 | 23 |
| Roof Bolter, Rock | 5 | 9 | 0 | 7 | 21 |
| Drill Operator, Rotary Air | 1 | 19 | 0 | 1 | 21 |
| Miner, Drift | 16 | 1 | 0 | 0 | 17 |
| Crusher Oper/Worker | 0 | 13 | 0 | 2 | 15 |
| Miner, Stope | 14 | 0 | 0 | 0 | 14 |
| All Others Combined | 52 | 58 | 4 | 55 | 169 |
| Totals | 284 | 689 | 25 | 196 | 1,194 |

TC levels calculated by EC × 1.3 were lower than TC levels calculated by OC + EC in 858 (72%) of the 1,194 baseline samples. Of the 336 samples where TC = OC + EC was the lower value, 68% of the TC = EC × 1.3 values were within 12% of the TC = OC + EC value. Table V–5 summarizes the results of the baseline samples when determining the TC level using either EC × 1.3 or OC + EC. Approximately 6.4% of the paired results did not concur with respect to the $400_{TC}$ μg/m³ standard when measuring TC by the two calculations (OC + EC vs. EC × 1.3). Approximately 19.3% of the samples were above the $400_{TC}$ μg/m³ interim concentration limit when using TC = EC × 1.3 and approximately 22.7% were above the concentration limit when using TC = OC + EC. There is 93.6% concurrence between the two methods of calculating TC and comparing the calculations to the $400_{TC}$ μg/m³ interim concentration limit.

TABLE V–5.—COMPARISON OF RESULTS WITH $400_{TC}$ μG/M³ CALCULATING TC BY OC + EC OR EC × 1.3

| All valid samples | EC × 1.3 | | Total |
|---|---|---|---|
| | < $400_{TC}$ μg/m³ | > $400_{TC}$ μg/m³ | |
| OC+EC. | | | |
| < $400_{TC}$ μg/m³ | 905 (75.8%) | 18 (1.5%) | 923 (77.3%) |
| > $400_{TC}$ μg/m³ | 59 (4.9%) | 212 (17.8%) | 271 (22.7%) |
| Total | 964 (80.7%) | 230 (19.3%) | 1,194 (100.0%) |

Table V–6 lists the 26 occupations found to have at least one sample in which the level of TC was over the $400_{TC}$ μg/m³ interim concentration limit (TC = EC × 1.3). Table V–6 is sorted by the median (middle) TC result. The median is reported because it is a more robust measure of the middle value. Changing a single value won't change the median very much. In contrast, the value of the mean can be strongly affected by a single value that

is very low or very high. The table also lists the minimum value, maximum value, and the total number of valid samples for these occupations. TC values varied widely among all miners' occupations.

TABLE V–6.—OCCUPATIONS WITH AT LEAST ONE SAMPLE GREATER THAN OR EQUAL TO $400_{TC}$ μG/M³ (TC = EC× 1.3)

| Occupation | Total samples | TC, μg/m³ | | |
|---|---|---|---|---|
| | | Minimum | Median | Maximum |
| Diamond Drill Operator | 1 | 2,030 | 2,030 | 2,030 |
| Ground Control/Timberman | 2 | 368 | 545 | 722 |
| Washer Operator | 4 | 353 | 438 | 808 |
| Engineer | 1 | 438 | 438 | 438 |
| Roof Bolter, Mounted | 12 | 98 | 335 | 1,063 |
| Mucking Mach. Operator | 23 | 15 | 334 | 872 |
| Miner, Stope | 14 | 100 | 283 | 622 |
| Cleanup Man | 2 | 66 | 283 | 499 |
| Scoop-Tram Operator | 7 | 14 | 272 | 583 |
| Drill Operator, Rotary Air | 21 | 0 | 240 | 1,353 |
| Miner, Drift | 17 | 16 | 228 | 1,459 |
| Blaster, Powder Gang | 134 | 6 | 227 | 1,340 |
| Belt Crew | 8 | 26 | 225 | 502 |
| Roof Bolter, Rock | 21 | 63 | 223 | 1,310 |
| Truck Driver | 252 | 0 | 211 | 1,581 |
| Shuttle Car Operator (diesel) | 3 | 95 | 201 | 419 |
| Complete Load-Haul-Dump | 32 | 19 | 189 | 824 |
| Drill Operator, Jumbo Perc | 38 | 5 | 179 | 1,098 |
| Drill Operator, Rotary | 75 | 3 | 171 | 1,109 |
| Motorman | 8 | 59 | 168 | 419 |
| Front-end Loader Operator | 214 | 0 | 158 | 2,979 |
| Scaling (mechanical) | 80 | 0 | 139 | 1,246 |
| Supervisor, Co. Official | 13 | 1 | 130 | 856 |
| Utility Man | 29 | 29 | 94 | 991 |
| Scaling (hand) | 26 | 18 | 87 | 2,013 |
| Mechanic | 34 | 0 | 84 | 420 |

Table V–7 and Chart V–1 provide the percent of overexposures among the four commodity groups. Chart V–2 provides the number of overexposures among the four commodity groups. The metal mines have the highest percent of overexposures followed by stone, then other non-metal mines. For all samples combined, 19.3% were above $400_{TC}$ μg/m³.

TABLE V–7.—BASELINE SAMPLES BY COMMODITY (TC = EC × 1.3)

| Commodity | Number < $400_{TC}$ μg/m³ | Number > $400_{TC}$ μg/m³ | Total Samples | Percent > $400_{TC}$ μg/m³ |
|---|---|---|---|---|
| Metal | 195 | 89 | 284 | 31.3 |
| Stone | 571 | 118 | 689 | 17.1 |
| Other N/M | 174 | 22 | 196 | 11.2 |
| Trona | 24 | 1 | 25 | 4.0 |
| All Mines | 964 | 230 | 1,194 | 19.3 |

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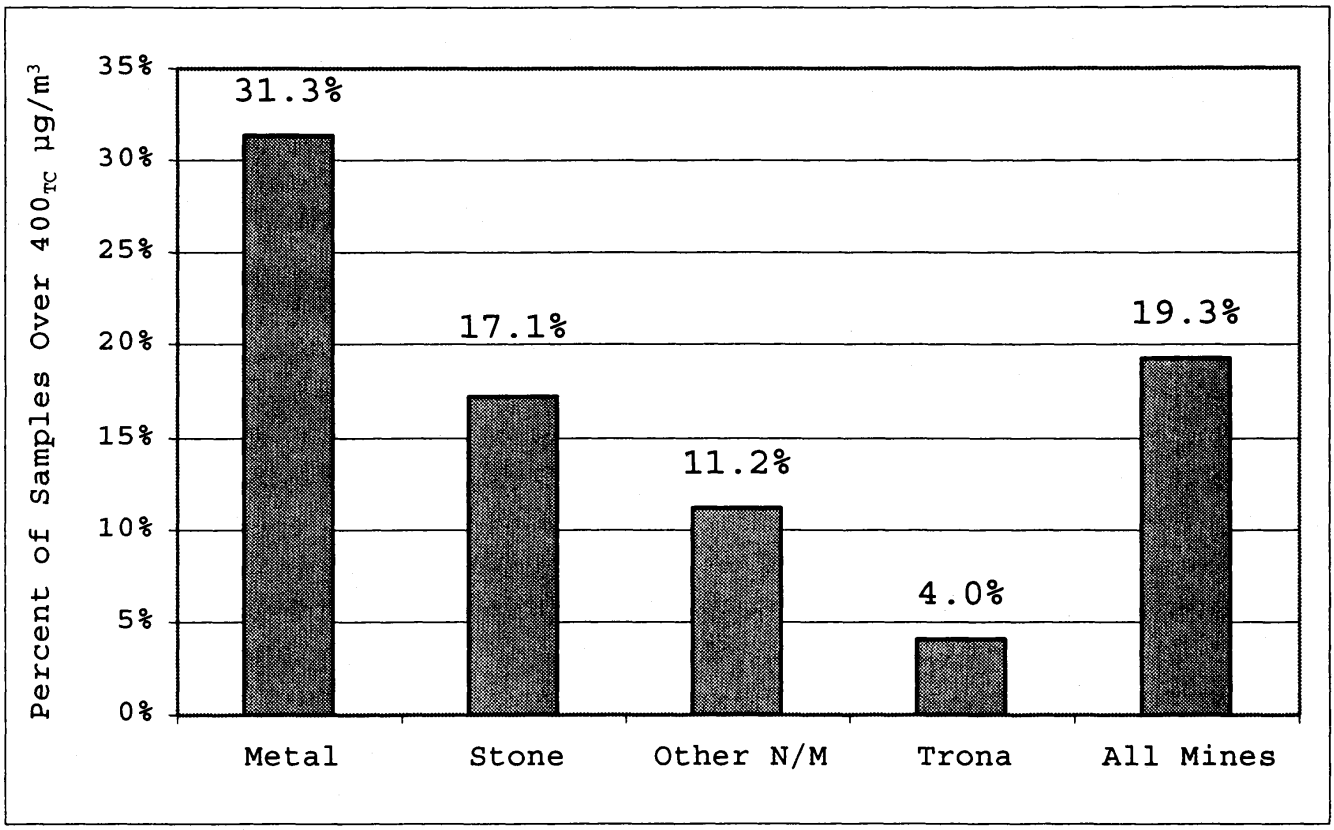


**Chart V-1: Percent of Overexposures by Commodity ($400_{TC}$ µg/m$^3$, TC=EC x 1.3)**

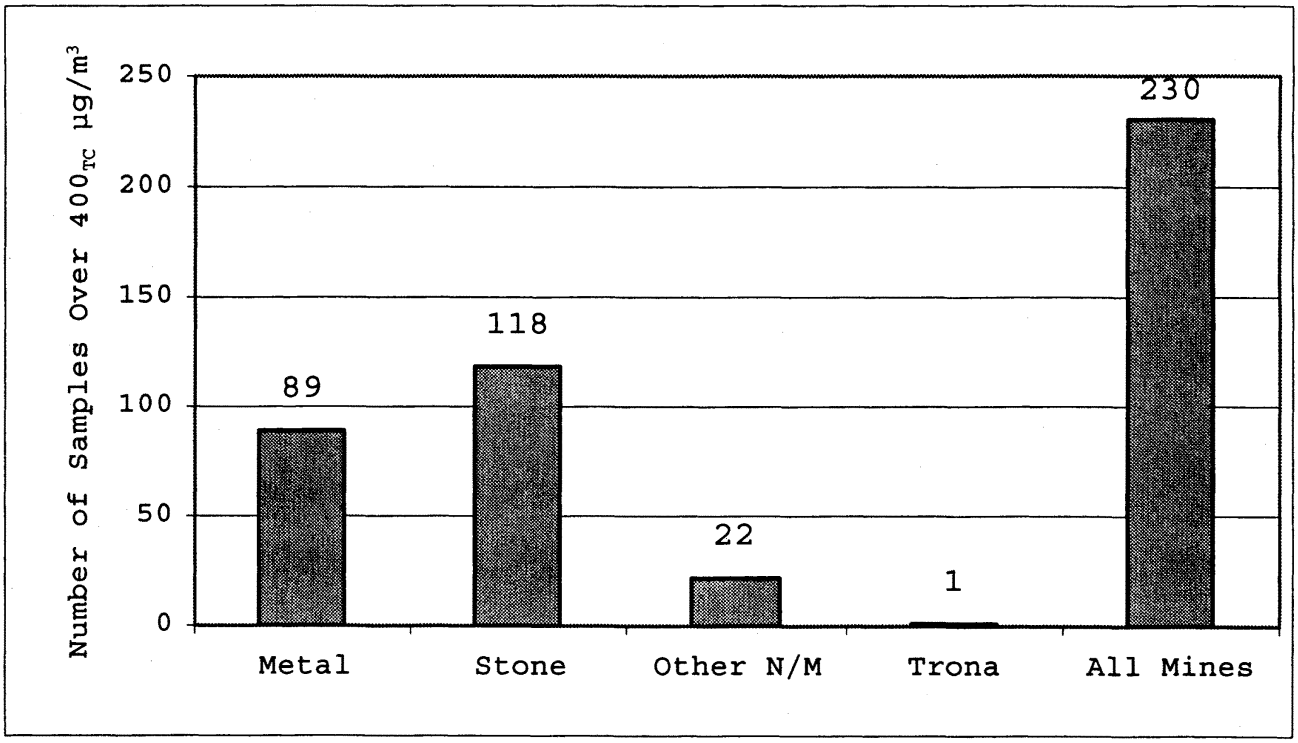


**Chart V-2: Frequency of Overexposures by Commodity ($400_{TC}$ µg/m$^3$, TC=EC x 1.3)**

Chart V–3 shows the number of mines with a specific number of overexposures. Examination of the frequency of mines with one or more overexposures shows that 68 mines (37%) are in this category. There were no mines with more than 12 samples $>400_{TC}$ μg/m³ for that mine.

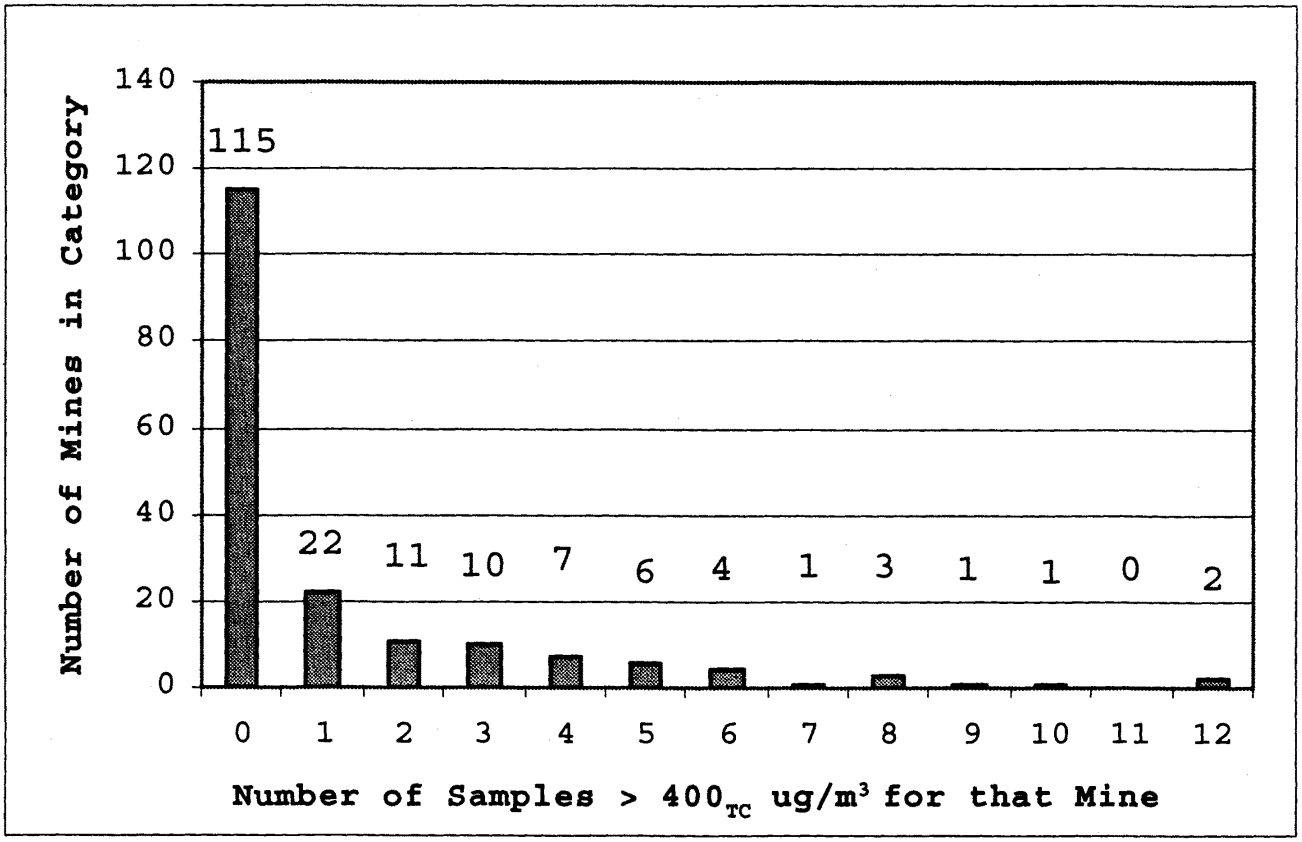


**Chart V-3: Number of Mines With Specified Number of Samples > $400_{TC}$ μg/m³ (TC=EC x 1.3)**

At four of the mines, all samples taken during the assistance period were above $400_{TC}$ μg/m³. Between one and ten samples were taken at each of these four mines. No overexposures were found in 115 (63%) of the mines sampled. (See Chart V–4.)

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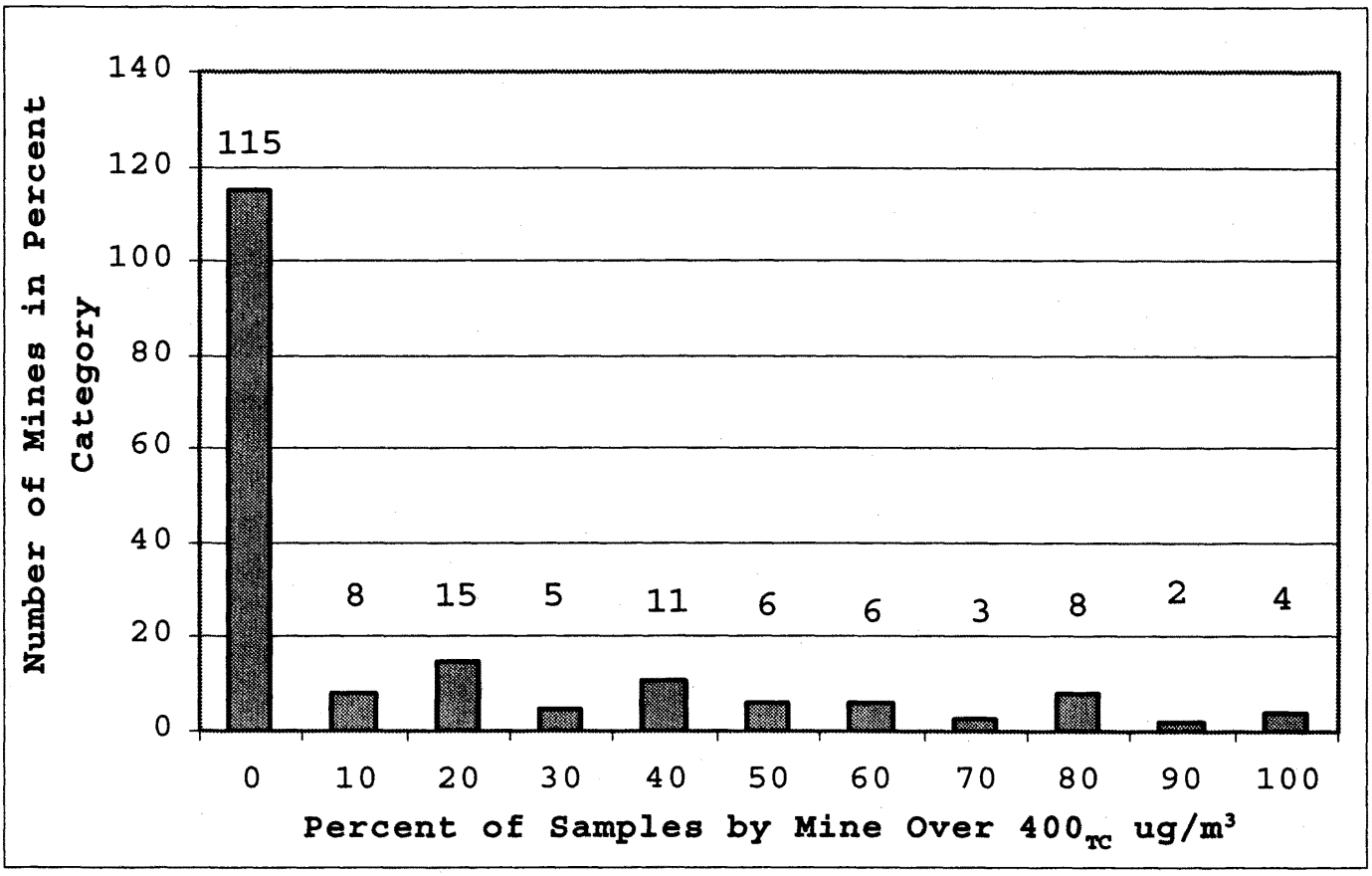
(See Chart V-4.)




## Chart V-4: Number of Mines by Percentage of Overexposures for that Mine

Tables V–8 and V–9 summarize sample statistics by commodity for TC calculated by TC = EC × 1.3 and TC = EC + OC respectively. Overall, the mean TC as calculated by EC × 1.3 is 255 μg/m³. The median level is 174 μg/m³. The mean TC level by OC + EC is 293 μg/m³ and the median level is 226 μg/m³. Individual exposure levels of TC vary widely within all commodities and most mines. The commodity groupings reported in Tables V–8 and V–9 were chosen to be consistent with those reported in the 31-Mine Study and the Quantitative Risk Assessment (QRA) for this rule.

The mean and median TC values for each group, using EC × 1.3, are lower than the interim compliance limit of 400 μg/m³. The mean (median) TC value for metal mines is 356(271) μg/m³. The mean (median) for stone mines is 236(149), other non-metal mines is 194(148), and trona mines is 105(82) μg/m³. Table V–8 lists additional statistics for TC values compiled by commodity.

TABLE V–8.—AVERAGE LEVELS OF TC BY COMMODITY MEASURED IN μG/M³ (EC × 1.3)

[Estimated 8-hour Full Shift Equivalent TC Concentration (μg/m³)]

| TC = EC × 1.3 | Metal | Stone | Other N/M | Trona | All Mines |
|---|---|---|---|---|---|
| No. of Samples | 284 | 689 | 196 | 25 | 1,194 |
| Maximum | 2,026 | 2,979 | 960 | 407 | 2,979 |
| Median | 271 | 149 | 148 | 82 | 174 |
| Mean | 356 | 236 | 194 | 105 | 255 |
| Std. Error | 19 | 10 | 12 | 16 | 8 |
| 95% CI Upper | 392 | 256 | 217 | 138 | 270 |
| 95% CI Lower | 319 | 216 | 172 | 73 | 239 |

The mean and median TC values for each group of mines as calculated by OC + EC are also lower than the interim compliance limit of 400 μg/m³. The mean (median) TC value for metal mines is 370(313) μg/m³. The mean for

stone mines is 282(209), other non-metal mines is 238(191) and for trona mines is 140(126) μg/m³. Table V–9 lists additional statistics for TC values compiled by commodity group.

TABLE V–9.—AVERAGE LEVELS OF TC BY COMMODITY GROUP MEASURED IN μG/M³ (OC + EC)

[Estimated 8-hour Full Shift Equivalent TC Concentration (μg/m³)]

| TC = OC + EC | Metal | Stone | Other N/M | Trona | All Mines |
|---|---|---|---|---|---|
| No. of Samples | 284 | 689 | 196 | 25 | 1,194 |
| Maximum | 2,045 | 2,796 | 1,230 | 344 | 2,796 |
| Median | 313 | 209 | 191 | 126 | 226 |
| Mean | 370 | 282 | 238 | 140 | 293 |
| Std. Error | 17 | 11 | 12 | 12 | 8 |
| 95% CI Upper | 404 | 303 | 263 | 165 | 308 |
| 95% CI Lower | 336 | 261 | 214 | 115 | 278 |

Tables V–10, V–11, and V–12 show summary statistics for whole DPM exposures for the baseline sampling and the 31-Mine Study. For baseline sampling whole DPM was calculated by EC × 1.3 × 1.25 and by (OC + EC) × 1.25. The 1.25 factor represents the assumption that TC comprises 80% of whole DPM. The other 20% includes the solid aerosols such as ash particulates, metallic abrasion particles, sulfates and silicates. The vast majority of these particulates are in the sub-micron range.

Section VI–B discusses the relationship between EC and TC. For whole DPM concentrations, the mean (median) value is 444(339) μg/m³ for metal mines, 295(186) for stone mines, 243(185) for other non-metal mines, and 132(102) μg/m³ for trona mines. The whole DPM exposures for Table V–11 were calculated as (OC + EC) × 1.25.

TABLE V–10.—BASELINE WHOLE DPM CONCENTRATIONS (EC × 1.3 × 1.25, μG/M³), BY MINE CATEGORY

[Estimated 8-hour Full Shift Equivalent Whole DPM Concentration (μg/m³)]

| DPM = EC × 1.3 × 1.25 | Metal | Stone | Other N/M | Trona | All Mines |
|---|---|---|---|---|---|
| Number of Samples | 284 | 689 | 196 | 25 | 1,194 |
| Maximum | 2,532 | 3,724 | 1,200 | 509 | 3,724 |
| Median | 339 | 186 | 185 | 102 | 218 |
| Mean | 444 | 295 | 243 | 132 | 318 |
| Std. Error | 23 | 13 | 15 | 20 | 10 |
| 95% CI Upper | 490 | 320 | 272 | 173 | 338 |
| 95% CI Lower | 399 | 270 | 214 | 91 | 299 |

TABLE V–11.—BASELINE WHOLE DPM CONCENTRATIONS ((EC + OC) × 1.25, μG/M³), BY MINE CATEGORY

[Estimated 8-hour Full Shift Equivalent Whole DPM Concentration (μg/m³)]

| DPM = (EC + OC) × 1.25 | Metal | Stone | Other N/M | Trona | All Mines |
|---|---|---|---|---|---|
| Number of Samples | 284 | 689 | 196 | 25 | 1,194 |
| Maximum | 2,556 | 3,495 | 1,538 | 430 | 3,495 |
| Median | 392 | 262 | 238 | 158 | 283 |
| Mean | 463 | 353 | 298 | 175 | 366 |
| Std. Error | 21 | 13 | 16 | 15 | 10 |
| 95% CI Upper | 505 | 379 | 329 | 206 | 385 |
| 95% CI Lower | 421 | 327 | 267 | 144 | 347 |

The mean whole DPM concentration for metal and stone mines (as measured by (EC + OC) × 1.25) was significantly lower during baseline compliance assistance sampling than the levels measured during the 31-Mine Study.

TABLE V–12.—31-MINE STUDY WHOLE DPM CONCENTRATIONS (μG/M³) BY MINE CATEGORY

[Estimated 8-hour Full Shift Equivalent Whole DPM Concentration (μg/m³)]

| DPM = (EC + OC) × 1.25 | Metal | Stone | Other N/M | Trona |
|---|---|---|---|---|
| Number of Samples | 116 | 105 | 83 | 54 |
| Maximum | 2,581 | 1,845 | 1,210 | 331 |
| Median | 491 | 331 | 341 | 82 |
| Mean | 610 | 466 | 359 | 94 |
| Std. Error | 45 | 36 | 27 | 9 |
| 95% CI Upper | 699 | 537 | 412 | 113 |
| 95% CI Lower | 522 | 394 | 306 | 75 |

Chart V–5 compares the means from Tables V–10, V–11 and V–12. The mines selected in the 31-Mine Study (Table V–12) were not randomly selected, and the study is, therefore, not considered representative of the underground M/NM mining industry. Additionally, the industry has continued to change the diesel-powered fleet to low emission engines that reduce DPM exposure. Workers inside equipment cabs were not sampled during the 31-Mine Study due to possible interference from cigarette smoke. During baseline compliance assistance sampling, however, personal samples were taken on miners inside cabs.

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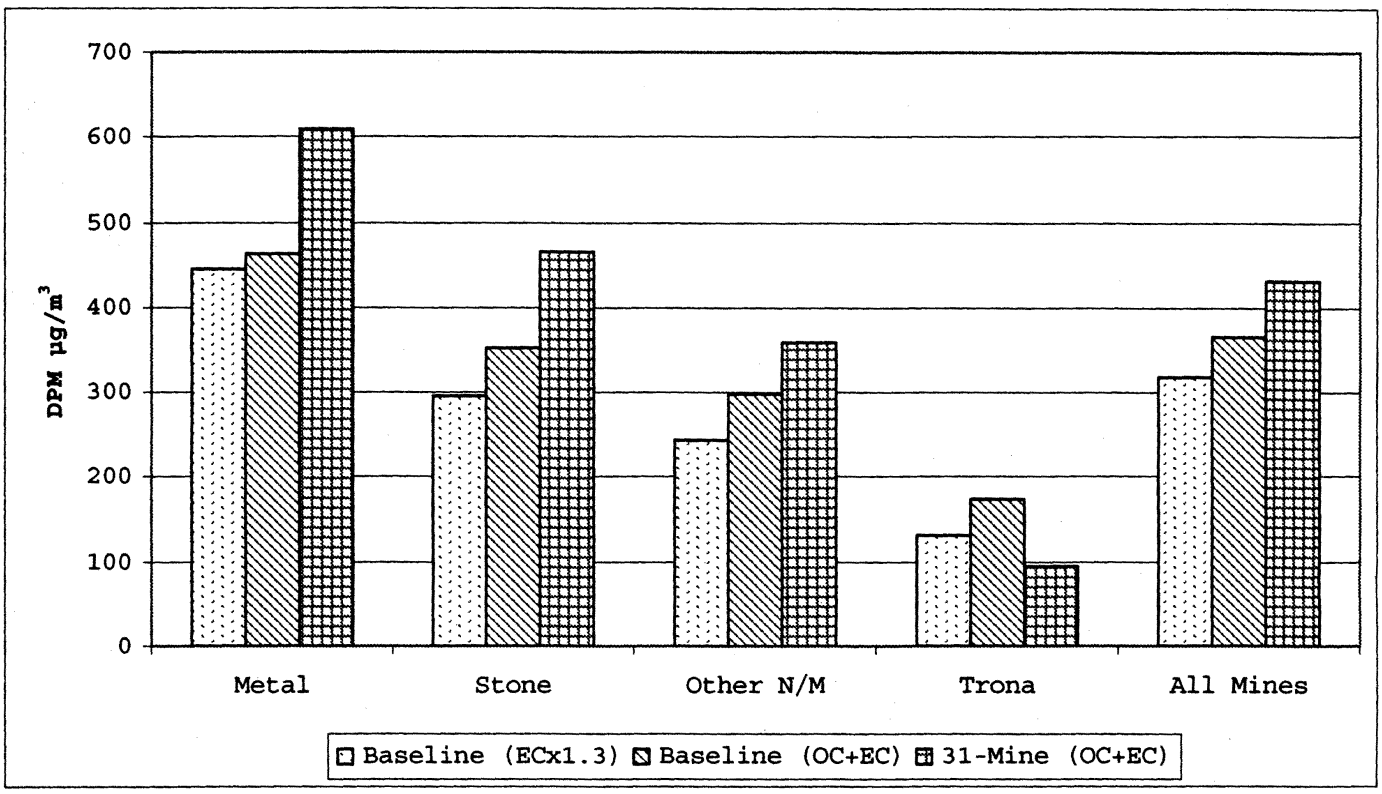


## Chart V-5. Comparison of Mean DPM Levels from Baseline Sampling and the 31-Mine Study

MSHA received several comments on the baseline sampling. Some commenters stated that many mines were sampled in a manner that rendered results exceedingly low and not representative of operating conditions. Commenters also stated that the results of independent DPM sampling conducted by operators indicate MSHA's results underestimate DPM exposure. These commenters did not provide data or analyses from mine operators' sampling programs to substantiate their claim.

MSHA compliance specialists collected baseline samples in the same manner they have been instructed to use for collecting samples for enforcement purposes. It is expected that personal exposure to DPM will fluctuate due to variations in day to day operations in a mine. Reported levels of DPM are representative of the exposures of the highest risk miners identified during compliance assistance. In an ideal situation, and with unlimited resources, every potentially exposed miner would be individually sampled. It is not necessary or practical, however, to sample all miners on a mine property in order to evaluate personal exposures. Suspected and potential health hazards may be reasonably and adequately evaluated by sampling the maximum risk miner in a work area. The maximum risk miner is the one expected to have the greatest exposure of all of the miners in the area. Other miners in the same work area or area of common exposure sources may reasonably be expected to experience lesser concentrations of occupational hazards than the maximum risk miner. There may be more than one maximum risk miner when activities, operations, and exposure sources vary throughout the day. MSHA acknowledges that some samples were not taken on the highest possible risk occupation at some mines. As previously stated, we continued baseline sampling past the date of July 19, 2003 in response to this concern.

A miner experiences high risk because of the location and type of tasks performed relative to the source of the suspected hazard. The miner's predicted environment or duties may change during the course of the work shift. If the working conditions present during the exposure assessment are not typical of the regular mining operation, the sample results may not represent the typical exposure for that occupation. Compliance specialists strive to characterize the higher exposure levels during typical work shifts. The baseline samples are representative of the conditions experienced on work shifts during the defined compliance assistance period. MSHA has obtained the best available information for

characterizing recent activities at the relevant M/NM mines.

*B. DPM Control Technology*

MSHA participated in a number of compliance assistance activities directed at improving sampling and assisting mine operators with selecting and implementing appropriate DPM control technology. Some of these activities were directed to either a segment of the mining industry, or to the entire industry, while others were conducted on a mine specific basis. In general, activities directed toward a large number of mines included outreach programs, workshops, website postings and publications, while activities directed at an individual mine included evaluation of a specific control technology, and review of the technology in use by or available to a specific mine.

*Regional DPM Seminars.* During September and October, 2002, MSHA conducted regional DPM seminars at the following locations: Ebensburg, PA; Knoxville, TN; Lexington, KY; Des Moines, IA; Kansas City, MO; Albuquerque, NM; Coeur d'Alene, ID; Green River, WY; and Elko, NV. MSHA offered these full-day seminars free of charge in the major underground M/NM mining regions of the country to facilitate attendance by key mining industry personnel. The seminars covered the health effects of DPM exposure, the history and specific provisions of the regulation, DPM controls, DPM sampling, and the DPM Estimator, a computerized program that calculates DPM concentration reduction.

*NIOSH Diesel Emission and Control Technologies in Underground M/NM Mines Workshops.* MSHA participated in these two workshops in February, 2003 in Cincinnati, OH and March, 2003, in Salt Lake City, UT. The workshops served several purposes. They provided technical presentations and a forum for discussing control technology for reducing exposure to particulate matter and gaseous emissions from the exhaust of diesel-powered vehicles in underground mines. Additionally, they intended to help mine managers, maintenance personnel, safety and health professionals, and ventilation engineers select and apply control technologies in their mines. Speakers, representing MSHA, NIOSH, and several mining companies, provided ample time for questions and in-depth technical discussion of issues raised by participants.

*National Stone, Sand & Gravel Association (NSSGA)/MSHA DPM Sampling Workshop.* This three day seminar, hosted by the Rogers Group, Inc.'s Jefferson County Stone and Underground in Louisville, Kentucky, was held on December 11 through 13, 2002. On the first day, MSHA reviewed DPM sampling procedures, and presented training on pump calibration, sample train assembly and note taking. On the second day, participants traveled to the Rogers Group Jefferson County Mine to conduct full shift sampling on underground miners. Our technical support staff took ventilation measurements and collected area samples to assess DPM emissions in the mine. On the third day, MSHA reviewed engine emission and ventilation measurements. Additionally, MSHA reviewed and discussed DPM outreach material. Approximately 10 industry participants attended the seminar.

*Nevada Mining Association Safety Committee.* In April, 2003, MSHA discussed DPM control technologies at a meeting of the Nevada Mining Association Safety Committee in Elko, NV. Discussion topics included bio-diesel fuel blends, various fuel additives and fuel pre-treatment devices, mine ventilation, environmental cabs, clean engines, and diesel particulate filter (DPF) systems. Mining company representatives discussed their experiences with and perspectives on these technologies. MSHA discussed experiences and observations that it made at various mines, and results of its laboratory and field testing.

*MSHA South Central Joint Mine Safety and Health Conference.* MSHA presented a DPM workshop at this conference in April 2003, in New Orleans, LA. The workshop included a detailed history and explanation of the provisions of the DPM regulation, and a technical presentation on feasible DPM engineering controls. At the April 2004 conference in Albuquerque, NM, MSHA presented a review of DPM control strategies that have generally been adopted in the underground M/NM mining industry.

*National Meeting of the Joseph A. Holmes Safety Association, National Association of State Mine Inspection and Training Agencies, Mine Safety Institute of America, and Western TRAM (Training Resources Applied to Mining).* MSHA presented a DPM workshop at this conference in June 2003, in Reno, NV. The workshop included a detailed history and explanation of the provisions of the regulation, and a technical presentation on DPM sampling, analytical tools for identifying and evaluating DPM sources in mines, and feasible DPM engineering controls.

*DPM Sampling and Control Workshops.* In March 2004, MSHA presented full one day workshops in Bloomington, IN and Des Moines, IA. In these workshops, MSHA reviewed the sampling procedures that MSHA inspectors would use for DPM, and MSHA provided hands on instruction to the participants in these procedures. MSHA also presented a review of DPM control strategies that have generally been adopted in the underground M/NM mining industry.

*Equipment Manufacturers Association (EMA) DPM Workshop.* In August 2003, MSHA conducted a DPM workshop for the EMA in Chicago, IL. At this workshop, MSHA reviewed the M/NM DPM regulations, discussed the need for clean engine technology, explained engine emission testing for mines, reviewed the importance of environmental cabs and discussed ventilation issues.

*Web site.* Our Web site, www.msha.gov, contains a single source page for DPM rules for M/NM mines. The page has links to specific topics, including:

- Draft Metal and Nonmetal Health Inspection Procedures Handbook, Chapter T—Diesel Particulate Matter Sampling.
- DRAFT Diesel Particulate Matter Sampling Field Notes.
- Metal and Nonmetal Diesel Particulate Matter Standard Error Factor for TC Analysis.
- MSHA Metal and Nonmetal DPM Standard Compliance Guide of August 5, 2003, addressing the interim DPM limit.
- NIOSH Listserver.
- MSHA-NIOSH Diesel Particulate Filter Selection Guide for Diesel-powered Equipment in Metal and Nonmetal Mines (Filter Selection Guide), last updated February 20, 2003.
- Baseline DPM Sample Results, updated October 2003.
- Presentation from Compliance Assistance Workshop, October 16, 2002.
- Summary of Requirements: MSHA Standard on Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners that are in effect as of July 20, 2002.
- Link to SKC Web site: SKC Diesel Particulate Matter Cassette with Precision-jeweled Impactor.
- Diesel Particulate Matter Control Technologies, last updated January 14, 2004.

—Table I: Paper/Synthetic Filters.
—Table II: Non-Catalyzed Particulate Filters, Base Metal Particulate Filters, Specially Catalyzed Particulate Filters, and High Temperature Disposable Filters.

—Table III: Catalyzed (Platinum Based) Diesel Particulate Filters.

• Work Place Emissions Control Estimator.

• **Federal Register** documents concerning this and prior DPM rulemakings.

• Public comments on this rulemaking.

• Economic analyses for this rule and prior DPM rules.

• MSHA News Release: MSHA Rules Will Control Miners' Exposure to Diesel Particulate, January 18, 2001.

• Program Information Bulletins:

—PIB01–10 Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners, August 28, 2001.

—PIB02–04 Potential Health Hazard Caused by Platinum-Based Catalyzed Diesel Particulate Matter Exhaust Filters, May 31, 2002.

—PIB02–08 Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners-—Summary of Settlement Agreement, August 12, 2002.

Additionally, our diesel single source page for the coal industry contains topics that may also be of interest to the M/NM mining industry, particularly for those operations at gassy mines where permissible equipment is required.

*Specific control technology studies.* Following the settlement agreement, MSHA was invited by various mining companies to evaluate the effectiveness of different control technologies for DPM, including ceramic filters, alternative fuels and a fuel oxygenator. Company participation was essential to the success of each test. MSHA evaluated ceramic filters in two mines, one where MSHA was the only investigator and one where NIOSH was the primary investigator. In our test, MSHA evaluated DPM on a production unit with and without ceramic filters installed on the loader and trucks. In the NIOSH study a variety of ceramic filters were tested in an isolated zone.

MSHA evaluated bio-diesel fuel in two mines. In one, MSHA evaluated a 20% and a 50% recycled bio-diesel fuel and a 50% new bio-diesel. In the other, MSHA evaluated a 35% recycled bio-diesel fuel and a 35% new bio-diesel.

MSHA evaluated the fuel catalyst system in one mine. MSHA sampled the mine exhaust with fuel catalyst systems installed on all production equipment, and also without the units installed.

MSHA evaluated water emulsion diesel fuel in four mines.

Following is a summary of the individual mine technology evaluation studies:

*Kennecott Greens Creek Mining Company:* MSHA participated with Kennecott Greens Creek Mining Company in a collaborative test to verify the efficiency of catalyzed ceramic DPFs for reducing diesel particulate emissions. The goal of the testing was to identify site-specific practical mine-worthy filter technology.

This series of tests was designed to determine the reduction in emissions and personal exposure that can be achieved when ceramic filters are installed on a loader and associated haulage trucks operating in a production stope. MSHA also determined relative engine gaseous and DPM emissions for the equipment under specific load conditions.

MSHA conducted the tests over a two-week period. MSHA sampled three shifts with ceramic after-filters installed; and three shifts without the after-filters. MSHA also collected personal samples to assess worker exposures, and area samples to assess engine emissions. MSHA took both gaseous and diesel particulate measurements.

Sampling results indicate significant reductions in both personal exposures and engine emissions. These results also indicated that factors such as diesel particulate contamination of intake air, stope ventilation parameters, and isolated atmospheres in vehicle cabs as well as the ceramic DPFs may have a significant impact on personal exposures. The following findings and conclusions were obtained from the test:

1. The results of the raw exhaust gas measurements conducted during the test indicate that the engines were operating properly.

2. The ceramic filters installed on the machines used in this test do not adversely affect machine operation. Even with some apparent visual cracking from the rotation of the filter media, the ceramic filters removed more than 90% of the DPM. The filters passively regenerated during machine operation.

3. The Bosch smoke test provides an indication of filter deterioration; however, the colorization method does not quantify the results.

4. Personal DPM exposures were reduced by 60% to 68% when after-filters were used.

5. CO levels decreased by up to one-half while the catalyzed filters were used. There appeared to be an increase in $NO_2$ (Nitrous Dioxide) while catalyzed filters were being used; however, it is unclear whether this increase was due to data variability, changes in ventilation rate, or the use of the catalyzed filters.

6. The use of cabs reduced DPM exposure by 75% when DPFs were in use and by 80% when DPFs were not in use.

7. Ventilation airflow was provided to the stopes through fans with rigid and bag tubing. Airflow was the same or greater than the Particulate Index, but typically lower than the gaseous ventilation rate.

8. The use of ceramic DPFs reduced average engine DPM emissions by 96%.

9. The reduction in personal exposure was not attributed solely to DPF performance because other factors such as ventilation, upwind equipment use, and cabs also influence personal exposure.

*Carmeuse North America, Inc., Maysville Mine:* MSHA entered into a collaborative effort with NIOSH, industry, and the Kentucky Department of Energy to test DPM emissions and exposures when using various blends of bio-diesel fuels in an underground stone mine. As part of our compliance assistance program, MSHA provided support to mining operations to evaluate diesel particulate control technologies. The test was initiated by the industry partner, and, along with NIOSH, MSHA provided support for test design, data collection, and sample and data analysis. The project was funded by Carmeuse and Kentucky Department of Energy, through the Kentucky Clean Fuels Coalition.

The initial test was conducted in two phases, using a 20% and a 50% bio-diesel blend of recycled vegetable oil (RVO), each mixed with low sulfur No. 2 standard diesel fuel. Baseline conditions were established using low sulfur No. 2 standard diesel fuel. In a third phase of the test, a 50% blend of new soy bio-diesel fuel was tested.

Area samples were collected at shafts to assess equipment emissions. Personal samples were collected to assess worker exposure. These samples were analyzed by NIOSH using the NIOSH 5040 method to determine TC and EC concentrations. Results indicate that significant reductions in emissions and worker exposure were obtained for all bio-diesel mixtures. These reductions were in terms of both elemental and TC. Results for the 20% and 50% RVO indicated 33% and 69% reductions in DPM emissions, respectively. Results for the tests on the 50% blend of new soy bio-diesel fuel, showed about a 37% reduction in DPM emissions.

*Carmeuse North America, Inc., Black River Mine:* Following the success of the bio-diesel tests at Maysville Mine, Carmeuse requested our assistance in continuing the bio-diesel optimization testing at their Black River Mine. Two bio-diesel blends were tested, and a baseline test was made. In each test

personal exposures and the mine exhaust were tested for two shifts. The two bio-diesel blends included a 35% RVO and a 35% blend of new soy oil. Results for the 35% RVO showed a 32% reduction in DPM emissions. Results of the 35% blend of new soy bio-diesel fuel showed an approximate 16% reduction in DPM emissions.

*Stone Creek Brick Company, Water Emulsion Fuel Tests:* During the Stone Creek Brick Company compliance assistance visit, MSHA identified several control strategies that would reduce DPM emissions and exposures. These strategies included: The installation of clean engines, the use of alternative fuels, and an increase in mine ventilation. The mine chose to implement alternative fuel use followed by an engine replacement program. MSHA provided in-mine testing to evaluate the impact of using an alternative fuel. The company chose to use a water emulsion fuel. This fuel is an EPA approved fuel, consisting of a 20% blend of water with No. 2 diesel fuel. A surfactant is added to keep the water and diesel fuel from separating. MSHA sampled at the mine before (using No. 2 diesel fuel) and after the implementation of the fuel. MSHA collected personal samples to evaluate the worker exposure and area samples to evaluate emissions.

Results of the testing showed that the highest exposure was reduced from $823_{TC}$ μg/m³ to $321_{TC}$ μg/m³ (61% reduction). EC emissions were reduced by 49% and TC emissions were reduced by 3%. The lack of a reduction in TC emissions was attributed to the lower combustion temperature resulting from the water emulsion fuel and the older engine technology in use. The older engines have larger injector nozzles which do not provide efficient fuel burning. The mine has been using the fuel for approximately one year, and continues to be satisfied with the results.

*Carmeuse North American, Inc., Maysville Mine, Water Emulsion Fuel Tests:* MSHA provided assistance to Carmeuse North American, Inc., to evaluate summer and winter blends of a water emulsion fuel at their Maysville Mine. For the first test, emission reductions for a 10% blend (winter blend) of water with No. 2 diesel fuel was compared to a 35% blend of RVO. Emission reductions were compared to both a 35% blend of RVO and standard No. 2 diesel fuel. MSHA collected personal samples to evaluate the worker exposure and area samples to evaluate emissions.

Results of the testing showed that the highest average exposure (high scaler working outside a cab) was reduced from $254_{TC}$ μg/m³ to $145_{TC}$ μg/m³ (43% reduction) when changing from RVO to the water emulsion. EC emissions were reduced by 52% and TC emissions were reduced by 49% for the water emulsion to 35% RVO fuel comparison. EC emissions were reduced by 77% and TC emissions were reduced by 74% for the water emulsion to standard diesel fuel comparison.

For the second test, emission reductions for a 20% blend (summer blend) of water with No. 2 diesel fuel was compared to a 35% blend of RVO. Emission reductions were compared to both a 35% blend of RVO and standard No. 2 diesel fuel. The comparison to No. 2 diesel fuel was obtained by combining the water emulsion to the 35% RVO results and previously obtained 35% RVO to No. 2 diesel fuel results. MSHA collected personal samples to evaluate the worker exposure and area samples to evaluate emissions. For the summer blend, EC emissions were reduced by 60% and TC emissions were reduced by 59% for the water emulsion to 35% RVO fuel comparison. EC emissions were reduced by 81% and TC emissions were reduced by 79% for the water emulsion to standard diesel fuel comparison.

*Carmeuse North American, Inc., Black River Mine, Water Emulsion Fuel Tests:* MSHA provided assistance to Carmeuse North American, Inc. to evaluate summer and winter blends of a water emulsion fuel at their Black River Mine. For these tests, emission reductions for 10% and 20% blends (winter blend) of water with No. 2 diesel fuel was compared to a 35% blend of RVO. Emission reductions were compared to both a 35% blend of RVO and standard No. 2 diesel fuel. MSHA collected personal samples to evaluate the worker exposure and area samples to evaluate emissions.

For the winter blend (10%), EC emissions were reduced by 46% and TC emissions were reduced by 45% for the water emulsion to 35% RVO fuel comparison. EC emissions were reduced by 63% and TC emissions were reduced by 62%, for the water emulsion to standard No. 2 diesel fuel comparison.

For the summer blend (20%), EC emissions were reduced by 61% and TC emissions were reduced by 54% for the water emulsion to 35% RVO fuel comparison. EC emissions were reduced by 73% and TC emissions were reduced by 68% for the water emulsion to standard diesel fuel comparison.

*Martin Marietta, Durham Mine, Water Emulsion Fuel Tests:* MSHA provided assistance to Martin Marietta to evaluate a summer blend of water emulsion fuel at their Durham Mine. This was a multi-level mine, with a 15% ramp between levels. For this test, emissions for a 20% blend of water with No. 2 diesel fuel was compared to standard No. 2 diesel fuel. MSHA collected personal samples to evaluate the worker exposure and area samples to evaluate emissions. Even with the 15% ramps, the loss in horsepower due to the fuel did not adversely effect the mine operations.

Results of the testing showed that the highest average exposure (powder crew working outside a cab) was reduced from $372_{TC}$ μg/m³ to $54_{TC}$ μg/m³ (85% reduction) when changing from No. 2 diesel fuel to the water emulsion. EC emissions were reduced by approximately 80% for the water emulsion compared to standard diesel.

*Rogers Group, Jefferson County Mine:* MSHA was invited to this mine to evaluate a fuel catalyst system that was installed in the fuel line of the diesel equipment. The company had installed the units to increase fuel economy, and sought to determine the effects of the units on DPM. Prior to the units having been installed, MSHA had conducted baseline sampling and had collected personal samples on production workers and area samples in the mine exhaust airflow. After the units were installed on loaders and trucks and the units had accumulated 100 hours of operation, sampling was repeated. Results indicated that the use of the fuel catalyst had no measurable effect on either DPM exposure or emissions.

*Summary of DPM control technology:* In addition to conducting baseline sampling and providing assistance in developing DPM control strategies at specific mines, MSHA assessed the effectiveness of various DPM controls during and following the compliance assistance period. These controls included alternative fuels, fuel oxygenators, environmental cabs and ceramic DPFs. Alternative fuels evaluated included various blends of bio-diesel fuels (including both Virgin Soy Oil (VSO) and RVO), No. 1 diesel fuel, and water emulsion fuels.

The resulting reduction in DPM emissions for each of these controls is given in Chart V–6. All reductions are compared to diesel emissions with low sulfur No. 2 diesel fuel. All bio-diesel tests were conducted at mines with relatively clean engines. The first water emulsion test was conducted at a mine utilizing older engines. Subsequent water emulsion tests were conducted at mines utilizing clean engines with oxidation catalytic converters.

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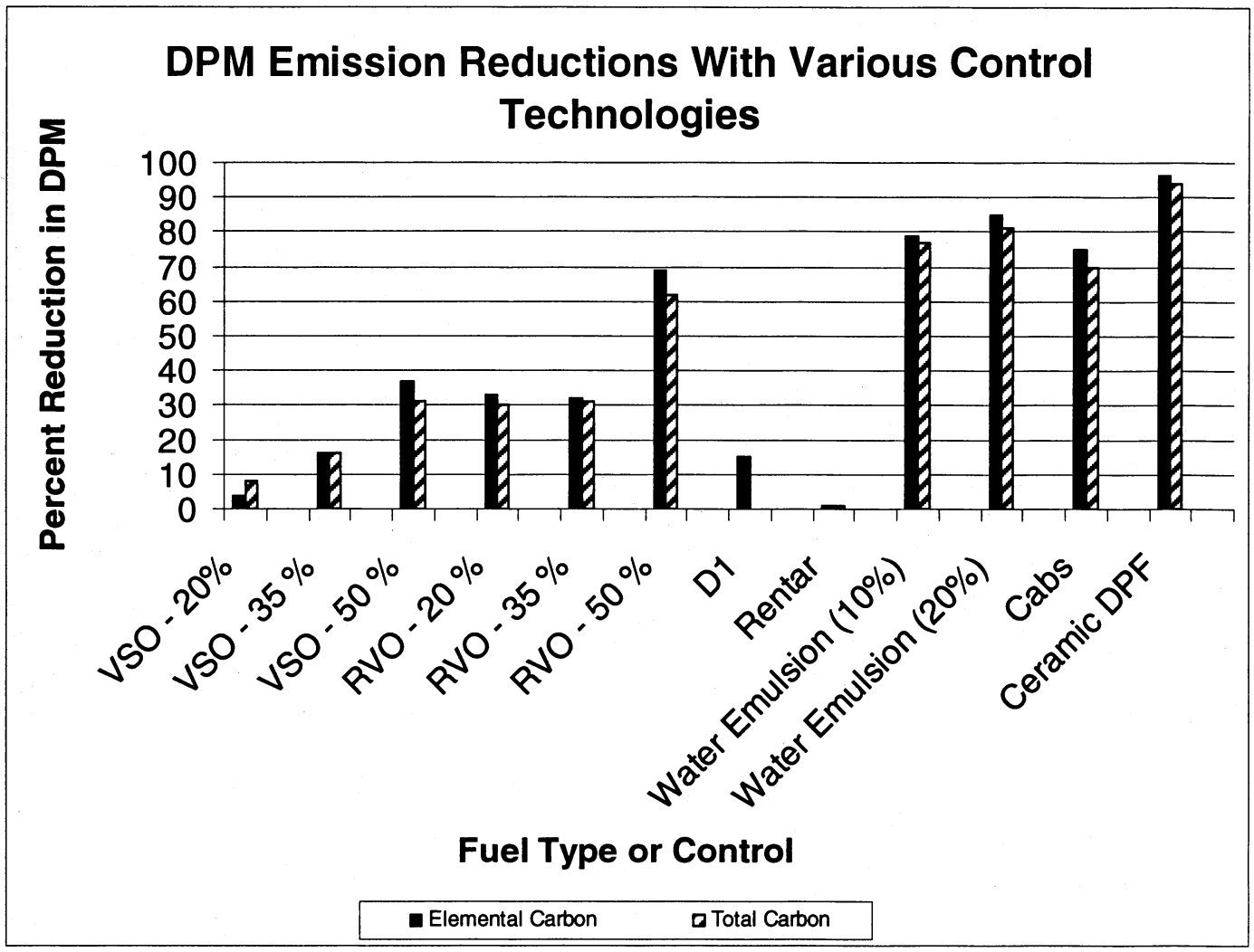


**Chart V-6 Results of Field Tests on Diesel Exhaust Controls.**

VSO (Virgin Soy Oil) – 20% - Columbus Junction
VSO (Virgin Soy Oil) – 35% - Black River, Carmeuse
VSO (Virgin Soy Oil) – 50% - Maysville, Carmeuse
RVO (Recycled Vegetable Oil) – 20% - Maysville, Carmeuse
RVO (Recycled Vegetable Oil) – 35% - Black River, Carmeuse
RVO (Recycled Vegetable Oil) – 50% - Maysville, Carmeuse
D1 – No. 1 Diesel Fuel – Stillwater (NIOSH, Phase I)
Rentar – Jefferson County Mine, Rogers Group,
Water Emulsion - 10% – Black River, Carmeuse
Water Emulsion - 20% – Black River, Carmeuse
Cabs – Greens Creek Mine, Kennecott Mining
Ceramic DPF– Greens Creek Mine, Kennecott Mining

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*Assistance for Developing Control Strategies*

*Martin Marietta Aggregates:* MSHA provided compliance assistance during full-day visits at the North Indianapolis Mine and the Parkville Mine in March, 2003, and at the Kaskaskia Mine and the Manheim Mine in May, 2003. MSHA

reviewed each mine's DPM sampling history, current operating and equipment maintenance practices, ventilation, diesel equipment inventory, and steps taken to date and future plans to reduce DPM exposures. MSHA discussed the full range of engineering controls, demonstrated an exhaust temperature measurement and data logging system, and presented a spreadsheet for using such data to select appropriate filter systems. MSHA presented a simple approach for measuring the effectiveness of cab air filtering and pressurization systems, identified the highest DPM-emitting equipment (so future equipment-specific DPM control efforts could be appropriately focused), and discussed the likely effect of various ventilation system upgrades.

*Rogers Group, Oldham County Mine:* MSHA provided compliance assistance at this mine during a full-day visit in November 2002. MSHA conducted extensive DPM sampling at the mine, collecting both personal exposure samples and area samples. Further, MSHA collected DPM samples from both inside and outside of equipment cabs. No personal samples exceeded $160_{TC}$ μg/m³. MSHA reviewed current operating and equipment maintenance practices, ventilation, diesel equipment inventory, and steps taken to date and future plans to reduce DPM exposures. MSHA discussed the full range of engineering controls. Results from this survey indicate the environmental cabs significantly reduced the DPM exposure of equipment operators.

*Rogers Group, Jefferson County Mine:* MSHA provided compliance assistance at this mine during a full-day visit in December 2002. MSHA collected both personal exposure samples and area samples. The highest personal sample, collected on the loader, was $468_{TC}$ μg/m³. This loader was operated with the window open. MSHA reviewed current operating and equipment maintenance practices, ventilation, diesel equipment inventory, and steps taken to date and future plans to reduce DPM exposures. Mechanical ventilation was provided for the mine. MSHA discussed the full range of engineering controls, demonstrated an exhaust temperature measurement and data logging system, and presented a spreadsheet for using such data to select appropriate filter systems. MSHA presented a simple approach for measuring the effectiveness of cab air filtering and pressurization systems, identified the highest DPM-emitting equipment (so future equipment-specific control efforts could be appropriately focused), and discussed the likely effect of various ventilation system upgrades.

*Nalley and Gibson, Georgetown Mine:* MSHA provided compliance assistance at this mine during a full-day visit in May 2003. MSHA reviewed current operating and equipment maintenance practices, ventilation, diesel equipment inventory, and steps taken to date and future plans to reduce DPM exposures. MSHA collected DPM samples to assess improvements since the baseline sampling. At that time, mechanical ventilation provided airflow to the mine. MSHA discussed the full range of engineering controls, demonstrated an exhaust temperature measurement and data logging system, and presented a spreadsheet for using such data to select appropriate filter systems. MSHA presented a simple approach for measuring the effectiveness of cab air filtering and pressurization systems, identified the highest DPM-emitting equipment (so future equipment-specific DPM control efforts could be appropriately focused), and discussed the likely effect of various ventilation system upgrades.

*Stone Creek Brick Company:* MSHA provided compliance assistance at this mine during a full-day visit in May 2003. MSHA reviewed current operating and equipment maintenance practices, ventilation, diesel equipment inventory, and steps taken to date and future plans to reduce DPM exposures. MSHA collected DPM samples from underground miners. The mine was using mechanical ventilation. None of the equipment had environmental cabs. MSHA discussed the full range of engineering controls, presented a spreadsheet for using such data to select appropriate filter systems, identified the highest DPM-emitting equipment (so future equipment-specific DPM control efforts could be appropriately focused), and discussed the likely effect of various ventilation system upgrades.

*Wisconsin Industrial Sand Co., Maiden Rock Mine:* MSHA provided compliance assistance at this mine during a full-day visit in May 2003. MSHA reviewed the mine's current operating and equipment maintenance practices, ventilation, diesel equipment inventory, and steps taken to date and future plans to reduce DPM exposures. MSHA discussed the full range of engineering controls, presented a spreadsheet for using such data to select appropriate filter systems, and identified the highest DPM-emitting equipment so future equipment-specific DPM control efforts could be appropriately focused.

*Gouverneur Talc Company, Inc., No. 4 Mine:* MSHA provided compliance assistance at this mine during a full-day visit in May 2003. DPM samples were collected on underground workers. MSHA reviewed then current operating and equipment maintenance practices, ventilation, diesel equipment inventory, and steps taken to date and future plans to reduce DPM exposures. MSHA discussed the full range of engineering controls, demonstrated an exhaust temperature measurement and data logging system, and presented a spreadsheet for using such data to select appropriate filter systems. MSHA presented a simple approach for measuring the effectiveness of cab air filtering and pressurization systems, identified the highest DPM-emitting equipment (so future equipment-specific control efforts could be appropriately focused), and discussed the likely effect of various ventilation system upgrades.

*Additional specific mine compliance assistance:* Following the initial baseline sampling period, MSHA compiled a list of mines having at least one DPM sample which exceeded the $400_{TC}$ μg/m³ limit. Of the 183 mines sampled, approximately 69 mines had at least one sample over the $400_{TC}$ μg/m³ interim TC limit. Of the 69 mines with one or more overexposures, 44 used room and pillar mining methods. These include stone mines, salt mines and a potash mine. Of the 44 room and pillar mines, MSHA provided specific compliance assistance to 36 of these mines (two mines were closed and two mines declined assistance). Although trona mines use room and pillar mining methods, they were not visited because they were in compliance with the $400_{TC}$ μg/m³ limit. The remaining 15 mines with overexposures were multilevel metal mines using a variety of stoping mining methods. Industry seminars were provided to assist these mines.

Typically, the high risk workers in the mines visited were the face workers that worked outside an environmental cab. Production loader and truck operators had elevated exposures when they either did not have an environmental cab or when the cab was not being properly maintained. Additional high risk workers include the blasting crew, drillers, and roof bolters.

During each mine visit, DPM samples were collected unless the mine had been recently sampled or the mine reported no additional DPM controls had been implemented since MSHA's previous sampling was conducted. The DPM controls, including engines, ventilation, cabs, fuels and work practices, were reviewed with mine management. Specific engine emission rates, mine ventilation rates, cab pressures and

work practices were determined. At some mines, a temperature trace of an engine exhaust was made. The information was entered into a computer spreadsheet model to assess the effect of control changes on DPM levels and to assist the mine in developing a DPM control strategy.

*Laboratory Compliance Assistance:* In addition to the compliance assistance field tests, our diesel testing laboratory has been working with manufacturers to evaluate various types of DPM control technologies. Certain of these technologies can be applied in either underground M/NM or coal mines.

*Evaluating paper/synthetic media as exhaust filters:* MSHA has evaluated paper/synthetic media as exhaust filters. These filters have shown DPM removal efficiencies in excess of 90% in the laboratory when tested on our test engine using the test specified in subpart E of part 7. The laboratory has tested approximately 20 different paper/synthetic media from 10 different filter manufacturers. Although much of this work is directed to underground coal mine applications for use on permissible equipment, this technology is available for use on permissible equipment that is used in underground gassy M/NM mines. In addition, some underground coal mine operators have considered adding exhaust heat exchanger systems to nonpermissible equipment in order to use the paper/synthetic filters in place of ceramic filters. The heat exchanger is needed to reduce the exhaust gas temperature to below 302° F for these types of filters. This could also be an option for equipment in M/NM mines, particularly gassy mines where permissible equipment is required.

*Evaluating Ceramic Filter Systems:* MSHA worked with six ceramic filter manufacturers to evaluate the effects of their catalytic wash-coats on $NO_2$ production. As discussed under the ''Effectiveness of the DPM Estimator'' portion of this preamble, catalytic wash-coats on the ceramic filters may cause increases in $NO_2$ levels. MSHA used our test engine (Caterpillar 3306 PCNA) and followed the test procedures in subpart E of 30 CFR part 7. The DPM single source webpage lists the ceramic filters that have significantly increased $NO_2$ levels, as well as the ceramic filters that are not known to increase $NO_2$ levels. MSHA tested the DPM removal efficiencies of these filters during the laboratory tests. The efficiency results agree with the efficiencies posted on our web site DPM Control Technologies with Percent Removal Efficiency page (85% for cordierite and 87% for silicon carbide). Finally, MSHA worked with NIOSH during these tests to collect DPM samples for EC analysis using the NIOSH 5040 method. The laboratory results showed that the filters removed EC at up to 99% efficiency.

*Evaluation of Fuel Oxygenator System:* MSHA'S laboratory completed tests on the Rentar ™ in-line fuel catalyst. The Rentar ™ unit was installed on a Caterpillar™ 3306 ATAAC, which was coupled to a generator. MSHA used an electrical load bank to load the engine under various operating conditions. To establish a baseline, MSHA tested the engine for gaseous and DPM emissions without the Rentar ™ unit. The unit was then installed, and MSHA operated the engine for a 100 hour break-in period. MSHA then repeated the gaseous and DPM emission measurements. The test results of the one laboratory evaluation for this control device to date showed no significant reductions in whole diesel particulate, however, the data did not show any adverse effects on the raw whole DPM exhaust emission. NIOSH's results were consistent with MSHA's results, and showed no significant EC reductions and no adverse effects on the engine's emissions. MSHA has discussed with Rentar ™ further laboratory tests.

*Evaluation of a Magnet System:* MSHA performed laboratory tests for Ecomax, a manufacturer of a magnet system installed on the fuel line, oil filter, air intake and radiator. MSHA performed a preliminary field test of this product at a surface aggregate operation. The magnetic device demonstrated a 30% reduction in CO levels. The laboratory tests were performed with the Ecomax system installed and compared to our baseline engine data. The test results of the one laboratory evaluation for this control device to date showed no significant reductions in whole diesel particulate, however, the data did not show any adverse effects on the raw DPM exhaust emissions.

*Evaluation of the Fuel Preporator® System:* MSHA's laboratory tested a fuel preparator system. The system is designed to remove collected air from the fuel system for better fuel combustion. The results of the system installed were compared to the baseline engine. The test results of the one laboratory evaluation for this control device to date showed no significant reductions in whole diesel particulate, however, the data did not show any adverse effects on the raw DPM exhaust emissions. NIOSH also conducted tests in our lab on the Fuel Preporator® and the results were consistent with MSHA's results. There were no significant EC reductions and no adverse effects on the engine's emissions.

## VI. DPM Exposures and Risk Assessment

### *A. Introduction*

In support of the 2001 final rule, MSHA published a comprehensive risk assessment (66 FR at 5752–5855, with corrections at 35518–35520). In the following discussion, we will refer to the risk assessment published in conjunction with the 2001 final rule as the ''2001 risk assessment.''

The 2001 risk assessment presented MSHA's evaluation of health risks associated with DPM exposure levels encountered in the mining industry. This was based on a review of the scientific literature available through March 31, 2000, along with consideration of all material submitted during the applicable public comment periods.

The 2001 risk assessment was divided into three main sections. Section 1 (66 FR at 5753–5764) contained a discussion of U.S. miner exposures based on field data collected through mid-1998. An important conclusion of this section was that, prior to the 2001 final rule,

> * * * median dpm concentrations observed in some underground mines are up to 200 times as high as mean environmental exposures in the most heavily polluted urban areas [footnote deleted] and up to 10 times as high as median exposures estimated for the most heavily exposed workers in other occupational groups. [66 FR at 5764]

Section 2 of the 2001 risk assessment (66 FR at 5764–5822) reviewed the available scientific literature on health effects associated with DPM exposures. This review covered effects of both acute and chronic exposures and also contained a discussion of potential mechanisms of toxicity. The review of acute effects included anecdotal reports of symptoms experienced by exposed miners, studies based on exposures to diesel emissions, and studies based on exposures to particulate matter in the ambient air. The review of chronic effects included studies based specifically on exposures to diesel emissions and studies based more generally on exposures to fine particulate matter in the ambient air. As part of this discussion, MSHA evaluated 47 epidemiologic studies examining the prevalence of lung cancer within groups of workers occupationally exposed to DPM and discussed the criteria used to evaluate and rank these studies (66 FR at 5774–5810). For both acute and chronic health effects, information from

genotoxicity studies and studies on laboratory animals was discussed in the separate subsection on mechanisms of toxicity. Section 2 of the 2001 risk assessment also explained MSHA's rationale for utilizing certain types of information whose relevance had been questioned during the public comment periods: health effects observed in animals, health effects that are reversible, and health effects associated with fine particulate matter in the ambient air (66 FR at 5765–55767).

In section 3 of the 2001 risk assessment (66 FR at 5822–5855), MSHA evaluated the best available evidence to ascertain whether exposure levels currently existing in mines warranted regulatory action pursuant to the Mine Act. To do this, MSHA addressed three questions: (a) Whether health effects associated with occupational DPM exposures constitute a ''material impairment'' to miner health or functional capacity; (b) whether exposed miners were at significant excess risk of incurring any of these material impairments; and (c) whether the 2001 final rule would substantially reduce such risks. After careful consideration of all the submitted public comments, the 2001 risk assessment established three main conclusions:

1. Exposure to dpm can materially impair miner health or functional capacity. These material impairments include acute sensory irritations and respiratory symptoms (including allergenic responses); premature death from cardiovascular, cardiopulmonary, or respiratory causes; and lung cancer.
2. At dpm levels currently observed in underground mines, many miners are presently at significant risk of incurring these material impairments due to their occupational exposures to dpm over a working lifetime.
3. By reducing dpm concentrations in underground mines, the rule will substantially reduce the risks of material impairment faced by underground miners exposed to dpm at current levels.

The third of these conclusions was supported primarily by a quantitative risk assessment for lung cancer (66 FR at 5848–5854).

Throughout the current rulemaking, MSHA advised the mining community of its intent to include the 2001 risk assessment in the current rulemaking record to support this final rule. In this preamble, MSHA supplements the 2001 risk assessment with new exposure data and health effects literature published after March 31, 2000. MSHA asked that public comment be focused on this supplemental information. Nevertheless, some commenters presented critiques challenging the 2001 risk assessment and disputing scientific support for any DPM exposure limit, especially by means of an EC surrogate. Other commenters endorsed the 2001 risk assessment and stated that recent scientific publications support MSHA's conclusions.

MSHA also received a number of comments from the mining industry suggesting that the risk assessment lacks an adequate scientific foundation and does not comply with present requirements under OMB and information quality guidelines to use the best available, peer reviewed science. The risk assessment sustaining this final rule uses the best available, peer-reviewed scientific studies. It supplements the risk assessment sustaining the 2001 final rule and the existing coal DPM final rule also promulgated on January 19, 2001 (66 FR 5526) (coal rule). The coal rule was unchallenged by the mining community.

Before promulgating the 2001 final rule, MSHA provided a copy of its draft risk assessment supporting the 2001 rule for peer review to two experts in the field of epidemiology and risk assessment. These experts evaluated the overall methodology used by MSHA in the draft risk assessment, the appropriateness of the studies selected by MSHA, and MSHA's conclusions. MSHA had the draft independently peer-reviewed, published the evidence and tentative conclusions for public comment, and incorporated the reviewers' recommendations in the final version. In the 2001 risk assessment, MSHA carefully laid out the best available evidence, including shortcomings inherent in that evidence.

Of particular note is that the two quantitative meta-analyses of lung cancer studies supporting the 2001 risk assessment were peer reviewed and published in scientific journals. (Bhatia, Rajiv, *et al.*, ''Diesel Exhaust Exposure and Lung Cancer,'' Journal of Epidemiology, 9:84–91, January 1998, and Lipsett M., and Campleman, Susan, ''Occupational Exposure to Diesel Exhaust and Lung Cancer: A Meta-Analysis,'' *American Journal of Public Health,* (89) 1009–1017, July 1999).

MSHA informed the public as early as September 25, 2002, in the 2002 ANPRM for this final rule, and again in the 2003 NPRM, that MSHA would incorporate the existing rulemaking record, including the 2001 risk assessment, into the record of this rulemaking. MSHA was open to considering any new scientific evidence relating to its risk assessment. Commenters were encouraged in the instant rulemaking to submit additional evidence of new scientific information related to health risks associated with exposure to DPM. After considering both the more recent scientific literature and all of the submitted comments, MSHA has concluded that no change is warranted in the 2001 risk assessment's conclusions with respect to health risks associated with DPM exposures.

Section VI.B updates Section 1 of the 2001 risk assessment by summarizing the new exposure data that became available after publication of the 2001 final rule. This summary includes a description of the relationship between EC and TC observed in these exposure measurements, and addresses public comments on possible health implications of substituting EC for TC as a surrogate measure of DPM. In Section VI.C, MSHA reviews some of the more recent scientific literature (April 2000–March 2003) pertaining to adverse health effects of DPM and fine particulates in general. In addition, this section updates the 2001 risk assessment's discussion of scientific evidence on mechanisms of DPM toxicity. Thus, Section VI.C supplements Section 2 of the 2001 risk assessment. Section VI.C also discusses a document by Dr. Gerald Chase that purports to analyze preliminary data extracted from an ongoing NIOSH/NCI study. Finally, in Section VI.D, MSHA assesses current risk to underground M/NM miners in light of the most recent exposure and health effects information. Section VI.D also responds to a critique of the 2001 risk assessment submitted by Dr. Jonathan Borak on behalf of the MARG Diesel Coalition (MARG) and the NMA.

*B. DPM Exposures in Underground M/NM Mines*

In Section 1 of the 2001 risk assessment, MSHA evaluated exposures based on 355 samples collected at 27 underground U.S. M/NM mines prior to promulgating the 2001 rule. Mean DPM concentrations found in the production areas and haulageways at those mines ranged from about 285 $\mu g/m^3$ to about 2000 $\mu g/m^3$, with some individual measurements exceeding 3500 $\mu g/m^3$. The overall mean DPM concentration was 808 $\mu g/m^3$. All of the samples considered in the 2001 risk assessment were collected prior to 1999, and some were collected as long ago as 1989.

Two new bodies of DPM exposure data, collected after promulgation of the 2001 final rule, have now been compiled for underground M/NM mines: (1) Data collected in 2001 and 2002 from 31 mines for purposes of the 31-Mine Study and (2) data collected between 10/30/2002 and 10/29/2003 from 183 mines to establish a baseline

for future samples. Key results from these two datasets are summarized in the next two subsections below. Following these summaries, the relationship between EC and TC, including the ratio of EC to TC (EC:TC) is discussed. This discussion is based exclusively on samples taken for the 31-Mine Study, since those samples were controlled for potential TC interferences from tobacco smoking and oil mist, whereas the baseline samples were not. The subsection concludes with a response to comments on the potential health effects of substituting EC for TC as a surrogate measure of DPM.

It should be noted that the new exposure data reflect conditions at least two years, and up to five years, later than the most recent miners' exposure data considered in the 2001 risk assessment. Furthermore, all of the new exposure data were obtained after promulgation of the 2001 rule. It is, therefore, reasonable to expect that the data discussed below would show generally different exposure levels than those presented in the 2001 risk assessment—both on account of normal technological changes over time and because of DPM controls that may have been implemented in response to the 2001 rule.

(1) Data from 31-Mine Study

MSHA collected 464 DPM samples in 2001 and 2002 at 31 underground M/NM mines. (For a more detailed description, see MSHA's final report on the 31-Mine Study.) Of these 464 samples, 106 were voided—mostly because of potential interference by sources of OC other than DPM. Table VI–1 shows how the remaining 358 valid DPM samples were distributed across four broad mine categories. All samples at one of the metal mines were voided, leaving 30 mines with valid samples indicating DPM concentrations.

TABLE VI–1.—NUMBER OF DPM SAMPLES, BY MINE CATEGORY

| | Number of mines with valid samples | Number of valid samples | Avg. number of valid samples per mine |
|---|---|---|---|
| Metal | 11 | 116 | 10.5 |
| Stone | 9 | 105 | 11.7 |
| Trona | 3 | 54 | 18.0 |
| Other | 7 | 83 | 11.9 |
| Total | 30 | 358 | 12.5 |

Table VI–2 summarizes the valid DPM concentrations observed in each mine category, assuming that submicrometer TC, as measured by the SKC sampler, comprises 80% of all DPM. The mean concentration across all 358 valid samples was 432 μg/m³ (Std. error = 21.0 μg/m³). The mean concentration was greatest at metal mines, followed by stone and ''other.'' At the three trona mines sampled, both the mean and median DPM concentration were substantially lower than what was observed for the other categories. This was due to the increased ventilation used at these mines to control methane emissions.

TABLE VI–2.—DPM CONCENTRATIONS (μ/M³), BY MINE CATEGORY

[DPM Is Estimated by TC ÷ 0.8]

| | Metal | Stone | Trona | Other |
|---|---|---|---|---|
| No. of samples | 116 | 105 | 54 | 83 |
| Minimum | 46. | 16. | 20. | 27. |
| Maximum | 2581. | 1845. | 331. | 1210. |
| Median | 491. | 331. | 82. | 341. |
| Mean | 610. | 465. | 94. | 359. |
| Std. Error | 44.7 | 36.0 | 9.4 | 26.6 |
| 95% UCL | 699. | 537. | 113. | 412. |
| 95% LCL | 522. | 394. | 75. | 306. |

After adjusting for differences in sample types and in occupations sampled, DPM concentrations at the non-trona mines were estimated to be about four to five times the concentrations found at the trona mines. Although there were significant differences between individual mines, the adjusted differences between the general categories of metal, stone, and other mines were not statistically significant.[1] For the 304 valid samples taken at mines other than trona, the mean DPM concentration was 492 μg/m³ (Std. error = 23.0 μg/m³).

Again assuming that submicrometer TC as measured by the SKC sampler comprises 80% of DPM, the mean DPM concentration observed was 1019 μg/m³ at the single mine exhibiting greatest DPM levels. Four of the nine valid samples at this mine exceeded 1487 μg/m³. In contrast, DPM concentrations never exceeded 500 μg/m³ at 8 of the 30 mines with valid samples (2 of the 11 metal mines, 1 of the 3 stone, all 3 trona, and 2 of the 7 others). (Note that 500 μg/m³ is the whole particulate equivalent of the $400_{TC}$ μg/m³ interim limit.) Some individual measurements exceeded $200_{DPM}$ μg/m³ at all but one of the mines sampled.

(2) Baseline Data

MSHA s baseline sampling results are presented in Section III, Compliance Assistance. These results provide the basis for the present discussion. The baseline samples discussed here, in connection with the risk assessment, were collected and analyzed between

[1] These conclusions derive from an analysis of variance, based on TC measurements, described in the Report on the 31-Mine Study. They depend on an assumption that the ratio of DPM to TC is uncorrelated with mine category, sample type (*i.e.*, personal or area), and occupation.

October 30, 2002 and October 29, 2003. They comprise a total of 1,194 valid samples collected from 183 mines. MSHA is including 320 additional valid samples because MSHA decided to continue to conduct baseline sampling after July 19, 2003 in response to mine operator's concerns. Some of these mines were either not in operation or were implementing major changes to ventilation systems during the original baseline period. MSHA is including supplementary samples from seasonal and intermittent mines, mines that were under-represented, and mines that were not represented in the analysis published in the proposed preamble in 2003.

Table VI–3 summarizes, by general commodity, the EC levels measured during MSHA's baseline sampling through October 29, 2003. The overall mean eight-hour full shift equivalent EC concentration was 196 μg/m³, and the overall median was 134 μg/m³. Table VI–4 provides a similar summary for estimated DPM levels, using DPM ≈ TC/0.8 and TC ≈ 1.3 × EC.[2] Under these assumptions, the estimated mean DPM level was 318 μg/m³, and the median was 218 μg/m³. Since the baseline data and the 31-Mine Study both showed significantly lower levels at trona mines than at other underground M/NM mines, Tables VI–3 and VI–4 present overall results both including and excluding the three underground trona mines sampled.[3]

TABLE VI–3.—BASELINE EC CONCENTRATIONS

| | 8-hour Full Shift Equivalent EC Concentration (μg/m³) | | | | | |
|---|---|---|---|---|---|---|
| | Metal | Stone | Other N/M | Trona | Total | Total excluding Trona |
| No. of Samples | 284 | 689 | 196 | 25 | 1,194 | 1,169 |
| Maximum | 1,558 | 2,291 | 738 | 313 | 2,291 | 2,291 |
| Median | 208 | 115 | 114 | 63 | 134 | 137 |
| Mean | 273 | 181 | 150 | 81 | 196 | 198 |
| Std. Error | 14 | 8 | 9 | 12 | 6 | 6 |
| 95% UCL | 302 | 197 | 167 | 106 | 208 | 210 |
| 95% LCL | 245 | 166 | 132 | 56 | 184 | 186 |

TABLE VI–4.—BASELINE DPM CONCENTRATIONS

[DPM is estimated by (1.3 × EC) ÷ 0.8]

| | Estimated 8-hour Full Shift Equivalent DPM Concentration (μg/m³) | | | | | |
|---|---|---|---|---|---|---|
| | Metal | Stone | Other N/M | Trona | Total | Total excluding Trona |
| No. of Samples | 284 | 689 | 196 | 25 | 1,194 | 1,169 |
| Maximum | 2,532 | 3,724 | 1,200 | 509 | 3,724 | 3,724 |
| Median | 339 | 186 | 185 | 102 | 218 | 223 |
| Mean | 444 | 295 | 243 | 132 | 318 | 322 |
| Std. Error | 23 | 13 | 15 | 20 | 10 | 10 |
| 95% UCL | 490 | 320 | 272 | 173 | 338 | 342 |
| 95% LCL | 399 | 270 | 214 | 91 | 299 | 303 |

Baseline EC sample results varied widely between mines within commodities and also within most mines. Table VI–5 summarizes baseline EC results for the 26 occupations found to have at least one sample where the EC level exceeded the 308 μg/m³ 8-hour full shift equivalent interim EC limit. As indicated by the table, EC levels varied widely within each occupation.

TABLE VI–5.—BASELINE EC CONCENTRATIONS FOR OCCUPATIONS WITH AT LEAST ONE VALUE EXCEEDING INTERIM EC LIMIT

| Occupation | Number of valid samples | 8-hour full shift equivalent EC Concentration (μg/m³) | | |
|---|---|---|---|---|
| | | Minimum | Median | Maximum |
| Diamond Drill Operator | 1 | 1,561 | 1,561 | 1,561 |
| Ground Control/Timberman | 2 | 283 | 419 | 555 |
| Washer Operator | 4 | 272 | 337 | 621 |
| Engineer | 1 | 337 | 337 | 337 |
| Roof Bolter, Mounted | 12 | 76 | 258 | 818 |
| Mucking Mach. Operator | 23 | 12 | 257 | 671 |
| Miner, Stope | 14 | 77 | 218 | 479 |

[2] The relationship DPM ≈ TC/0.8 is the same as that assumed in the 2001 risk assessment. The relationship TC 1.3 × EC was formulated under the settlement agreement, based on TC:EC ratios observed in the joint 31-Mine Study, as described in the subsection VI.3 of this preamble.

[3] The distributions of EC values are skewed. Therefore, the standard errors and confidence intervals reported in Tables VI–3 and VI–4 should be interpreted with caution.

TABLE VI–5.—BASELINE EC CONCENTRATIONS FOR OCCUPATIONS WITH AT LEAST ONE VALUE EXCEEDING INTERIM EC LIMIT—Continued

| Occupation | Number of valid samples | 8-hour full shift equivalent EC Concentration (μg/m³) | | |
|---|---|---|---|---|
| | | Minimum | Median | Maximum |
| Cleanup Man | 2 | 51 | 217 | 384 |
| Scoop-Tram Operator | 7 | 10 | 210 | 449 |
| Drill Operator, Rotary Air | 21 | 0 | 185 | 1,041 |
| Miner, Drift | 17 | 12 | 175 | 1,122 |
| Blaster, Powder Gang | 134 | 5 | 175 | 1,031 |
| Belt Crew | 8 | 20 | 173 | 386 |
| Roof Bolter, Rock | 21 | 48 | 172 | 1,007 |
| Truck Driver | 252 | 0 | 162 | 1,216 |
| Shuttle Car Operator (diesel) | 3 | 73 | 154 | 323 |
| Complete Load-Haul-Dump | 32 | 14 | 145 | 634 |
| Drill Operator, Jumbo Perc | 38 | 4 | 137 | 845 |
| Drill Operator, Rotary | 75 | 2 | 132 | 853 |
| Motorman | 8 | 46 | 129 | 322 |
| Front-end Loader Operator | 214 | 0 | 121 | 2,291 |
| Scaling (mechanical) | 80 | 0 | 107 | 958 |
| Supervisor, Co. Official | 13 | 1 | 100 | 658 |
| Utility Man | 29 | 22 | 73 | 762 |
| Scaling (hand) | 26 | 14 | 67 | 1,548 |
| Mechanic | 34 | 0 | 64 | 323 |

Figure VI–1 depicts, by mine category, the percentage of baseline samples that exceeded the interim EC limit of 308 μg/m³. Underground metal mines exhibited the highest proportion of samples exceeding this limit, followed by stone and then other nonmetal mines. In the three trona mines sampled, 24 of the 25 samples were lower than the proposed limit. Across all commodities, 19.3% of the 1,194 valid baseline samples exceeded the interim EC limit.

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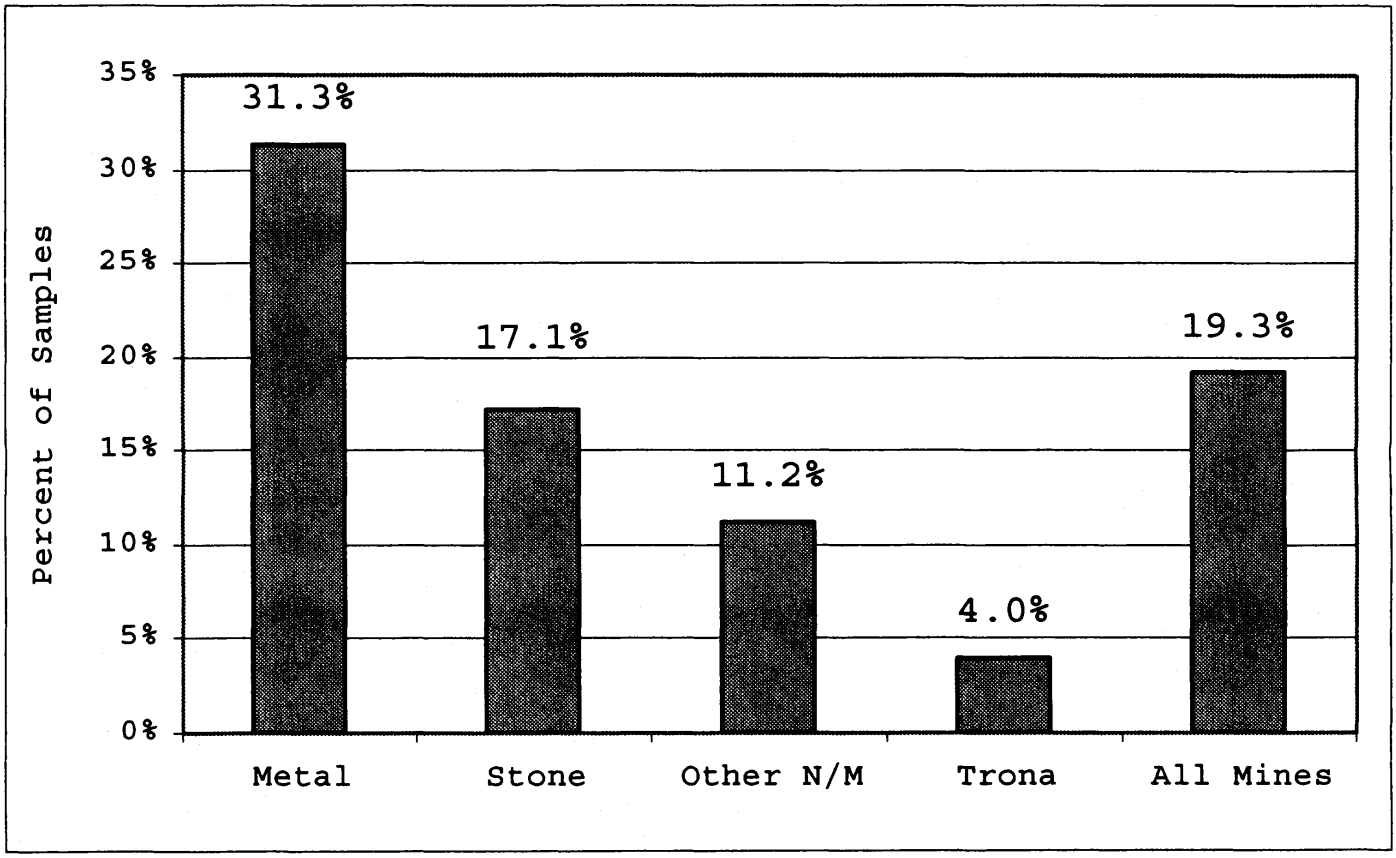


**Figure VI-1. Percentage of baseline samples exceeding interim EC limit.**

Figure VI–2 shows how samples exceeding the interim EC limit were distributed over individual mines. One to 20 baseline samples were taken at each mine. In 115 of the 183 mines sampled (63%), none of the baseline EC measurements exceeded 308 μg/m³. The remaining 68 mines (37%) had at least one sample for which EC exceeded 308 μg/m³. All samples taken at 4 of the mines exceeded the interim limit.

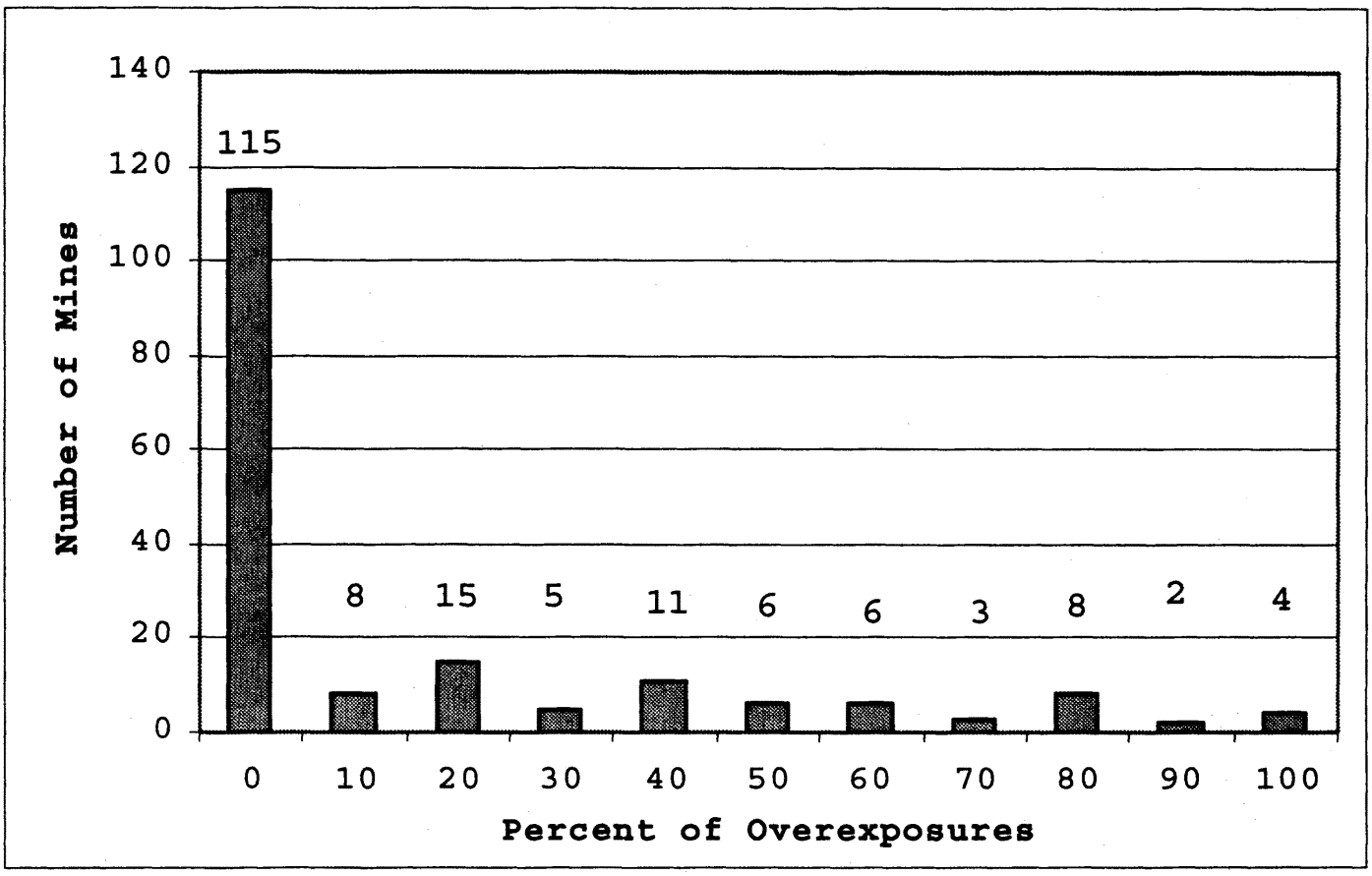


**Figure VI-2. Distribution of samples exceeding interim EC limit.**

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(3) Relationship Between EC and TC

The 2001 final rule stipulated that TC (*i.e.*, EC + OC) measurements would be used to monitor and limit DPM concentration levels. Although it was recognized that TC measurements were subject to various interferences from non-DPM sources, MSHA believed that, in underground metal and nonmetal mines, it could effectively eliminate such interferences by a combination of selective sampling procedures and careful analytical techniques. During the 31-Mine Study, however, MSHA found no reasonable sampling method that would adequately protect TC measurements from interference by such sources of organic carbon as oil mist and ammonium nitrate fuel oil (ANFO). Furthermore, MSHA found that it was cumbersome and impractical to restrict its TC sampling so as to avoid potential interference from environmental tobacco smoke (ETS). Indeed, as indicated earlier, nearly one fourth of the TC samples collected during the 31-Mine Study (106 out of 464) had to be voided on account of potential interferences from extraneous sources of OC. Therefore, in concert with the Second Partial Settlement Agreement, the 2003 NPRM proposed to ''[r]evise the existing diesel particulate matter (DPM) interim concentration limit measured by total carbon (TC) to a comparable permissible exposure limit (PEL) measured by elemental carbon (EC) which renders a more accurate DPM exposure measurement.'' (68 FR 48668) Using EC as the surrogate permits direct sampling of miners (such as those who smoke, operate jackleg drills, or load ANFO) for whom accurate DPM monitoring would be difficult or impossible using TC measurements.

Also in accordance with the Second Partial Settlement Agreement, the NPRM proposed to convert the existing interim exposure limit, expressed in terms of TC measurements, to a ''comparable'' EC limit by applying a specific conversion factor obtained from data gathered during the 31-Mine Study, as explained below. MSHA is adopting this proposal with the intention of providing at least the same degree of protection to miners as the existing interim limit. However, since it is unlikely that EC and OC have identical health effects, it is important to consider the extent to which the ratio of EC to OC (and hence of EC to TC) may vary in different underground mining environments.

Unlike the 31-Mine Study, no special precautions were taken during MSHA's baseline sampling to avoid ETS or other substances that could potentially interfere with using TC as a surrogate measure of DPM. Therefore, the baseline data should not be used to evaluate the OC content of DPM or the ratio of EC to TC within DPM. In the 31-Mine Study, on the other hand, great care was taken to void all samples that may have been exposed to ETS or other extraneous sources of OC.

Consequently, the analysis of the EC:TC ratio presented here relies entirely on data from the 31-Mine Study. It is important to note that nearly all of the samples in this study were taken in the absence of exhaust filters to

control DPM emissions. Since exhaust filters may have different effects on EC and OC emissions, the results described here apply only to mine areas where exhaust filters are not employed.

Figure VI–3 plots the EC:TC ratios observed in the 31-Mine Study against the corresponding TC concentrations. The various symbols shown in the plot identify samples taken at the same mine. The EC:TC ratio ranged from 23% to 100%, with a mean of 75.7% and a median of 78.2%. Note that the reciprocal of 0.78, which is 1.3, equals the median of the TC:EC ratio observed in these samples.[4] The 1.3 TC:EC ratio was the value accepted, under terms of the settlement agreement, for the purpose of temporarily converting EC measurements to TC measurements.

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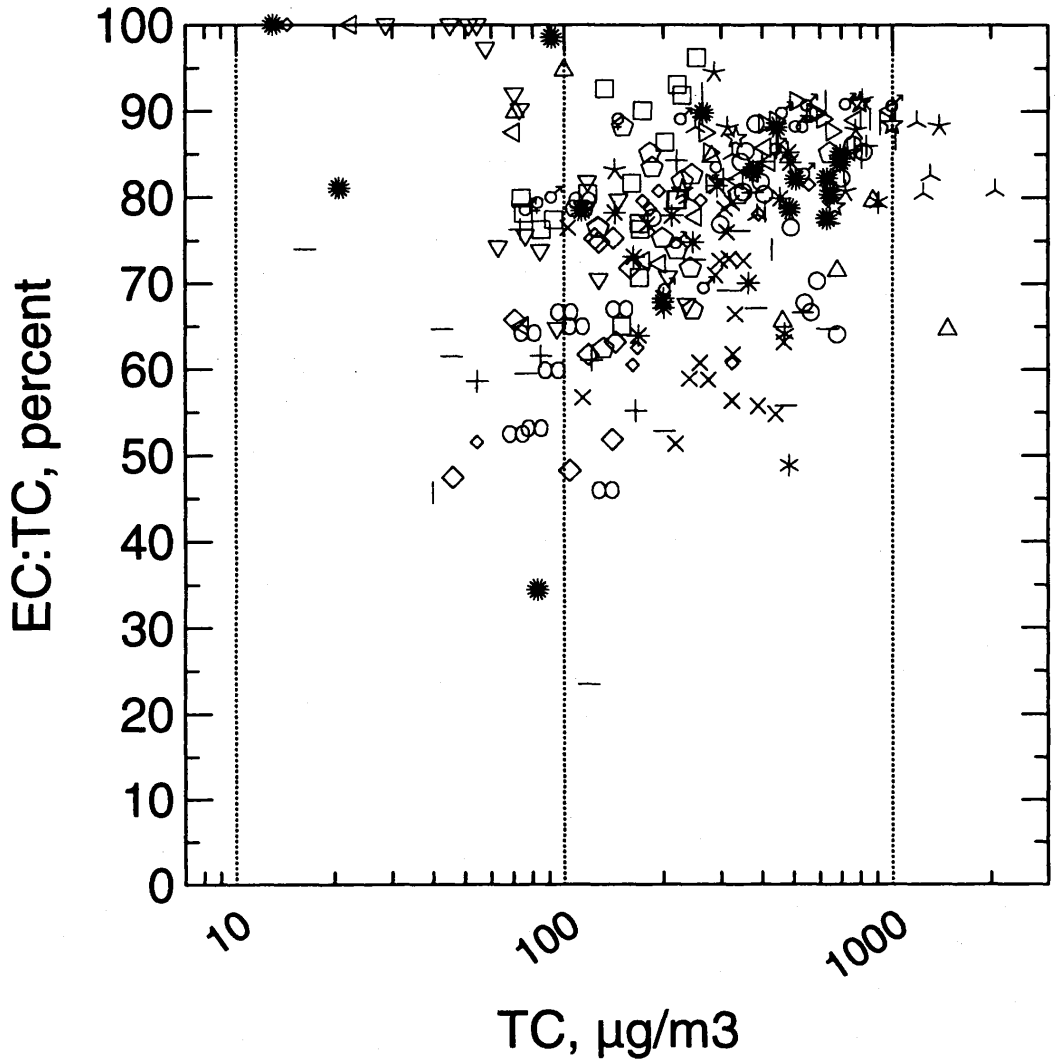


**Figure VI-3. EC:TC ratios found in 358 valid samples from 31-Mine Study. Symbols identify samples from same mine.**

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The 2001 rule set a TC interim concentration limit of 400 µg/m³. Under the new rule, this TC interim limit is replaced with an EC interim limit of 400/1.3 = 308 µg/m³. Table VI–6 indicates the impact of this change, based on the EC and TC data obtained from the 31-Mine Study. Both the original 400 µg/m³ TC limit and the new 308 µg/m³ EC limit were exceeded by about 31% to 32% of the samples. The difference (one sample out of 358) is not statistically significant in the aggregate. Seven samples, however, exceeded the TC limit but not the EC limit, and six samples exceeded the EC limit but not the TC limit.

[4] The median of reciprocal values is always equal to the reciprocal of the median. This relationship does not hold for the mean.

TABLE VI–6.—COMPLIANCE WITH ORIGINAL 400 μG/M³ TC LIMIT AND/OR NEW 308 μG/M³ EC LIMIT. NUMBERS IN PARENTHESES ARE PERCENTAGES

| EC > 308 μg/m³ | TC > 400 μg/m³ | | Total |
|---|---|---|---|
| | No | Yes | |
| No | 239 (66.8) | 7 (2.0) | 246 (68.7) |
| Yes | 6 (1.7) | 106 (29.6) | 112 (31.3) |
| Total | 245 (68.4) | 113 (31.6) | 358 (100.0) |

Several commenters noted that the ratio of EC to TC in DPM can vary widely. One commenter pointed out that EC appeared to make up nearly all of the TC at the mine with which he was affiliated. This commenter stated that replacing a 400 μg/m³ TC limit with a 308 μg/m³ EC limit would impose a much more stringent standard at that mine. Another commenter noted that a 308 μg/m³ EC limit would be less protective of miners than the 400 μg/m³ TC limit in cases where the ratio of EC comprised less than 78% of the TC. MARG submitted comments by a consultant, Dr. Jonathan Borak, who emphasized that the highly variable nature of the EC to OC ratio introduces ''large and important uncertainties in the exposure assessments needed to sustain QRA [*i.e.*, quantitative risk assessment].''

As indicated by Figure VI–3, the percentage of EC tended to increase with increasing TC concentration—except for cases showing a TC concentration of less than about 60 μg/m³. In many of the samples for which TC < 60 μg/m³, the recorded ratio of EC to TC was at or near 100%. Since TC concentrations less than 60 μg/m³ appear to deviate from the general pattern and are far below the interim limit, our response to commenters concerns about variability in the ratio of EC to TC will focus on those samples for which TC exceeds 60 μg/m³.

There were 319 samples with TC > 60 μg/m³. For these samples, the mean and median EC:TC ratio were 76.3% and 78.4%, respectively. In accordance with standard statistical practice, an arcsine transformation was applied to these 319 EC:TC ratios in order to normalize them for further statistical analysis (Snedecor and Cochran, *Statistical Methods,* 7th Ed., pp 290–291). The transformed EC:TC ratios are plotted against corresponding TC concentrations in Figure VI–4. Various symbols are used to identify the mineral commodity corresponding to each sample.

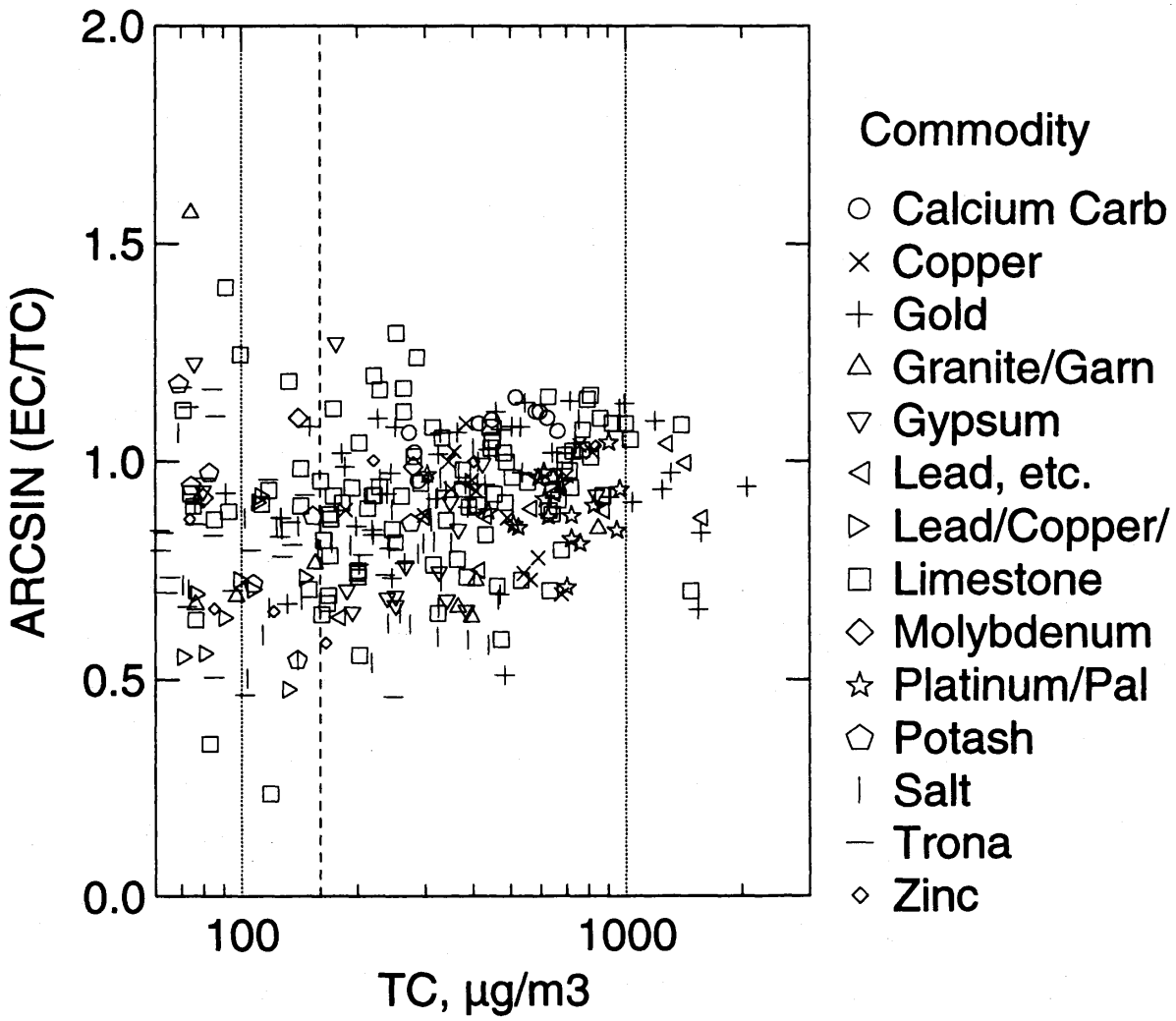


**Figure VI-4. Transformed EC:TC ratios, by commodity, plotted against TC concentration. Data restricted to 319 samples for which TC > 60 µg/m$^3$. The sine of the transformed value plotted along the verical axis (in radians) yields EC/TC. Transformed (arcsin) values of 0.5, 0.75, 1.0, and 1.6 correspond to EC/TC respectively equaling 0.48, 0.68, 0.84, and 1.00.**

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It is clear from Figures VI–3 and VI–4 that individual samples in the 31-Mine Study exhibited considerable variation in their EC:TC ratios. What is not so clear from these plots, however, is whether different mines and/or working environments tended to experience different EC:TC ratios. To answer this question, an analysis of variance (ANOVA) was performed to determine whether there were statistically significant differences in the EC:TC ratios exhibited at different mines and on different days at the same mine. Table VI–7 contains the results of this ANOVA. At a confidence level exceeding 99.9%, the data show statistically significant differences in the mean EC:TC ratios between mines and between different sampling days within mines.

TABLE VI–7.—ANALYSIS OF VARIANCE FOR ARCSIN OF EC:TC RATIOS, RESTRICTED TO SAMPLES WITH TC > 60 µG/M$^3$

| Source | Sum of squares | Degrees of freedom | Mean square | F-ratio | P |
|---|---|---|---|---|---|
| MINE | 3.360 | 29 | 0.116 | 6.960 | 0.000 |
| DAY within MINE | 1.643 | 30 | 0.055 | 3.290 | 0.000 |
| Error | 4.295 | 258 | 0.017 | | |

Figure VI–5 illustrates the magnitude and extent of differences in the mean EC:TC ratio between mines. Note that values on the arcsin scale of 0.7, 0.9, and 1.1 correspond to EC:TC ratios of 64%, 78%, and 89%, respectively.

Since TC = EC + OC, variability in the EC:TC ratio corresponds to variability in the ratio of either EC or TC to OC. Dr. Borak stated that if DPM is carcinogenic, then the carcinogenic agents (for humans) are probably in the organic fraction (*i.e.*, OC). Consequently, according to Dr. Borak, neither EC nor TC provides an appropriate surrogate for assessing or limiting health risks.

MSHA believes that Dr. Borak's assumption that any carcinogenic effect of DPM is due entirely to the organic fraction is speculative. This assumption contradicts findings reported by Ichinose *et al.* (1997b) and does not take into account the contribution that inflammation and active oxygen radicals induced by the inorganic carbon core of DPM may have in promoting lung cancers. Indeed, identifying the toxic components of DPM, and particulate matter in general, is an important research focus of a variety of government agencies and scientific organizations (see, for example: Health Effects Institute, 2003; Environmental Protection Agency, 2004b). The 2001 risk assessment discusses possible mechanisms of carcinogenesis for which both EC and OC would be relevant factors (66 FR at 5811–5822). Multiple routes of carcinogenesis may operate in human lungs—some requiring only the various organic mutagens in DPM and others involving induction of free radicals by the EC core, either alone or in combination with the organics.

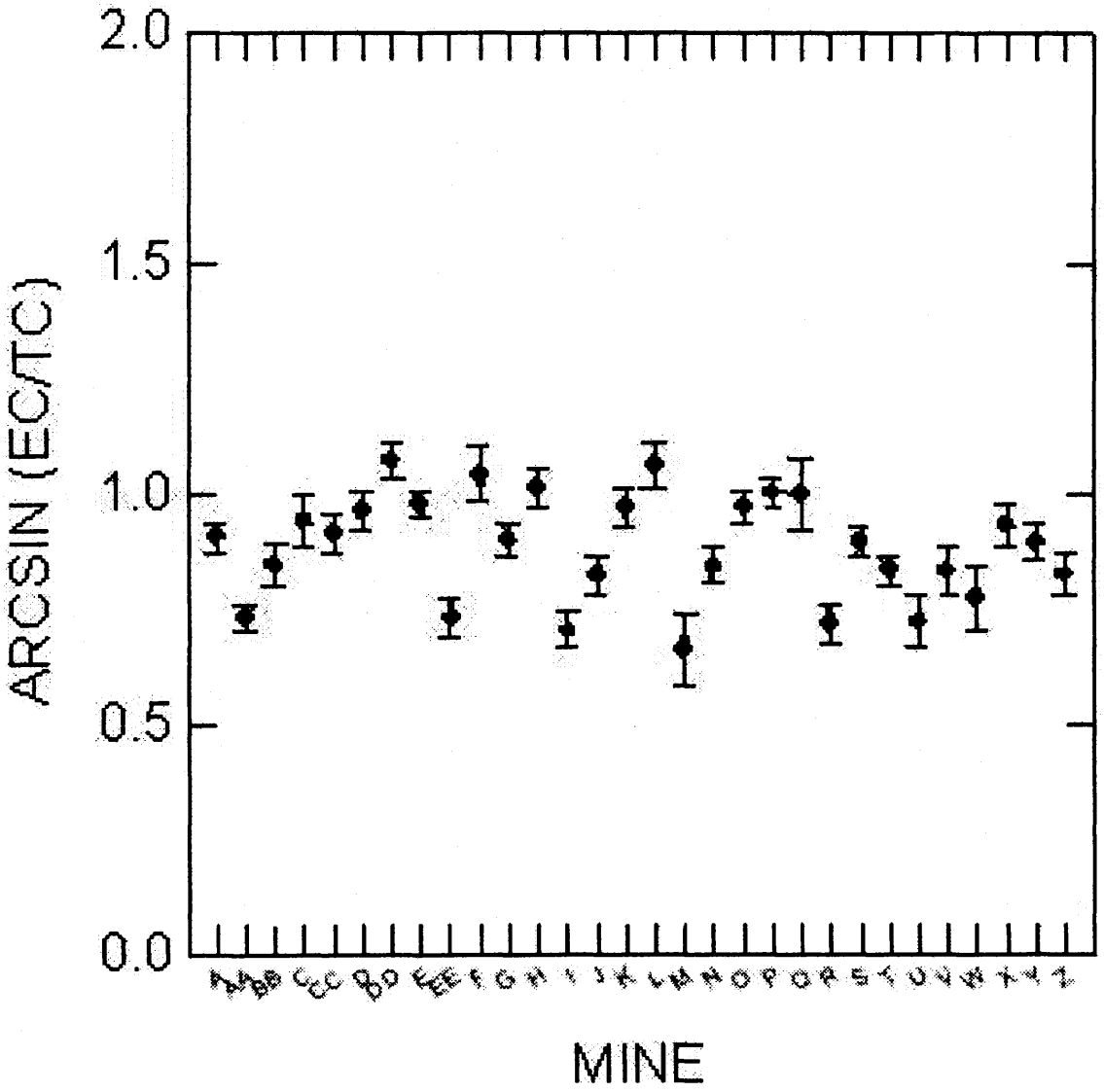


**Figure VI-5. Mean EC:TC ratios (transformed values) at mines in 31-Mine Study. Vertical bar plotted for each mine represents 95% confidence interval for mean of arcsin(EC/TC). Samples with TC ≤ 60 μg/m$^3$ were excluded from the analysis.**

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In focusing on the carcinogenic agents in OC, Dr. Borak has also ignored non-cancer health effects documented in the 2001 risk assessment—*e.g.*, immunological, inflammatory, and allergenic responses in healthy human volunteers exposed to $300_{DPM}$ μg/m$^3$ (*i.e.*, ~ $240_{TC}$ μg/m$^3$) for as little as one hour (66 FR at 5769–70, 5816–17, 5820, 5823, 5837, 5841, 5847).

The 308 μg/m$^3$ interim EC PEL established by this rule is intended to be commensurate with the interim TC limit of 400 μg/m$^3$ established under the 2001 rule—*i.e.*, to be equally protective and equally feasible. Although, as shown by Table VI–7 and Figure VI–5, the EC:TC ratio can exhibit considerable variability in specific cases, MSHA has concluded that application of the 1.3 average conversion factor, as suggested in the second partial settlement agreement, generally achieves the goal of equal protection and feasibility.

*C. Health Effects*

A key conclusion of the 2001 risk assessment was:

> Exposure to DPM can materially impair miner health or functional capacity. These material impairments include acute sensory irritations and respiratory symptoms (including allergenic responses); premature death from cardiovascular, cardiopulmonary, or respiratory causes; and lung cancer. [66 FR at 5854–5855]

MSHA has reviewed the scientific literature pertaining to health effects of fine particulates in general and DPM in particular published later than what was considered in the 2001 risk assessment. As will be shown below, the more recent scientific evidence generally supports the conclusion above, and nothing in our review suggests that it should be altered. In fact, the U.S. Environmental Protection Agency (EPA) recently reached very similar conclusions after reviewing all of the evidence to date (EPA; 2002, 2004b).

Some commenters endorsed the 2001 risk assessment, and suggested that the latest evidence strengthens its conclusions. For example, one group of commenters jointly stated:

> The evidence presented in MSHA's 2001 risk assessment is overwhelming * * * The evidence linking exposure to particulate air pollution and/or diesel particulate matter with lung cancer, cardiovascular and cardiopulmonary and other adverse health effects continues to mount.

Similarly, another pair of commenters jointly stated that ''[t]he scientific evidence for the [adverse] health effects of DPM is overwhelming'' and that ''evidence for the carcinogenicity and non-cancer health effects of DPM has grown since 1998.''

Other commenters contended that all of the evidence to date is insufficient to support limitation of occupational DPM exposures. Several of these commenters ignored evidence presented in the 2001 risk assessment and/or mischaracterized its conclusions. For example, the NMA, MARG, and the Nevada Mining Association (NVMA) all erroneously stated that promulgation of the 2001 rule was based on only ''two principal health concerns: (1) The transitory, reversible health effects of exposure to DPM; and, (2) the long-term impacts that may result in an excess risk of lung cancer for exposed workers.'' Actually, as shown in the conclusion cited above, the 2001 risk assessment identified three different kinds of material health impairment associated with DPM exposure: (1) Acute sensory irritations and respiratory symptoms (including allergenic responses); (2) premature death from cardiovascular, cardiopulmonary, or respiratory causes; and (3) lung cancer. Although the cardiovascular, cardiopulmonary, and respiratory effects leading to an increased risk of premature death were associated with acute DPM exposures, commenters presented no evidence that any such effects were ''transitory'' or ''reversible.'' Nor did commenters present evidence that immunological responses associated with either short-term or long-term DPM exposure were ''transitory'' or ''reversible.''

In addition, some commenters erroneously stated that ''no [quantitative] dose/response relationship related to the PELs could be demonstrated by MSHA.'' These commenters apparently ignored the discussion of exposure-response relationships in the 2001 risk assessment (66 FR at 5847–54) and failed, specifically, to note the quantitative exposure-response relationships shown for lung cancer in the two tables provided (66 FR at 5852–53). Relevant exposure-response relationships were also demonstrated in articles by Pope *et al.* cited in the 2003 NPRM, which will be discussed further below.

Some commenters objected that the exposure-response relationships presented in the 2001 risk assessment did not justify adoption of the specific DPM exposure limits promulgated. These commenters mistakenly assumed the limits set forth in the 2001 final rule were derived from an exposure-response relationship. As explained in 66 FR at 5710–14, the choice of exposure limits, while justified by quantifiable adverse health effects, was actually driven by feasibility concerns. The exposure-response relationships provided clear evidence of adverse human health effects (both cancer and non-cancer) at levels far below those determined to be feasible for mining.

In the 2003 NPRM, MSHA identified scientific literature pertaining to health effects of fine particulates in general and DPM in particular published subsequent to the 2001 final rule. The 2003 NPRM stated MSHA's intentions to continue its reliance on the 2001 risk assessment and cited the newer literature in a neutral manner, soliciting public comment on its implications for the 2001 risk assessment.

Two commenters complained that MSHA had not described the recent scientific literature in sufficient detail to determine whether it supports the 2001 risk assessment. Most of the commenters who evaluated the recent literature found that it supported and/or strengthened the conclusions of the 2001 risk assessment. Some other commenters, however, disagreed. Accordingly MSHA will present the supplemental literature in more detail than in the 2003 NPRM and explain why MSHA believes that it continues to support the 2001 risk assessment. This discussion will include our review of an analysis by Dr. Gerald Chase of some preliminary data from an ongoing NIOSH/NCI study.

The scientific literature cited in the 2003 NPRM was meant only to update and supplement the evidence of health effects cited in the 2001 risk assessment. Although MSHA believes the 2001 risk assessment presented ample evidence to justify its conclusions, MSHA is adding this supplemental literature because it represents more recent scientific investigations related to DPM health effects. The following discussion of literature cited in the 2003 NPRM is organized into four categories, roughly corresponding to the three types of material health impairments identified in the 2001 risk assessment, followed by a category covering toxicology studies: (1) Respiratory and immunological effects, including asthma, (2) cardiovascular and cardiopulmonary effects, (3) cancer, and (4) mechanisms of toxicity. Although the discussion of cancer will focus on lung cancer, it will also take note of two recent meta-analyses of epidemiological studies investigating DPM in connection with bladder and pancreatic cancers.

(1) Respiratory and Immunological Effects, Including Allergenic Responses

In the 2001 risk assessment, acute sensory irritations with respiratory symptoms, including immunological or allergenic effects such as asthmatic responses were grouped together, and all such effects as material health impairments likely to be caused or exacerbated by excessive DPM exposures were identified. This finding was based on human experimental and epidemiological studies and was supported by experimental toxicology. (For an explanation of why MSHA considers such effects to be material impairments, regardless of whether they are ''reversible,'' See, 66 FR at 5766.)

Table VI–8 summarizes six additional studies dealing with possible respiratory and immunological effects of DPM and/or fine particulates in general. Three of these studies (Frew *et al.*, 2001; Holgate *et al.*, 2002; Salvi *et al.*, 2000) involved experiments in which human subjects inhaled specified doses of DPM. These three studies all support the view that occupational DPM exposures are likely to promote or exacerbate adverse respiratory symptoms and immunological responses. A fourth study (Svartengren *et al.*, 2000) exposed human subjects to high and low doses of an unspecified mix of diesel and gasoline engine exhausts. Although 30-minute $PM_{2.5}$ exposures greater than 100 μg/m3 were found to increase asthmatic response, the authors of this study attributed the effects they observed primarily to $NO_2$ exposure. The fifth study (Oliver *et al.*, 2001) attempted to

relate pulmonary function test results and asthmatic conditions to estimated lifetime diesel exposure in a cohort of 359 ''heavy and highway'' (HH) construction workers. After adjustment for smoking and other potential confounders, the results indicated an elevated risk of asthma for exposed workers in enclosed spaces (tunnel workers), relative to other HH workers. The lack of additional statistically significant results may be attributable to the small cohort size. The sixth study (Fusco *et al.*, 2001) examined the relationship between various markers of engine exhaust pollution levels and daily hospital admissions for acute respiratory infections, COPD, asthma, and total respiratory conditions in Rome, Italy. No direct measurements of fine particulate concentrations were available. However, having found a significant correlation between respiratory-related admissions and CO and $NO_2$ levels, the authors noted that since CO and $NO_2$ are good indicators of combustion products in vehicular exhaust, the detected effects may be due to unmeasured fine and ultrafine particles.

TABLE VI–8.—STUDIES OF HUMAN RESPIRATORY AND IMMUNOLOGICAL EFFECTS, 2000–2002

| Authors, year | Description | Key results |
|---|---|---|
| Frew *et al.*, 2001 | 25 healthy subjects and 15 subjects with mild asthma were exposed to diesel exhaust (108 μg/m³) or filtered air for 2 hr, with intermittent exercise. Lung function was assessed using a computerized whole body plethysmograph. Airway responses were sampled by bronchial wash (BW), bronchoalveolar lavage (BAL), and mucosal biopsies 6 hr after ceasing exposures. | Both the asthmatic and healthy subjects developed increased airway resistance after exposure to diesel emissions, but airway inflammatory responses were different for the 2 groups. The healthy subjects showed statistically significant BW neutrophilia and BAL lymphocytosis 6 hr after exposure. The neutrophilic response of the healthy subjects was less intense than that seen in a previous study using a DPM concentration of 300 μg/m³. |
| Fusco *et al.*, 2001 | Analysis of daily hospital admissions for acute respiratory infections, COPD, asthma, and total respiratory conditions in Rome, Italy. | Respiratory admissions among adults were significantly correlated with CO and $NO_2$ levels, but not with suspended particles. The authors noted that since CO and $NO_2$ are good indicators of combustion products in vehicular exhaust, the detected effects may be due to unmeasured fine and ultrafine particles. |
| Holgate *et al.* 2002 | 25 healthy and 15 asthmatic subjects were exposed for 2 hours to 100 μg/m³ of DPM and to filtered air on separate days. Another 30 healthy subjects were exposed for 2 hours to DPM concentrations ranging from 25 to 311 μg/m³ and compared to 12 different healthy subjects exposed to filtered air. Exposure effects were assessed using lung function tests and biochemical tests of bronchial tissue samples. | Healthy and asthmatic subjects exhibited evidence of bronchioconstriction immediately after exposure<br>Biochemical tests of inflammation yielded mixed results but showed small inflammatory changes in healthy subjects after DPM inhalation. |
| Oliver *et al.,* 2001 | Pulmonary function tests and questionnaire data were obtained for 350 ''heavy and highway'' (HH) construction workers. Intensity of DPM exposure was estimated according to job classification. Duration of exposure was estimated based on length of union membership. | After adjusting for smoking and some other potential confounders, HH workers showed elevated risk of asthma. One subgroup (tunnel workers) also showed elevated risk of both undiagnosed asthma and chronic bronchitis, compared to other HH workers.<br>Respiratory symptoms appeared to declined with exposure duration as measured length of union membership. The authors interpreted this as suggesting that HH workers tend to leave their trade when they experience adverse respiratory symptoms. |
| Salvi *et al.*, 2000 | 15 healthy nonsmoking volunteers were exposed to 300 μg/m³ DPM and clean air for one hour at least three weeks apart. Biochemical analyses were performed on bronchial tissue and bronchial wash cells obtained six hours after each exposure. | Diesel exhaust exposure enhanced gene transcription of IL–8 in the bronchial tissue and airway cells and increased IL–8 and GRO-α protein expression in the bronchial epithelium. This was accompanied by a trend toward increased IL–5 mRNA gene transcripts in the bronchial tissue. Study showed effects on chemokine and cytokine production in the lower airways of healthy adults. These substances attract and activate leukocytes. They are associated with the pathophysiology of asthma and allergic rhintisi. |
| Svartengren *et al;.* 2000 | Twenty nonsmoking subjects with mild allergic asthma were exposed for 30 minutes to high and low levels of engine exhaust air pollution on two separate occasions at least four weeks apart. Respiratory symptoms and pulmonary function were measured immediately before, during and after both exposure periods. Four hours after each exposure, the test subjects were challenged with a low dose of inhaled allergen. Lung function and asthmatic reactions were monitored for several hours after exposure. | Subjects with $PM_{2.5}$ exposure ≥ 100 μg/m³ exhibited slightly increased asthmatic responses.<br>Association with adverse outcome variables were weaker for particulates than for $NO_2$. |

The 2003 NPRM also cited five new review articles that summarize the scientific literature pertaining to the respiratory and immunological effects of DPM and fine particulate matter in general. These review articles, published after the 2001 risk assessment, are identified and briefly described in Table VI–9. The three

articles most specifically dealing with DPM effects are Pandya *et al.* (2002), Peden at al. (2002), and Sydbom *et al.* (2001). In general, these reviews indicate that while DPM is likely to contribute to asthmatic and/or other immunological responses, the role of DPM in producing these health effects is complex. As noted by Pandya *et al.* (op cit.), DPM may have a far greater impact as an adjuvant with allergens than alone. Nevertheless, all three of these review articles support the view that there is significant evidence of adverse respiratory and immunological effects to warrant regulating DPM exposures. The remaining review articles (Gavett and Koren, 2001; Patton and Lopez, 2002) offer little new support for the 2001 risk assessment, but MSHA found no studies that either refute or challenge the 2001 risk assessment.

TABLE VI–9.—REVIEW ARTICLES ON RESPIRATORY AND IMMUNOLOGICAL EFFECTS, 1999–2002

| Authors, year | Description | Key results |
|---|---|---|
| Gavett and Koren, 2001 | Summarizes results of EPA studies done to determine whether PM can enhance allergic sensitization or exacerbate existing asthma or asthma-like responses in humans and animal models. | Studies indicate that PM enhances allergic sensitization in animal models of allergy exacerbate inflammation and airway hyper-responsiveness in asthmatics and animal models of asthma. |
| Pandya et al. 2002 | Reviews human and animal research relevant to question of whether DPM is associated with asthma. | Evidence indicates that DPM is associated with the inflammatory and immune responses involved in asthma, but DPM appears to have far greater impact as an adjuvant with allergens than alone.<br>DPM appears to augment IgE, trigger eosinophil degranulation, and stimulate release of numerous cytokines and chemokines. DPM may also promote the cytotoxic effects of free radicals in the airways. |
| Patton and Lopez, 2002 | Review of evidence and mechanisms for the role of air pollutants in allergic airways disease. | Evidence suggests that air pollutants (including DPM) ''affect allergic response by different mechanisms. Pollutants may increase total IgE levels and potentiate the initial sensitization to allergens and the IgE response to a subsequent allergen exposure. Pollutants also may act by increasing allergic airway inflammation and by directly stimulating airway inflammation. In addition, it is well known that pollutants can be direct irritants of the airways, increasing symptoms in patients with allergic syndromes.'' |
| Peden, 2002 | Review of ''studies that exemplify the impact of ozone, particulates, and toxic components of particulates on asthma.''. | DPM ''may play a significant role not only in asthma exacerbation but also in $T_H2$ inflammation via the actions of polyaromatic hydrocarbons on B lymphocytes.''<br>''* * * PM in which the active agents are biologically active metal ions and organic residues * * * may have significant effects on asthma, especially modulating immune function, as demonstrated by the role of polyaromatic hydrocarbons from diesel exhaust in IgE production.'' |
| Sydbom et al. 2001 | Review of scientific literature on health effects of disease exhaust, especially the DPM components. | The epidemiological support for particle effects on asthma and respiratory health is very evident; and respiratory, immunological, and systemic effects of DPM have been documented in a wide variety of experimental studies.<br>Acute effects of DPM exposure include irritation of the nose and eyes, lung function changes, and airway inflammation.<br>Exposure studies in healthy humans have documented a number of profound inflammatory changes in the airways, notably, before changes in pulmonary function can be detected. Such effects may be even more detrimental in subjects with compromised pulmonary function.<br>Ultrafine particles are currently suspected of being the most aggressive particulate component of diesel exhaust. |

In its 2002 ''Health Assessment Document for Diesel Engine Exhaust,'' the Environmental Protection Agency (EPA) reached the following conclusion with respect to immunological effects of diesel exhaust:

Recent human and animal studies show that acute DE [diesel exhaust] exposure episodes can exacerbate immunological reactions to other allergens or initiate a DE-specific allergenic reaction. The effects seem to be associated with both the organic and carbon core fraction of DPM. In human subjects, intranasal administration of DPM has resulted in measurable increases of IgE antibody production and increased nasal mRNA for some proinflammatory cytokines. These types of responses also are markers typical of asthma, though for DE, evidence has not been produced in humans that DE exposure results in asthma. The ability of DPM to act as an adjuvant to other allergens also has been demonstrated in human subjects. (EPA, 2002)

(2) Cardiovascular and Cardiopulmonary Effects

In the 2001 risk assessment, the evidence presented for DPM's adverse cardiovascular and cardiopulmonary effects relied on data from air pollution studies in the ambient air. This evidence identifies premature death from cardiovascular, cardiopulmonary, or respiratory causes as an endpoint significantly associated with exposures to fine particulates. The 2001 risk assessment found that ''[t]he mortality effects of acute exposures appear to be primarily attributable to combustion-related particles in $PM_{2.5}$ [*i.e.*, fine Particulate Matter] (such as DPM) * * *.''

There are difficulties involved in utilizing the evidence from such studies in assessing risks to miners from occupational DPM exposures. As noted in the 2001 risk assessment,

First, although dpm is a fine particulate, ambient air also contains fine particulates other than dpm. Therefore, health effects associated with exposures to fine particulate matter in air pollution studies are not associated specifically with exposures to dpm or any other one kind of fine particulate matter. Second, observations of adverse health effects in segments of the general population do not necessarily apply to the population of miners. Since, due to age and selection factors, the health of miners differs from that of the public as a whole, it is possible that fine particles might not affect miners, as a group, to the same degree as the general population.

However,

Since dpm is a type of respirable particle, information about health effects associated with exposures to respirable particles, and especially to fine particulate matter, is certainly relevant, even if difficult to apply directly to dpm exposures. [66 FR 5767]

Pope (2000) reviewed the epidemiological evidence for adverse health effects of $PM_{2.5}$ and characterized populations at increased risk due to $PM_{2.5}$ exposure. He found that ''[t]he overall epidemiologic evidence indicates a probable link between fine particulate air pollution and adverse effects on cardiopulmonary health.'' The observed endpoints include ''death from cardiac and pulmonary disease, emergency and physician office visits for asthma and other cardiorespiratory disorders, hospital admissions for cardiopulmonary disease, increased reported respiratory symptoms, and decreased measured lung function.'' Moreover, according to Pope, recent research suggests that ''those who are susceptible to increased risk of mortality from acutely elevated PM may include more than just the most old and frail who are already very near death.'' Pope went on to state that, with respect to chronic exposure, ''[t]here is no evidence that increased mortality risk is confined to any well-defined susceptible subgroup.''

Table VI–10 identifies five studies on cardiovascular and cardiopulmonary effects published since the 2001 risk assessment (Lippmann *et al.*, 2000; Magari *et al.*, 2001; Pope *et al.*, 2002; Samet *et al.*, 2000a, 2000b; Wichmann *et al.*, 2000). Three of these studies (Pope *et al.*, 2002; Samet *et al.*, 2000a, 2000b; Wichmann *et al.*, 2000) significantly strengthen MSHA's existing evidence implicating particulate exposures with premature mortality from cardiovascular and cardiopulmonary causes.[5] The Samet and Pope (2002) articles both establish statistically significant exposure-response relationships.

TABLE VI–10.—STUDIES RELATING TO CARDIOVASCULAR AND CARDIOPULMONARY EFFECTS, 2000–2002

| Authors, years | Description | Key results |
|---|---|---|
| Lippmann *et al.* 2000 | Day-to-day fluctuations in particulate air pollution in the Detroit area were compared with corresponding fluctuations in daily deaths and hospital admissions for 1985–1990 and 1992–1994. | After adjustment for the presence of other pollutants, significant associations were found between particulate levels and an increased risk of death due to circulatory causes. However, relative risks were about the same for $PM_{2.5}$ and larger particles. |
| Magari *et al.,* 2001 | Longitudinal study of a male occupational cohort examined the relationship between $PM_{2.5}$ exposure and cardiac autonomic function. | After adjusting for potential confounding factors such as age, time of day, and urinary nicotine level, $PM_{2.5}$ exposure was significantly associated with disturbances in cardiac autonomic function. |
| Pope *et al.,* 2002 | Prospective cohort mortality study, based on data collected for Cancer Prevention II Study, which began in 1982. Questionnaires were used to obtain individual risk factor data (age, sex, race, weight, height, smoking history, education, marital status, diet, alcohol consumption, and occupational exposures). For about 500,000 adults, these were combined with air pollution data for metropolitan areas throughout the U.S. and with vital status and cause of death data through 1998. | After adjustment for other risk factors and potential confounders, using a variety of statistical methods, fine particulate ($PM_{2.5}$) exposures were significantly associated with cardiopulmonary mortality (and also with lung cancer).<br>Each 10-$\mu g/m^3$ increase in mean level of ambient fine particulate air pollution was associated with an increase of approximately 6% in the risk of cardiopulmonary mortality. |
| Samet *et al.,* 2000a, 2000b | Time series analyses were conducted on data from the 20 and 90 largest U.S. cities to investigate relationships between $PM_{10}$ and other pollutants and daily mortality. | Results of both the 20-city and 90-city mortality analyses are consistent with an average increase in cardiovascular and cardiopulmonary deaths of more than 0.5% for every 10 $\mu g/m^3$ increase in $PM_{10}$ measured the day before death. (Estimated effects are, in general, slightly lower using a more stringent statistical analysis. See Dominici *et al.*, 2002.) |
| Wichmann *et al.,* 2000 | Time series analyses were conducted on data from Erfurt, Germany to investigate relationships between the number and mass concentrations of ultrafine and fine particles and daily mortality. | Higher levels of both fine and ultrafine particle concentrations were significantly associated with increased mortality rate. |

[5] As discussed below, Pope *et al.* (2002) also provides strong evidence linking chronic $PM_{2.5}$ exposure with an elevated risk of lung cancer.

Pope *et al.* (2002) warrants special attention because this study addresses chronic effects of long-term $PM_{2.5}$ exposures. (Other studies on $PM_{2.5}$, described in the 2001 risk assessment, have almost all dealt with acute exposure effects.) The authors concluded that ''* * * the findings of this study provide the strongest evidence to date that long-term exposure to fine particulate air pollution * * * is an important risk factor for cardiopulmonary mortality.'' In the 2001 risk assessment, the conclusion related to cardiopulmonary effects was motivated mostly by evidence on short-term exposures from daily time series analyses. Therefore, in finding a significant increase in cardiopulmonary mortality attributable to chronic fine particulate exposures, this study provides important supplement evidence supporting this conclusion. The portion of the study related to lung cancer effects is summarized in the next section.

The EPA's 2004 Air Quality Criteria Document for particulate matter (EPA, 2004b) describes a number of additional studies related to the cardiopulmonary and cardiovascular effects of $PM_{2.5}$, including work published later than that cited in the 2003 NPRM. One of the summary conclusions presented in that document is:

> Overall, there is strong epidemiological evidence linking (a) short-term (hours, days) exposures to $PM_{2.5}$ with cardiovascular and respiratory mortality and morbidity, and (b) long-term (years, decades) $PM_{2.5}$ exposure with cardiovascular and lung cancer mortality and respiratory morbidity. The associations between $PM_{2.5}$ and these various health endpoints are positive and often statistically significant. [EPA, 2004b, Sec. 9 p. 46]

1. Cancer Effects

The 2001 risk assessment concluded that DPM exposure, at occupational levels encountered in mining, was likely to increase the risk of lung cancer. The assessment also found that there was insufficient evidence to establish a causal relationship between DPM and other forms of cancer. Both of these conclusions are supported by the most recent scientific literature. The first part of this update contains a description of three new human research studies and a literature review relating DPM and/or other fine particulate exposures to lung cancer. Since it relates specifically to lung cancer, this subsection also discusses Dr. Chase's analysis. New research on the relationship between DPM exposures and other forms of cancer are described immediately after the lung cancer discussion.

*Lung Cancer*

Table VI–11 presents three human studies pertaining to the association between lung cancer and exposures to DPM or fine particulates in general completed after the 2001 risk assessment was done.

TABLE VI–11.—STUDIES ON LUNG CANCER EFFECTS, 2000–2002.

| Authors, year | Description | Key results |
|---|---|---|
| Boffetta *et al.,* 2001 | Cohort consisting of entire Swedish working population other than farmers. Exposure assessment based on job title and industry, classified according to probability and intensity of diesel exhaust exposure. | Statistically significant elevations in relative risk (RR) of lung cancer among men for job categories with medium, and high exposure to diesel exhaust, compared to workers in jobs classified as having no occupational exposure |
| Gustavsson *et al.,* 2000 | Case-control study involving all 1,042 male cases of lung cancer and 2,364 randomly selected controls (matched by age and inclusion year) in Stockholm County, Sweden from 1985 through 1990. Semi-quantitative assessment of exposure to diesel exhaust. Relative Risk (RR) estimates adjusted for age, selection year, tobacco smoking, residential radon, occupational exposures to asbestos and combustion products, and environmental exposure to $NO_2$. | Adjusted RR for the highest quartile of estimated lifetime exposure was 1.63, compared to the group with no exposure. |
| Pope *et al.,* 2002 | Prospective cohort mortality study using data collected for the American Cancer Society Cancer Prevention II Study (began 1982). Questionnaires used to obtain individual risk factor data including age, sex, race, weight, height, smoking history, education, marital status, diet, alcohol consumption, and occupational exposures. This risk factor data combined with air pollution data for metropolitan areas throughout U.S. and vital status and cause of death data through 1998 for about 500,000 adults. | After adjusting for other risk factors and potential co-founders, chronic $PM_{2.5}$ exposures found to be significantly associated with elevated lung cancer mortality. Each 10-$\mu g/m^3$ increase in mean level of ambient fine particulate air pollution ($PM_{2.5}$) associated with statistically significant increase of approximately 8% in risk of lung cancer mortality. |

Boffetta *et al.* (2001) investigated a Swedish cohort comprised of the whole Swedish working population not employed as farmers. Job title and industry were classified according to probability and intensity of diesel exhaust exposure in 1960 and 1970 and also according to the authors' confidence in the assessment. Cohort members were followed up for mortality for the 19-year period from 1971 through 1989. Cause of death and specific cancer type, when applicable, were obtained from national registries.

Compared to workers in jobs classified as having no occupational exposure to diesel emissions, relative risks (RR) of lung cancer among men were 0.95, 1.1, and 1.3 for job categories with low, medium, and high exposure intensity, respectively. The elevated risks for the medium and high exposure groups were statistically significant, and no similar pattern was observed for other cancer types. The authors concluded that these results ''provide evidence of a positive exposure-response relationship between exposure to diesel emissions and lung cancer among men.''

Although this study adds to the cumulative weight of evidence establishing a causal link between DPM exposure and lung cancer, it does not provide very strong evidence when viewed in isolation. One weakness of the study is that the exposure assessment was based on self-reported occupation and industry, with no information on duration of employment in various jobs. (This sort of uncertainty in the exposure assessment, however,

would not normally be expected to induce a false exposure-response relationship.) Another weakness is that there was no information on potential confounders, such as tobacco smoking and lifestyle factors that may be associated with certain jobs. While recognizing this limitation, the authors considered it unlikely that confounders could account for the increasing trend in relative risk observed according to intensity of diesel exposure.

Gustavsson *et al.* (2000) performed a case-control study involving all 1,042 male cases of lung cancer and 2364 randomly selected controls (matched by age and inclusion year) in Stockholm County, Sweden from 1985 through 1990. Occupational exposure, smoking habits, and other potential risk factors were assessed based on written questionnaires mailed to the subject or next of kin. Relative Risk (RR) estimates were adjusted for age, selection year, tobacco smoking, residential radon, occupational exposures to asbestos and combustion products, and environmental exposure to $NO_2$. Compared to the group with no exposure, adjusted RR for the highest quartile of estimated lifetime exposure was 1.63 (95% CI = 1.14 to 2.33). The authors concluded that ''[t]he present findings add further evidence for an association between diesel exhaust and lung cancer * * * ''

Strengths of this study include a semi-quantitative exposure assessment and adjustment of the relative risk for several important potential confounders. The statistically significant result corroborates the finding of a link between DPM exposure and lung cancer in MSHA's 2001 risk assessment.

Pope *et al.* (2002) used the cohort established by the American Cancer Society Cancer Prevention II Study to examine the relationship between lung cancer and $PM_{2.5}$ air pollution. This prospective cohort mortality study, which began in 1982, used questionnaires to obtain individual risk factor data (age, sex, race, weight, height, smoking history, education, marital status, diet, alcohol consumption, and occupational exposures). For about 500,000 adults, these risk factors were combined with air pollution data for metropolitan areas throughout the U.S. and with vital status and cause of death data through 1998.

After adjusting for other risk factors and potential confounders, using a variety of statistical methods, chronic $PM_{2.5}$ exposures were found to be significantly associated with elevated lung cancer mortality.[6] Each 10 μg/m$^3$ increase in the mean level of ambient fine particulate air pollution was associated with a statistically significant increase of approximately 8% in the risk of lung cancer mortality. Within the range of exposures found in the study, the exposure-response relationship between $PM_{2.5}$ and lung cancer was monotonically increasing. The authors concluded that ''[e]levated fine particulate exposures were associated with significant increases in lung cancer mortality * * * even after controlling for cigarette smoking, diet, occupational exposure, other individual risk factors, and after controlling for regional and other spatial differences.''

Szadkowska-Stanczyk and Ruszkowska (2000) performed a literature review of studies relating to the carcinogenic effects of diesel emissions. The authors concluded that long-term exposure (> 20 years) was associated with a 30% to 40% increase in lung cancer risk in workers in the transport industry. This article was written in Polish, and MSHA was unable to obtain a translation of it for this update. However, based on the English abstract, it appears to add no new information to the 2001 risk assessment.

Several commenters expressed opinions on the unpublished document by Dr. Gerald Chase (2004) entitled *Characterizations of Lung Cancer in Cohort Studies and a NIOSH Study on Health Effects of Diesel Exhaust in Miners*, which was placed into the public record at MARG's request. This document presents an analysis of some preliminary data provided by NIOSH and NCI at a public stakeholder meeting held on Nov. 5, 2003. These data were taken from unpublished charts that NIOSH and NCI used to inform the public on the status and progress of their ongoing project, *A Cohort Mortality Study with a Nested Case-Control Study of Lung Cancer and Diesel Exhaust Among Nonmetal Miners* [NIOSH/NCI 1997]. Researchers involved in that project have thus far published no analyses or conclusions based on these data. Dr. Chase, however, concluded that ''based on the limited data available to date, the number and pattern of lung cancer deaths reported * * * are in agreement with lung cancer deaths from the general population for the age groups involved * * *'' and ''* * * *are possible* without attributing any excess cancers to the study subject matter: diesel exhaust'' [emphasis added]. He offered no opinion as to whether the preliminary data actually demonstrate that there were no excess lung cancers attributable to DPM exposures.

Although Dr. Chase noted that his analyses and conclusions were limited and based on incomplete information, some commenters interpreted his report as casting serious doubt on any increased risk of lung cancer associated with occupational DPM exposures. For example, one commenter said the report ''suggests lung cancer is not a problem in this worker population.'' Another commenter interpreted Dr. Chase's findings as providing ''startling evidence rebutting MSHA's PELs and risk analysis.'' Other industry commenters asserted that Dr. Chase's analysis ''eliminates the rationale upon which the final 160 microgram standard was premised.'' Another commenter claimed that Dr. Chase's analysis shows MSHA's justification for limiting DPM exposures is ''contradicted by the NIOSH/NCI data.''

Commenters representing organized labor, on the other hand, focused on the preliminary and incomplete nature of the data Dr. Chase analyzed. One such commenter pointed out that these data had not been made directly available on MSHA's website and that the status of the NIOSH/NCI study was not discussed in the re-opening announcement. Another commenter argued that the Chase analysis does not meet minimal standards of ''real epidemiological research'' and that it ''is worthless for the purpose of [MSHA's DPM] rulemaking.'' This commenter also stated that ''the record already contains ample evidence of the carcinogenicity of DPM'' and that ''the NIOSH/NCI study will not shake those findings, even if it should prove to be inconclusive.''

The Chase analysis ignores at least three factors that can reasonably be expected to heavily influence the findings of the NIOSH/NCI study: (a) Differentiation between exposed and unexposed miners within the study, (b) quantification of exposure, and (c) possible ''healthy worker effect.'' According to the 1997 NIOSH/NCI study protocol, these three factors will be taken fully into account before any conclusions are published. The remainder of this subsection will explain how ignoring them, as in the Chase report, can mask adverse health effects potentially associated with DPM exposures.

[6] As discussed earlier, Pope *et al.* (2002) also provides strong evidence that chronic $PM_{2.5}$ exposure increases the risk of premature cardiopulmonary mortality.

(a) Differentiation Between Exposed and Unexposed Miners

Approximately 50% of the miners in the NIOSH/NCI study cohort are expected to be surface workers (NIOSH/NCI, 1997, Tables A.1 and B.2). These miners are likely to have experienced far lower levels of DPM exposure than underground miners in the cohort. The NIOSH/NCI study protocol specifies that such members of the cohort—*i.e.*, those who have had little or no occupational DPM exposure ''will be used as the ''unexposed'' control group for the study. In other words, the protocol calls for statistically comparing the health of these surface workers to the health of the much more highly exposed underground workers.

Dr. Chase did not distinguish between surface and underground workers in the cohort. Consequently, his analysis may dilute the lung cancer rate for exposed miners by combining it with the rate for miners with relatively little exposure. As noted by Dr. Chase, the preliminary data presented indicate that 9.8% of the deaths in the overall cohort were from lung cancer. He also suggests that the normal or ''background'' percentage is 8.0%, based on the national lung cancer mortality rate and that the excess of 9.8% over 8.0% is not statistically significant. Suppose, however, that the overall excess of lung cancer deaths arose entirely from that half of the cohort comprising exposed, underground workers. Then, for miners in the ''exposed'' group, the percentage of deaths from lung cancer would actually be 11.6%. Since 8.0/2 + 11.6/2 = 9.8, the 8.0% rate for surface workers would have diluted the 11.6% rate for exposed underground workers to yield an average rate of 9.8%. In this case, the lung cancer rate for underground miners would be about 45% greater than the national background rate (*i.e.*, 11.6/8.0).

Dr. Chase also claims that the 8% ''background'' rate is too low, since it combines all ages and includes relatively low lung cancer death rates for ages below 55 years. Although it is true that age-specific lung cancer mortality rates increase after age 55, this should be considered only in conjunction with the age at death for members of the specific study cohort. Approximately two-thirds of the cohort members were born after 1940, with a maximum age at death of 56 years. For this age group, less than 5% of all deaths are attributed to lung cancer. Therefore, for purposes of comparison with this particular study cohort, an 8% background rate may be too high rather than too low, and the excess for underground workers may be even greater than the 45% indicated above.

(b) Quantification of Exposure

As explained in the 2001 risk assessment, quantification of exposure was an important element in MSHA's evaluation of epidemiologic studies on DPM and lung cancer (FR 66 at 5784–5785, 5795ff). Relatively little weight was placed on studies that took no account of duration and intensity of exposure. At the time of the NIOSH/NCI Joint Study Meeting to discuss information with stakeholders on the progress of the study, exposure data for individual miners still were being processed. Since such exposure data were not presented at the meeting, they could not be used in Dr. Chase's analysis.

The lack of detailed exposure data in Dr. Chase's analysis could potentially cause major distortions in interpretation of the results. The study cohort includes a number of workers with relatively short exposure duration. This is demonstrated by a 1981 NIOSH study showing that the mean tenure of underground trona miners working in 1976 was only about 3 years for ages greater than 25 years. (Attfield *et al.* 1981). The two largest trona mines included in that study were also included in the NIOSH/NCI study (identified as Numbers 6 and 8 in Table A.1 of the 1997 NIOSH/NCI study protocol). Therefore, a substantial portion of the NIOSH/NCI study cohort may have been occupationally exposed to DPM for three years or less. If such short exposures produce little or no excess in lung cancers, then this portion of the cohort could mask a significant excess among workers with longer exposures. Since Dr. Chase's analysis lumps miners together without regard to exposure duration, it provides no effective way to evaluate effects associated with long-term exposure.

(c) Internal Versus External Analysis

Another important element in MSHA's evaluation of epidemiologic studies on DPM and lung cancer was equitable composition of the groups being compared (FR 66 at 5783–5784, 5795ff). As explained in the **Federal Register**, comparison of an exposed cohort to an external control group can give rise to various forms of selection bias. For example, the ''healthy worker effect,'' which is widely recognized in the occupational health literature, tends to reduce estimates of excess risk in a group of workers when that group is compared to a general population. Several of the lung cancer cohort studies reviewed in the 2001 risk assessment cohorts showed no excess lung cancers among exposed workers compared to an external population. Nevertheless, those studies showed excess lung cancers among exposed workers compared to otherwise similar but unexposed workers.

To avoid selection biases, the 2001 risk assessment favored comparisons against internal control groups or studies that compensated for the healthy worker effect by means of an appropriate adjustment. Dr. Chase's analysis, however, focuses entirely on external comparisons with no compensating adjustment—an approach that the 2001 risk assessment generally discounted. Although the NIOSH/NCI study protocol explicitly calls for internal comparisons, the detailed exposure data necessary for such comparisons were not available to Dr. Chase since they were not presented during the November 5, 2003 public meeting.

(d) Conclusions Regarding Dr. Chase's Analysis

Dr. Chase has argued that some preliminary and incomplete data made available from the NIOSH/NCI study do not demonstrate any excess lung cancer associated with DPM exposure. Even if Dr. Chase is correct, however, this may merely reflect limitations of the preliminary and incomplete data upon which his analysis relies. Because necessary data were not yet available, the Chase analysis was unable to consider a possible healthy worker effect, occupationally unexposed workers within the cohort, or potentially important variations in exposure intensity and duration. When the NIOSH/NCI study is completed, we are confident that it will take all these factors into account in accordance with the protocol.

MSHA concludes that the data on which Dr. Chase's analysis is based are inadequate for identifying or assessing the relationship between occupational DPM exposure and excess lung cancer mortality. These incomplete data provide little insight into what a comprehensive analysis of the NIOSH/NCI study results will ultimately show, when carried out in accordance with the study protocol.

*Bladder Cancer*

Boffetta and Silverman (2001) performed a meta-analysis of 44 independent results from 29 distinct studies of bladder cancer in occupational groups with varying exposure to diesel exhaust. Studies were included only if there were at least five

years between time of first exposure and development of bladder cancer.

Separate quantitative meta-analyses were performed for heavy equipment operators, truck drivers, bus drivers, and studies with semi-quantitative exposure assessments based on a job exposure matrix (JEM). The overall relative risk (RR) for heavy equipment operators was RR = 1.37 (95% CI: 1.05–1.81); for truck drivers, RR = 1.17 (1.06–1.29); for bus drivers, RR = 1.33 (1.22–1.45); and for JEM, RR = 1.13 (1.0–1.27).

A quantitative meta-analysis was also performed on 8 independent studies showing results for ''high'' diesel exposure. The combined results were RR = 1.23 (1.12–1.36) for ''any exposure'' and RR = 1.44 (1.18–1.76) for ''high exposure.''

The authors discovered a strong indication of publication bias for truck and bus driver studies, a tendency for studies to be published only when they showed a positive result. However, the summary RR for the seven largest truck or bus driver studies was 1.26 (1.18–1.34), which is very close to the RR based on all 27 truck or bus driver results. There was no indication of publication bias for studies with semi-quantitative exposure assessments.

The results of this meta-analysis suggest a statistically significant association between diesel exposure and an elevated risk of bladder cancer not fully explained by publication bias. Nevertheless, potential confounding by vibration, dietary factors, and infrequency of urination among drivers preclude a causal interpretation of this association.

Not included in this meta-analysis was a study by Zeegers *et al.* (2001). This was a prospective case-cohort study involving 98 cases of bladder cancer among men occupationally exposed to diesel exhaust. A cohort of 58,279 men who were 55 to 69 years old in 1986 was followed up through December 1992. Exposure was assessed by job history given on a self-administered questionnaire, combined with experts' assessment of the exposure probability for each job. A ''cumulative probability of exposure'' was determined by multiplying job duration by the corresponding exposure probability. Four categories of relative cumulative exposure probability were defined: none, lowest third, middle third, and highest third. Relative risks were adjusted for age, cigarette smoking, and exposure to other occupational risk factors.

The relative risk for the category with highest cumulative probability of exposure was RR = 1.17 (95% CI: 0.74–1.84). In light of the meta-analysis results described above, the lack of statistical significance found in this study may be due to low statistical power for detecting diesel exhaust effects, combined with nondifferential errors in the exposure assessment.

As with the epidemiological studies on diesel exposure and bladder cancer considered in the meta-analysis, no adjustment was made in this study for infrequency of urination or for dietary patterns possibly associated with occupations having diesel exposures. Therefore, this study, like the meta-analysis performed by Boffetta and Silverman, has no impact on the 2001 risk assessment.

*Pancreatic Cancer*

Ojajärvi *et al.* (2000) performed a meta-analysis of 161 independent results from 92 studies on the relationship between diesel exhaust exposure and pancreatic cancer. No elevated risk was associated with diesel exposure. The combined relative risk was RR = 1.0 (95% CI: 0.9–1.3). This result is consistent with the 2001 risk assessment, which identified lung cancer and bladder cancer as the only forms of cancer for which there was evidence of an association with DPM exposure.

4. Mechanisms of Toxicity

Table VI–12 describes 15 DPM toxicity studies published after the 2001 risk assessment and cited in the 2003 NPRM. Table VI–12 also describes a 16th toxicity study (Arlt *et al.*, 2002), which was cited by Dr. Jonathan Borak in comments submitted by MARG. All of these studies lend some degree of support to the conclusions of the 2001 risk assessment. In addition to briefly describing each study and its key results, the table identifies the agent(s) of toxicity investigated and indicates how the results support the risk assessment by categorizing the toxic effects and/or markers of toxicity found. The categories used to classify toxic effects are: (A) Immunological and/or allergic reactions, (B) inflammation, (C) mutagenicity and/or DNA adduct formation, (D) induction of free oxygen radicals, (E) airflow obstruction; (F) impaired clearance; (G) reduced defense mechanisms; and (H) adverse cardiovascular effects.

TABLE VI–12.—STUDIES ON TOXICOLOGICAL EFFECTS OF DPM EXPOSURE, 2000–2002

| Authors, year | Description | Key results | Agent(s) of toxicity | Toxic effect(s) * | Limitations |
|---|---|---|---|---|---|
| Al-Humadi *et al.,* 2002 | IT instillation in rats of 5 mg/kg saline, DPM, or carbon black. | Exposure to DPM or carbon black augments OVA sensitization; particle composition (of DPM) may not be critical for adjuvant effect. | DPM and carbon black particles. | A | |
| Arlt *et al.,* 2002 ..... | In Vitro and in Vivo: investigation of metabolic activation of 3-nitrobenzanthrone (3-NBA) by human enzymes. | Increased DNA adduct formation due to in the presence of human N,O acetyltransferases and sulfotransferases. | 3-NBA, a constituent of the organic fraction of DPM. | C | No DPM used. |

TABLE VI–12.—STUDIES ON TOXICOLOGICAL EFFECTS OF DPM EXPOSURE, 2000–2002—Continued

| Authors, year | Description | Key results | Agent(s) of toxicity | Toxic effect(s) * | Limitations |
|---|---|---|---|---|---|
| Bünger *et al.,* 2000 ..... | In Vitro: assessment of content of polynuclear aromatic compounds and mutagenicity of DPM generated from four fuels, Ames assay used. | Production of black carbon and polynuclear aromatic compounds that are mutagenic; correlation with sulfur content of fuel and engine speed. | DE generated from diesel engine. DPM collected on filters and soluble organic extracts prepared. | C | |
| Carero *et al.,* 2001 ..... | In Vitro: assessment of DPM, carbon black, and urban particulate matter genotoxicity, human alveolar epithelial cells used. | DNA Damage produced, but no cytotoxicity produced. | DPM, urban particulate matter (UPM), and carbon black (CB). DPM, UPM purchased from NIST, CB purchased from Cabot. | C | |
| Castranova *et al.,* 2001. | In Vitro: assessment of DPM on alveolar macrophage functions and role of adsorbed chemicals; rat alveolar macrophages used. In Vivo: assessment of DPM on alveolar macrophage functions and role of adsorbed chemicals, use of IT instillation in rats. | DPM depresses antimicrobial potential of macrophages, thereby increasing susceptibility of lung to infections, this inhibitory effect due to adsorbed chemicals rather than carbon core of DPM. | No information on generation of DPM. (details may be found in previous publications from this lab). | D, F, G | |
| Fujimaki *et al.,* 2001 ... | In Vitro: assessment of cytokine production, spleen cells used. In Vivo: assessment of cytokine production profile following IP sensitization to OA and subsequent exposure to 1.0 mg/mg$^3$ DE for 12 hr/day, 7 days/week over 4 weeks, mouse inhalation model used. | Adverse effects of DE on cytokine and antibody production by creating an imbalance of helper T-cell functions. | DE generated from diesel engine. DPM, $CO_2$, $SO_2$, and $NO/NO_2/NO_x$ measured. | A | Sensitization to OA via IP injection. Changes in pulmonary function not assessed. |
| Gilmour *et al.,* 2001 .... | In Vivo: assessment of infectivity and allergenicity following exposure to woodsmoke, oil furnace emissions, or residual oil fly ash, mouse inhalation model used, IT instillation used in rats. | Exposure to woodsmoke increased susceptibility to and severity of streptococcal infection, exposure to residual oil fly ash increased pulmonary hypersensitivity reactions. | Woodsmoke, oil furnace emissions, and residual oil fly ash (ROFA) used. | A, B | No DPM used. |
| Hsiao *et al.,* 2000 ..... | In Vitro: assessment of cytotoxic effects (cell proliferation, DNA damage) of $PM_{2.5}$ (fine PM and $PM_{2.5-10}$ (coarse PM), rat embryo fibroblast cells used. | Seasonal variations in PM, in their solubility, and in their ability to produce cytotoxicity. Long-term exposure to non-killing doses of PM may lead to accumulation of DNA lesions. | PM collected Hong Kong area and solvent-extractable organic compounds used. | C | No DPM used. |
| Kuljukka-Rabb *et al.,* 2001. | In Vitro: assessment of adduct formation following exposure to DPM, DPM extracts, benzo[a]pyrene, or 5-methylchrysene, mammary carcinoma cells used. | Temporal and dose-dependent DNA adduct formation by PAHs. Carcinogenci PAHs from diesel extracts lead to stable DNA adduct formation. | Some DPM purchased from NIST, some DPM collected on filters from diesel vehicle, and solvent-extractable organic compounds used. | C | Use of only soluble organic fraction of DPM. |

TABLE VI–12.—STUDIES ON TOXICOLOGICAL EFFECTS OF DPM EXPOSURE, 2000–2002—Continued

| Authors, year | Description | Key results | Agent(s) of toxicity | Toxic effect(s) * | Limitations |
|---|---|---|---|---|---|
| Moyer *et al.,* 2002 ..... | In Vivo: 2-phase retrospective study, review of NTP data from 90-day and 2-yr exposures to particulates, use of mouse inhalation model. | Induction and/or exacerbation of arteritis following chronic exposure (beyond 90-day) to particulates. | Indium phosphide, cobalt sulfate heptahydrate, vanadium pentoxide, gallium arsenide, nickel oxide, nickel subsulfide, nickel sulfate hexahydrate, talc, molybdenum trioxide used. | B, H | Nine particulate compounds selected to represent al PM. |
| Saito *et al.,* 2002 ..... | In Vivo: assessment of cytokine expression following exposure to DE (100 μg/m$^3$ or 3 mg/m$^3$ DPM) for 7-hrs/day × 5 days/wk × 4 wks, mouse inhalation model used. | DE alters immunological responses in the lung and may increase susceptibility to pathogens, low-dose DE may induce allergic/asthmatic reactions. | DE generated from diesel engine. DPM, CO, $SO_2$ and $NO_2$ measured. | A | |
| Sato *et al.,* 2000 ..... | In Vivo: assessment of mutant frequency and mutation spectra in lung following 4-wk exposure to 1 or 6 mg/m$^3$ DE, transgenic rat ihalation model used. | DE produced lesions in DNA and was mutagenic in rat lung. | DE generated from light-duty diesel engine. Concentration of suspended particulate matter (SPM) measured, 11 PAHs and nitrated PAHs identified and quantitated in SPM. | C | |
| Van Zijverden *et al.,* 2000. | In Vivo: assessment of immuno-modulating capacity of DPM, carbon black, and silica particles, mouse model used (sc injection into hind footpad). | DPM skew immune response toward T helper 2 (Th2) side, and may facilitate initiation of allergy. | DPM, carbon black particles (CBP) and silica particles (SIP) used. DPM donated by Nijmegen University, CBP and SIP purchased from BrunschwichChemie and Sigma. | A | Questionable relevance of exposure route (sc injection). |
| Vincent *et al.,* 2001 .... | In Vivo: assessment of cardiovascular effects following 4-hr exposure to 4.2 mg/m$^3$ diesel soot, 4.6 mg/m$^3$ carbon black, or 48 mg/m$^3$ ambient urban particulates, rat inhalation model used. | Increases in endothelin − 1 and − 3 (two vasoregulators) following ambient urban particulates and diesel soot exposure. Small increases in blood pressure following exposure to ambient urban particualtes. | Diesel soot, carbon black and urban air particulates used. Diesel soot purchased from NIST, carbon black donated by University of California, urban air particulates collected in Ottawa. | H | |
| Walters *et al.,* 2001 .... | In Vivo: assessment of airway reactivity/responsiveness, and BAL cells and BAL cytokines following exposure to 0.5 mg/mouse aspirated DPM, ambient PM, or coal fly ash. | Dose and time-dependent changes in airway responsiveness and inflammation following exposure to PM. Increase in BAL cellularity following exposure to DPM, but airway reactivity/responsiveness unchanged. | DPM, PM, and coal fly ash used. DPM purchased from NIST, PM collected in Baltimore, and coal fly ash obtained from Baltimore power plant. | A, B | |

TABLE VI–12.—STUDIES ON TOXICOLOGICAL EFFECTS OF DPM EXPOSURE, 2000–2002—Continued

| Authors, year | Description | Key results | Agent(s) of toxicity | Toxic effect(s) * | Limitations |
|---|---|---|---|---|---|
| Whitekus *et al.,* 2002 .. | In Vitro: assessment of ability of six antioxidants to interfere in DPM-mediated oxidative stress, cell cultures used. In Vivo: assessment of sensitization to OA and/or DPM and possible modulation by thiol antioxidants, mouse inhalation model used. | Thiol antioxidants (given as a pretreatment) inhibit adjuvant effects of DPM in the induction of OA sensitization. | DE generated from light-duty diesel engine, DPM collected, dissolved in saline, and aerosolized. | A, D | Changes in pulmonary function associated with sensitization not assessed. |

*KEY:
(A) Immunological and/or allergic reactions.
(B) Inflammation.
(C) Mutagenicity/DNA adduct formation.
(D) Induction of free oxygen radicals cardiovascular effects.
(E) Airflow obstruction.
(F) Impaired clearance.
(G) Reduced defense mechanisms.
(H) Adverse.

In addition to the new toxicity studies, four new reviews on various aspects of the scientific literature related to mechanisms of DPM toxicity were cited in the 2003 NPRM. These are listed in Table VI–13. Two of these reviews (ILSI, 2000 and Oberdoerster, 2002) focus on the applicability of the DPM rat toxicity studies to low-dose extrapolation for humans and conclude that such extrapolation is not appropriate. Since the 2001 risk assessment does not attempt to make any such extrapolation, these reviews do not affect MSHA's conclusions. As noted in the 2001 risk assessment, evidence that the carcinogenic effects of DPM in rats are due to overload of the rats' lung clearance mechanism does not rule out a mutagenic mechanism of carcinogenesis at lower exposure levels in other species. The other two review articles generally support the discussion in the 2001 risk assessment of inflammation responses due to DPM exposures.

TABLE VI–13.—REVIEW ARTICLES ON TOXICOLOGICAL EFFECTS OF DPM EXPOSURE, 2000–2002

| Authors, year | Description | Conclusions | Agent(s) of toxicity | Toxic effects * |
|---|---|---|---|---|
| ILSI Risk Science Institute Workshop Participants, 2000. | Review of rat inhalation studies on chronic exposures to DPM and to other poorly soluble nonfibrous particles of low acute toxicity that are not directly genotoxic. | No overload of rat lungs at lower lung doses of DPM and no lung cancer hazard anticipated at lower doses. | Poorly soluble particles nonfibrous particles of low acute toxicity and not directly genotoxic (PSPs). | |
| Nikula, 2000 ..... | Review of animal inhalation studies on chronic exposures to DE, carbon black, titanium dioxide, talc and coal dust. | Species differences in pulmonary retention patterns and lung tissue responses following chronic exposure to DE. | DE, carbon black, titanium dioxide, talc and coal dust. | B, F |
| Oberdoerster, 2002 ..... | In Vivo: review of toxicokinetics and effects of fibrous and nonfibrous particles. | High-dose rat lung tumors produced by poorly soluble particles of low cytotoxicity (*e.g.*, DPM) not appropriate for low-dose extrapolation (to humans); lung overload occurs in rodents at high doses. | Fibrous particles, and nonfibrous particles that are poorly soluble and have low cytotoxicity (PSP). | |
| Veronesi and Oortigiesen, 2001. | In Vitro: review of nasal and pulmonary innervation (receptors) and pulmonary responses to PM, mainly BEAS cells sensory neurons used. | Pulmonary receptors stimulated/activated by PM, leading to inflammatory responses. | PM: residual oil fly ash, woodstove emissions, volcanic dust, urban ambient particulates, coal fly ash, and and oil fly ash. | A, B |

*KEY:
(A) Immunological and/or allergic reactions
(B) Inflammation
(C) Mutagenicity/DNA adduct formation
(D) Induction of free oxygen radicals
(E) Airflow obstruction
(F) Impaired clearance
(G) Reduced defense mechanisms

(H) Adverse cardiovascular effects.

*D. Significance of Risk*

The first principal conclusion of the 2001 risk assessment was:

> Exposure to DPM can materially impair miner health or functional capacity. These material impairments include acute sensory irritations and respiratory symptoms (including allergenic responses); premature death from cardiovascular, cardiopulmonary, or respiratory causes; and lung cancer.

MSHA agrees with those commenters who characterized the weight of evidence from the most recent scientific literature as supporting or even strengthening this conclusion. Furthermore, this conclusion has also been corroborated by comprehensive scientific literature reviews carried out by other institutions and government agencies.

In 2002, for example, the U.S. EPA, with the concurrence of its Clean Air Scientific Advisory Committee (CASAC), published its Health Assessment Document for Diesel Engine Exhaust (EPA, 2002). With respect to sensory irritations, respiratory symptoms, and immunological effects, this document concluded that:

> At relatively high acute exposures, DE [diesel exhaust] can cause acute irritation to the eye and upper respiratory airways and symptoms of respiratory irritation which may be temporarily debilitating. Evidence also shows that DE has immunological toxicity that can induce allergic responses (some of which are also typical of asthma) and/or exacerbate existing respiratory allergies. [EPA, 2002]

In 2003, the World Health Organization (WHO) issued a review report on particulate matter air pollution and health. WHO concluded that ''fine particles (commonly measured as $PM_{2.5}$) are strongly associated with mortality and other endpoints such as hospitalization for cardiopulmonary disease, so that it is recommended that air quality guidelines for $PM_{2.5}$ be further developed.'' (WHO, 2003)

In the 10th edition of its Report on Carcinogens, the National Toxicology Program (NTP) of the National Institutes of Health formally retained its designation of diesel exhaust particulates as ''reasonably anticipated to be a human carcinogen.'' (U.S. Dept. of Health and Human Services, 2002) The report noted that:

> Diesel exhaust contains identified mutagens and carcinogens both in the vapor phase and associated with respirable particles. Diesel exhaust particles are considered likely to account for the human lung cancer findings because they are almost all of a size small enough to penetrate to the alveolar region. * * * Because of their high surface area, diesel exhaust particulates are capable of adsorbing relatively large amounts of organic material * * * A variety of mutagens and carcinogens such as PAH and nitro-PAH * * * are adsorbed by the particulates. There is sufficient evidence for the carcinogenicity for 15 PAHs (a number of these PAHs are found in diesel exhaust particulate emissions) in experimental animals. The nitroarenes (five listed) meet the established criteria for listing as ''reasonably anticipated to be a human carcinogen'' based on carcinogenicity experiments with laboratory animals. [U.S. Dept. of Health and Human Services, 2002]

Similarly, EPA's 2002 Health Assessment Document for Diesel Engine Exhaust concluded that diesel exhaust (as measured by DPM) is ''likely to be a human carcinogen.'' Furthermore, the assessment concluded that ''[s]trong evidence exists for a causal relationship between risk for lung cancer and occupational exposure to D[iesel]E[xhaust] in certain occupational workers.'' (EPA, 2002, Sec. 9, p. 20)

Although most commenters agreed that the adverse health effects associated with miners' DPM exposures warranted an exposure limit, some commenters continued to challenge the scientific basis for linking DPM exposures with an increased risk of lung cancer. An industry trade group submitted a critique of the 2001 risk assessment by Dr. Jonathan Borak, and this critique was endorsed by several other commenters representing the mining industry. The following discussion addresses Dr. Borak's comments in the same order that he presented them.

*1. Dr. Borak suggested that MSHA should have classified studies into 3 categories: positive, negative, and inconclusive. He indicated that MSHA's classification was asymmetric in the way that it classified studies as ''positive'' or ''negative,'' thereby distorting the results of MSHA's tabulation and nonparametric sign test, as presented in the 2001 risk assessment.*

This comment was apparently based on a misunderstanding of how MSHA classified a study as ''negative'' for purposes of the sign test. In describing MSHA's criterion for classifying a study as negative, Dr. Borak quoted a passage from the 2001 risk assessment that actually pertained to a statistically significant negative study. The tabulations to which Dr. Borak referred symmetrically counted epidemiologic results as positive or negative based on whether the reported relative risk or odds ratio fell above or below 1.0.

*2. Dr. Borak stated that ''MSHA approached the analysis as though any study failing to document a protective effect of diesel must perforce be evidence of a harmful effect.''*

This statement is false and stems from Dr. Borak's misunderstanding of the symmetric criteria for MSHA's tabulations, as explained above. Furthermore, Dr. Borak's discussion of statistical significance and hypothesis testing in connection with this comment is applicable to evaluating the results of a single study—not to risk assessment based on combining multiple results.

To evaluate the statistical significance of the aggregated epidemiologic evidence, the 2001 risk assessment relied largely on two meta-analyses (Bhatia *et al.*, 1998; Lipsett and Campleman, 1999). MSHA applied the nonparametric sign test to its tabulation of all 47 studies in order to roughly summarize the combined evidence.

3. *Dr. Borak quoted the 2001 risk assessment as stating that ''MSHA regards a real 10% increase in the risk of lung cancer (i.e., a relative risk of 1.1) as constituting a clearly significant health hazard.'' He then stated that the concept of a ''real 10-percent increase'' is ''actually undefined and subjective.''*

Dr. Borak paraphrased language in the 2001 risk assessment, substituting a ''reported'' 10% increase for a ''real'' 10% increase (top of his p. 5). The risk assessment's distinction between ''reported'' and ''real'' relative risks is important and corresponds to the fundamental distinction between a statistical estimate and the quantity being estimated.

Contrary to Dr. Borak's characterization, the risk assessment recognized that epidemiological results are often subject to a great deal of statistical uncertainty. Such uncertainty can be expressed by means of a confidence interval for the ''real'' value being estimated by a ''reported'' result. For example, a reported relative risk (RR) of 1.5 estimates the real relative risk underlying a particular study, for which a 95% confidence interval might be 1.3 to 1.7. This interval is designed to circumscribe the real relative risk with 95% probability.

A 95% confidence interval for the real relative risk may be so broad (e.g., 0.8 to 1.4) as to overlap 1.0 and thereby render the reported result statistically non-significant. Because of the statistical uncertainty associated with a reported RR, extremely large study

populations are required in order to obtain statistically significant results when the real relative risk is near 1.0. The point being made in the passage that Dr. Borak quoted and then incorrectly paraphrased is that notwithstanding this statistical uncertainty, a real (as opposed to merely reported) 10% increase in the risk of lung cancer would constitute a clearly significant health effect. Therefore, reported results whose associated confidence intervals overlap 1.1 are consistent with potential health effects that are sufficiently large to be of practical significance.

*4. Dr. Borak asserted that ''* * * Federal Courts have held that relative risks of less than 2.0 are not sufficient for showing causation * * * but MSHA has rejected that view.''*

MSHA has not rejected the view expressed in the court decisions to which Dr. Borak alluded. *Daubert* v. *Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); and Hall* v. *Baxter Healthcare Corp., 947 F Supp. 1387 (1996).* As explained in the 2001 risk assessment, these decisions pertain to establishing the specific cause of disease for a particular person and not to establishing the increased risk attributable to an exposure. (FR 66 at 5787–5789) This distinction was illustrated by two analogies in the 2001 risk assessment: (1) There is low probability that a particular death was caused by lighting, but exposure to lighting is nevertheless hazardous; and (2) a specific smoker may not be able to prove that his or her lung cancer was ''more likely than not'' caused by radon exposure, yet radon exposure significantly increases the risk—especially for smokers. (FR 66 at 5787) As stated in the 2001 risk assessment, the court decisions are inapplicable because ''[t]he excess risk of an outcome, given an excessive exposure, is not the same thing as the likelihood that an excessive exposure caused the outcome in a given case.'' (FR 66 5787)

Dr. Borak ignored MSHA's explanation of why the federal court rulings do not apply to the 2001 risk assessment. Instead, he attempted to differentiate the available epidemiologic studies on diesel exposure and lung cancer from examples, presented in the risk assessment, of studies reporting RR less than 2.0 that were nevertheless instrumental in previous clinical and public health policy decisions. For example, Dr. Borak pointed out that all ten of the results cited on the relationship between smoking and cardiovascular-related deaths achieved statistical significance. The risk assessment presented these examples, however, only to support the position that there is ''ample precedent'' for utilizing studies with RR less than 2.0 in a risk assessment. This was in response to comments urging MSHA to ignore all such results, even the many results with RR less than 2.0 that were also statistically significant. Thus, the ten results linking smoking to cardiovascular deaths, eight of which involved RR less than 2.0, adequately serve their intended illustrative purpose. Similarly, Dr. Borak's discussion of radon studies is not germane to their use as examples of studies with RR less than 2.0 that have not been generally discounted. Although the residential radon studies cited may, as Dr. Borak suggests, have been more powerful and had better exposure assessments than those available for DPM, they nevertheless demonstrate that there has been no blanket rejection of epidemiologic results whenever RR is less than 2.0.

*5. Dr. Borak objected to what he termed MSHA's ''reliance on the 'healthy worker effect' [HWE] to explain the finding of small or no differences in various studies.'' He argued that ''[a]s a result, MSHA has biased its own evaluation of this literature in a manner that exaggerates the alleged human cancer risks of DPM, while diminishing studies that are not directly supportive of the MSHA perspective.''*

The 2001 risk assessment expresses a clear preference for studies using internal comparisons or well-matched cases and controls—studies in which the question of whether an HWE adjustment is desirable does not even arise. In fact, internal comparisons or matched cases and controls were utilized in all eight of the epidemiological studies identified in the risk assessment as presenting ''the best currently available epidemiological evidence.'' In contrast, the risk assessment identified six negative (*i.e.*, RR or OR < 1.0) studies (out of 47) and noted that all six relied on unmatched cases and controls or on external comparisons to general populations, with no allowance for any potential HWE. However, potential bias due to HWE was not the only weakness identified in these six studies. The assessment also noted that five of the six studies had low statistical power due to a small study population, insufficient allowance for latency, or both. Furthermore, the assessment noted that all six of these negative studies contained weak DPM exposure assessments and failed to adjust for potentially different patterns of tobacco smoking in the disparate groups being compared. Dr. Borak did not dispute MSHA's exclusion of these six studies from the rank of best available epidemiologic evidence.

More specifically, Dr. Borak objected to a relatively simple method of adjusting for the HWE used in one part of a meta-analysis by Bhatia *et al.* (1998) and also in some of the individual studies cited in the risk assessment. Dr. Borak noted that ''most epidemiologists agree that the effects of selection bias are generally more important early in a person's work life and do not apply equally to all diseases and disease processes.'' Citing the adjustment formula from Bhatia *et al.* (1998), Dr. Borak claimed that it is ''implicit throughout the MSHA discussion'' that ''the effects of HWE on observed lung cancer mortality are essentially equivalent (*i.e.*, proportional) to its effects on mortality from all causes.''

Although most epidemiologists may agree selection biases do not apply equally to all diseases, this does not render consideration of HWE irrelevant to epidemiologic studies of lung cancer. Health Effects Institute (HEI) (1999) states that ''[w]orker mortality tends to be below average for all major causes of death.'' The 2001 risk assessment accepted a proportional adjustment only insofar as it was utilized in some of the published epidemiological studies. Although Dr. Borak may be correct that compensating for HWE is not really so simple, a proportional adjustment may nevertheless be better than no adjustment at all. MSHA did not itself make any such adjustments or otherwise attempt to quantify the impact of HWE in any of the studies. MSHA did, however, accept HWE adjustments as they appeared in published studies.

Although he did not explicitly say so, Dr. Borak presumably shares what he says is ''the general view that studies of cancer, particularly lung cancers, are not much affected by HWE.'' This view, however, is not universal. It is not, for example, shared by HEI (1999) or U.S. EPA (2002). Dr. Borak dwelled on pre-employment interviews and health exams as a source of HWE that would probably not apply to lung cancer studies, but pre-employment health screenings are not, after all, the only potential source of bias leading to HWE. Dr. Borak did not dispute the proposition that HWE reflects a potential bias when a working population is compared to a more general control population, or that this may be one of several factors contributing to a lack of positive results or statistical significance in some studies. As he has suggested, the potential impact of HWE in lung cancer studies may be greatest among those

involving the shortest latency allowances and/or follow-up times.

*6. In the study published by Säverin et al. (1999), exposure measurements were obtained in 1992, whereas ''the mines ceased production in 1991'' when ''most of the miners were dismissed and abandoned underground work and exposure.'' Based on this apparent discrepancy, Dr. Borak questioned the argument used by Säverin et al., and accepted in the risk assessment, to justify their assumption that their exposure measurements were representative of exposures from 1970 to 1991. Dr. Borak speculated that the 1992 exposure measurements were likely to have been made during a ''staged simulation'' and that these measurements may have underestimated DPM levels under conditions of routine production.*

To resolve this issue, MSHA contacted Dr. Säverin directly and asked him to explain the sequence of events relating to mine closures and exposure measurements. Dr. Saverin replied as follows:

> * * * [t]he full potash production of millions of tons per year in the seventies and eighties declined in the years after 1989, the official closing date being in 1991. But until 1994, there was a lot of mining activity underground because a mine cannot be abandoned immediately. So, in 1992, we had no problems to find exposure conditions not merely similar to but exactly like the routine-production situation before. Thus, we did not have to rely on any staged simulation but made our measurements as state of the art requires. [Säverin, R. 2005]

Thus, despite any ambiguity in the published article, Dr. Säverin maintains that the 1992 measurements were obtained under normal production conditions and were fully representative of exposures from 1970 through 1991. MSHA accepts Dr. Säverin's assessment.

As stated in the 2001 risk assessment, NIOSH commented that ''[d]espite the limitations discussed * * * the findings from the Säverin *et al.* (1999) study should be used as an alternative source of data for quantifying the possible lung cancer risks associated with Dpm exposures.'' MSHA is not relying on any single study but, instead, is basing its evaluation on the weight of evidence from all available data.

*7. Dr. Borak identified a number of weaknesses and limitations in the epidemiologic studies by Säverin et al. (1999) and Johnston et al. (1997). Despite their shortcomings, the 2001 risk assessment ranked these two studies among the eight ''that provide the best currently available epidemiologic evidence.''*

As Dr. Borak indicated, all of the weaknesses and limitations he identified were recognized and discussed in the 2001 risk assessment. The risk assessment consistently and repeatedly emphasized that the strength of evidence relating DPM exposure to an increased risk of lung cancer lies not in any individual study but in the cumulative weight of the research literature taken as a whole. As stated in the risk assessment,

> * * * MSHA recognizes that no single one of the existing epidemiologic studies, viewed in isolation, provides conclusive evidence of a causal connection between DPM exposure and an elevated risk of lung cancer in humans. Consistency and coherency of results, however, do provide such evidence. An appropriate analogy for the collective epidemiologic evidence is a braided steel cable, which is far stronger than any of the individual strands of wire making it up. (66 FR at 5825)

Both of the additional epidemiological studies cited in the 2003 NPRM specifically relating DPM exposures to lung cancer (Gustavsson *et al.*, 2000 and Boffetta *et al.*, 2001) found statistically significant positive results. The 2002 EPA document, which was compiled too early to consider these two newest studies, concluded that even at the far lower levels typically encountered in ambient air, ''[t]he available evidence [from toxicity studies and occupational epidemiology] indicates that chronic inhalation of DE is likely to pose a lung cancer hazard to humans.''

This conclusion has now received important additional confirmation from a large scale mortality study involving exposure to combustion-related fine particulate air pollution (Pope *et al.*, 2002). This study, which included estimates of lung cancer effects, was cited in the NPRM but not considered in either the 2001 risk assessment or the 2002 EPA document. As described earlier, a statistically significant exposure-response relationship was discovered between chronic $PM_{2.5}$ exposure in the ambient air and an increased risk of lung cancer. This finding is especially significant for confirming causality because it represents an entirely new source of evidence not subject to unknown biases that might tend to distort occupational epidemiology results in the same direction.

Dr. Borak also stated that presently available data are insufficient to establish an exposure-response relationship for lung cancer that would justify setting the PEL at any specific level. The 2001 risk assessment recognizes uncertainty in lung cancer exposure-response and presents a broad range of estimated exposure-response relationships (66 FR at 5852–53). Even the lowest estimate shows unacceptable risk at levels commonly encountered in underground mines. Lack of a definitive exposure-response relationship means MSHA cannot precisely distinguish differences in health effects—*e.g.*, between $50_{DPM}$ μg/m³ and $100_{DPM}$ μg/m³. Nevertheless, as explained below, MSHA can confidently say that exposures above the interim PEL are significantly more hazardous than exposures below the interim PEL.

The second principal conclusion of the 2001 risk assessment was:

> At DPM levels currently observed in underground mines, many miners are presently at significant risk of incurring these material impairments due to their occupational exposures to DPM over a working lifetime.

As described in Section VI.B, two new bodies of exposure data have been compiled since promulgation of the 2001 rule. Comparison of these data is not straightforward, since they employed different methods for measuring DPM. Nevertheless, the data suggest that exposure levels in many underground M/NM mines have dropped significantly, as compared to the 1989–1999 period covered by the 2001 risk assessment.

The 2001 risk assessment quantified excess lung cancer risk based on a mean DPM concentration of 808 μg/m³. This was based on 355 MSHA area and personal samples collected in production areas and haulageways at 27 underground M/NM mines between 1989 and 1999. Nearly all of these samples were collected without an impactor and analyzed for DPM content using the RCD method. The new samples, on the other hand, were collected with an impactor and analyzed for TC or EC using NIOSH Method 5040. To see how more recent exposure levels tie into the quantitative exposure-response models used in the 2001 risk assessment, it is necessary to convert sample results from both new sources of exposure data to approximate DPM concentrations.

Samples from the 31-Mine Study were collected in 2001 using an impactor and were analyzed by NIOSH Method 5040. These samples showed a mean DPM concentration of 432 μg/m³—assuming, as in the 2001 risk assessment, that TC comprises 80 percent of total DPM. Excluding the samples from trona mines, which were found to have significantly lower DPM levels than the other 27 underground M/NM mines with valid samples, the mean DPM

concentration was approximately 492 μg/m³.[7]

The other, more recent and more extensive, body of DPM exposure data considered here consists of 1,194 baseline samples obtained at 183 mines in 2002–2003. These samples were all collected using a submicrometer impactor and analyzed by NIOSH Method 5040. Assuming that TC ≈1.3 × EC and, as before, that TC comprises about 80 percent of the DPM, the mean DPM concentration observed was approximately 320 μg/m³.[8] MSHA considers the baseline sampling results to be more broadly representative of DPM concentrations currently experienced by underground M/NM miners than the generally higher DPM concentrations reported in the 31-Mine Study. Since the baseline samples were collected later, part of the apparent reduction in mean concentration levels may be due to improved DPM controls implemented in response to the 2001 rule.

The 2001 risk assessment used the best available data on DPM exposures at underground M/NM mines to quantify excess lung cancer risk. ''Excess risk'' refers to the lifetime probability of dying from lung cancer during or after a 45-year occupational DPM exposure. This probability is expressed as the expected excess number of lung cancer deaths per thousand miners occupationally exposed to DPM at a specified mean DPM concentration. The excess is calculated relative to baseline, age-specific lung cancer mortality rates taken from standard mortality tables. In order to properly estimate this excess, it is necessary to calculate, at each year of life after occupational exposure begins, the expected number of persons surviving to that age with and without DPM exposure at the specified level. At each age, standard actuarial adjustments must be made in the number of survivors to account for the risk of dying from causes other than lung cancer. Occupational exposure is assumed to begin at age 20 and to continue, for surviving miners, until retirement at age 65. The accumulation of lifetime excess risk continues after retirement through the age of 85 years.

Table VI–14, taken from the 2001 risk assessment, shows a range of excess lung cancer estimates at mean exposures equal to the interim and final DPM limits. The eight exposure-response models employed were based on studies by Saverin *et al.* (1999), Johnston *et al.* (1997), and Steenland *et al.* (1998). Assuming that TC is 80 percent of whole DPM, and that the mean ratio of TC to EC is 1.3, the interim DPM limit of 500 μg/m³ shown in Table VI–14 corresponds to the 308 μg/m³ EC surrogate limit adopted under the present rulemaking.

TABLE VI–14.—EXCESS LUNG CANCER RISK EXPECTED AT SPECIFIED DPM EXPOSURE LEVELS OVER AN OCCUPATIONAL LIFETIME

[Extracted from Table III–7 of the 2001 risk assessment]

| Study and statistical model | Excess lung cancer deaths per 1,000 occupationally exposed workers † | |
|---|---|---|
| | Final DPM limit 200 μg/m³ | Interim DPM limit 500 μg/m³ |
| Säverin *et al.* (1999): | | |
| Poisson, full cohort | 15 | 44 |
| Cox, full cohort | 70 | 280 |
| Poisson, subcohort | 93 | 391 |
| Cox, subcohort | 182 | 677 |
| Steenland *et al.* (1998): | | |
| 5-year lag, log of cumulative exposure | 67 | 89 |
| 5-year lag, simple cumulative exposure | 159 | 620 |
| Johnston *et al.* (1997): | | |
| 15-year lag, mine-adjusted | 313 | 724 |
| 15-year lag, mine-unadjusted | 513 | 783 |

† Assumes 45-year occupational exposure at 1,920 hours per year from age 20 to retirement at age 65. Lifetime risk of lung cancer adjusted for competing risk of death from other causes and calculated through age 85. Baseline lung cancer and overall mortality rates from NCHS (1996).

The mean DPM concentration levels estimated from both the 31-Mine Study (432–492 μg/m³, depending on whether trona mines are included) and the baseline samples (≈320 μg/m³) fall between the interim and final DPM limits shown in Table VI–14. All of the exposure-response models shown are monotonic (*i.e.*, increased exposure yields increased excess risk, though not proportionately so). Therefore, using the most current available estimates of mean exposure levels, they all predict excess lung cancer risks somewhere between those shown for the interim and final limits. Thus, despite substantial improvements apparently attained since the 1989–1999 sampling period addressed by the 2001 risk assessment, underground M/NM miners are still faced with an unacceptable risk of lung cancer due to their occupational DPM exposures.

The third principal conclusion of the 2001 risk assessment was:

By reducing DPM concentrations in underground mines, the rule will

[7] These values may be somewhat inflated due to the old ''crimped foil'' SKC sampler design used for many of the samples collected during the 31-Mine Study. As explained elsewhere in this preamble, this design resulted in lower-than-expected filter deposit areas in many cases, leading to overestimates of the corresponding TC concentrations. (The SKC sampler design was eventually modified by substituting a retainer ring for the crimped foil. However, the systematic errors in deposit area observed during the 31-Mine Study have no bearing on the ''paired punch comparison'' used in that study to evaluate analytical measurement precision.)

[8] The laboratory analysis of the baseline samples yielded two measures of TC: TC = EC + OC and TC = 1.3 × EC. However, since the intention under baseline sampling was to rely always on the lesser of these two values from each sample, no precautions were taken to avoid sampling near tobacco smoke and other substances that potentially interfere with the use of TC = EC + OC as a surrogate measure of DPM. Therefore, in the present discussion, MSHA is using only the TC = 1.3 × EC value to estimate baseline DPM levels.

substantially reduce the risks of material impairment faced by underground miners exposed to DPM at current levels.

Although DPM levels have apparently declined since 1989–1999, MSHA expects that further improvements will continue to significantly and substantially reduce the health risks identified for miners. There is clear evidence of DPM's adverse health effects, not only at pre-2001 levels but also at the generally lower levels currently observed at many underground mines. These effects are material health impairments as specified under section 101(a)(6)(A) of the Mine Act. From the baseline sampling results, 68 out of the 183 mines (37%) had at least one sample exceeding the interim exposure limit. Because the exposure-response relationships shown in Table VI–14 are monotonic, MSHA expects that industry-wide implementation of the interim limit will significantly reduce the risk of lung cancer among miners.

## VII. Feasibility

### *A. Background*

Section 101(a)(6)(A) of the Mine Act requires the Secretary of Labor in establishing health standards, to most adequately assure, on the basis of the best available evidence, that no miner will suffer material impairment of health or functional capacity over his or her working life. Standards promulgated under this section must be based upon research, demonstrations, experiments, and such other information as may be appropriate. MSHA, in setting health standards, is required to achieve the highest degree of health and safety protection for the miner, and must consider the latest available scientific data in the field, the feasibility of the standards, and experience gained under this or other health and safety laws.

The legislative history of the Mine Act states:

This section further provides that ''other considerations'' in the setting of health standards are ''the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws.'' While feasibility of the standard may be taken into consideration with respect to engineering controls, this factor should have a substantially less significant role. Thus, the Secretary may appropriately consider the state of the engineering art in industry at the time the standard is promulgated. However, as the circuit courts of appeals have recognized, occupational safety and health statutes should be viewed as ''technology-forcing'' legislation, and a proposed health standard should not be rejected as infeasible ''when the necessary technology looms on today's horizon''. *AFL–CIO* v. *Brennan*, 530 F.2d 109 (3d Cir. 1975); *Society of Plastics Industry* v. *OSHA*, 509 F.2d 1301 (2d Cir. 1975), *cert. denied* 427 U.S. 992 (1975).

Similarly, information on the economic impact of a health standard, which is provided to the Secretary of Labor at a [public] hearing or during the public comment period, may be given weight by the Secretary. In adopting the language of [this section], the Committee wishes to emphasize that it rejects the view that cost benefit ratios alone may be the basis for depriving miners of the health protection which the law was intended to insure. Rep. No. 95–181, 95th Cong. 1st Sess. 21 (1977).

In promulgating standards, hard and precise predictions from agencies regarding feasibility are not required. The ''arbitrary and capricious test'' is usually applied to judicial review of rules issued in accordance with the Administrative Procedure Act. The legislative history of the Mine Act further indicates that Congress explicitly intended the ''arbitrary and capricious test'' be applied to judicial review of mandatory MSHA standards. ''This test would require the reviewing court to scrutinize the Secretary's action to determine whether it was rational in light of the evidence before him and reasonably related to the law's purposes.'' S. Rep. No. 95–181, 95th Cong., 1st Sess. 21 (1977). In achieving the Congressional intent of feasibility under the Mine Act, MSHA may also consider reasonable time periods of implementation. *Ibid.* at 21.

Though the Mine Act and its legislative history are not specific in defining feasibility, the Supreme Court has clarified the meaning of feasibility in the context of OSHA health standards in *American Textile Manufacturers' Institute* v. *Donovan* (OSHA Cotton Dust), 452 U.S. 490, 508–09 (1981), as ''capable of being done, executed, or effected,'' both technologically and economically.

MSHA need only base its predictions on reasonable inferences drawn from existing facts. In order to establish the economic and technological feasibility of a new rule, an agency is required to produce a reasonable assessment of the likely range of costs that a new standard will have on an industry, and an agency must show that a reasonable probability exists that the typical firm in an industry will be able to develop and install controls that will meet the standard. *United Steelworkers of America, AFL–CIO–CLC* v. *Marshall*, (OSHA Lead) 647 F.2d 1189, 1273.

### *B. Technological Feasibility*

Courts have ruled that in order for a standard to be technologically feasible an agency must show that modern technology has at least conceived some industrial strategies or devices that are likely to be capable of meeting the standard, and which industry is generally capable of adopting. *Ibid.* (citing *American Iron and Steel Institute* v. *OSHA,* (AISI–I) 577 F.2d 825 (3d Cir. 1978) at 832–35; and, *Industrial Union Dep't., AFL–CIO* v. *Hodgson,* 499 F.2d 467 (DC Cir.1974)); *American Iron and Steel Institute* v. *OSHA,* (AISI–II) 939 F.2d 975, 980 (DC Cir. 1991). The existence of general technical knowledge relating to materials and methods which may be available and adaptable to a specific situation establishes technical feasibility. A control may be technologically feasible when ''if through reasonable application of existing products, devices or work methods with human skills and abilities, a workable engineering control can be applied'' to the source of the hazard. It need not be an ''off-the-shelf'' product, but ''it must have a realistic basis in present technical capabilities.'' (*Secretary of Labor* v. *Callanan Industries, Inc.* (Noise), 5 FMSHRC 1900, 1908 (1983)).

The Secretary may also impose a standard that requires protective equipment, such as respirators, if technology does not exist to lower exposures to safe levels. See *United Steelworkers of America, AFL–CIO–CLC* v. *Marshall,* (OSHA Lead) 647 F.2d 1189, 1269 (DC Cir. 1981).

MSHA has established that it is technologically feasible to reduce underground miners' exposures to the DPM interim permissible exposure limit (PEL) of 308 micrograms of EC per cubic meter of air ($308_{EC}$ μg/m$^3$) by using available engineering control technology and various administrative control methods. However, MSHA acknowledges that compliance difficulties may be encountered at some mines due to implementation issues and the cost of purchasing and installing certain types of controls. Therefore, this final rule incorporates the industrial hygiene concept of a hierarchy of controls for implementing DPM controls. To attain the interim DPM limit, mine operators are required to install, use, and maintain engineering and administrative controls to the extent feasible. When such controls do not reduce a miner's exposure to the DPM limit, controls are infeasible, or controls do not produce significant reductions in DPM exposures, operators must continue to use all feasible engineering and administrative controls and supplement them with respiratory protection. When respiratory protection is required under the final standard, mine operators must establish a respiratory protection program that

meets the specified requirements. Thus, MSHA has provided a regulatory scheme that adequately accomplishes control of exposure under circumstances where a mine operator cannot reduce a miner's exposure to the interim PEL solely by use of engineering and administrative controls, including work practices.

DPM control technology is not new to the mining industry. MSHA has afforded the mining industry a significant period of time to implement DPM controls. The existing DPM standard was first promulgated on January 19, 2001 (66 FR 5706) with an effective date of July 19, 2002 for meeting the interim concentration limit of 400 micrograms of TC per cubic meter of air. The instant rulemaking provides for a comparable EC PEL of $308_{EC}$ μg/m³. Under the settlement agreement, MSHA allowed mine operators an additional year in which to begin to install appropriate engineering and administrative controls to reduce DPM levels due to feasibility constraints at that time. Altogether, the mining industry has had over four years to institute controls required under this rulemaking. Any controls currently used to meet the existing concentration limit can be used to reduce miners' exposures to the interim PEL.

MSHA acknowledges that the current DPM rulemaking record lacks sufficient feasibility documentation to justify lowering the DPM limit below $308_{EC}$ μg/m³ at this time. Therefore, MSHA is not lowering the limit in this rulemaking. MSHA believes that this interim limit is reasonable, and that MSHA can document feasibility across the affected sector of underground M/NM mines. MSHA is continuing to gather information on the feasibility of the mining industry to comply with a final DPM PEL of less than $308_{EC}$ μg/m³

MSHA emphasizes that a DPM control may be deemed feasible, and therefore be required by MSHA even if a miner's exposure is not reduced to the DPM limit. Mine operators cited for DPM overexposures will continue to be required to implement feasible engineering and administrative controls even if these controls are not fully successful in attaining the DPM exposure limit. In the context of this rule, feasible DPM controls must be capable of achieving a significant reduction in DPM. MSHA considers a significant reduction in DPM to be at least a 25% reduction in the affected miners' exposures. Thus, for mines that are out of compliance with the DPM interim limit, controls would be required that attain compliance, or that achieve at least a 25% reduction in DPM exposure if it is not possible to attain compliance by implementing feasible controls. If feasible engineering and administrative controls are not capable of attaining compliance, or at least of achieving a DPM exposure reduction of 25%, MSHA would not require the implementation of those controls. In such cases, which MSHA believes will be very limited, MSHA would require miners to be protected using appropriate respiratory protective equipment.

Some commenters criticized the 25% threshold for a significant reduction because it lacks a scientific basis, and that controls should be evaluated individually in reference to site-specific conditions and DPM levels for significance or effectiveness. MSHA notes that the 25% threshold for DPM is lower than the 50% threshold adopted in MSHA's noise rule. However, DPM's classification as a carcinogen justifies the more protective 25% level for determining whether controls achieve a significant reduction for purposes of assessing feasibility.

MSHA also notes that most of the practical and effective controls that are currently available, such as DPM filters, enclosed cabs with filtered breathing air, and low-emission engines will achieve at least a 25% reduction. Other controls such as ventilation upgrades or alternative fuel blends may achieve a 25% reduction, depending on exposure circumstances and the specific nature of the subject control. It should also be noted that reductions of less than 25% could be due to normal day-to-day variations in mining operations as opposed to reductions due to implementing a control technology. MSHA's Compliance Guide includes the 25% significant reduction for determining feasibility.

If a particular DPM control were capable of achieving at least a 25% reduction all by itself, MSHA would evaluate the costs of that individual control to determine its economic feasibility. If a number of controls could together achieve at least a 25% reduction, but no individual control, if implemented by itself, could achieve a 25% reduction, MSHA would evaluate the total costs of all controls added together to determine their economic feasibility as a group. In determining whether a combination of controls is economically feasible, MSHA would consider whether the total cost of the combination of controls is wholly out of proportion to the expected results. MSHA will not cost the controls individually, but will combine their expected results to determine if the 25% significant reduction criteria can be satisfied.

MSHA's rulemaking record addressing feasibility includes: MSHA's final report on the 31-Mine Study; NIOSH's peer review of the 31-Mine Study; results from MSHA's baseline sampling at mines covered under the DPM standard; results of MSHA's comprehensive compliance assistance work at mining operations with implementation issues affecting feasibility; NIOSH's conclusions on the performance of the SKC sampler and the availability of technology for control of DPM; NIOSH's Diesel Emissions Workshops in 2003 in Cincinnati and Salt Lake City; the Filter Selection Guide posted on the MSHA and NIOSH Web sites; MSHA's final report on DPM filter efficiency; NIOSH's report titled, ''Review of Technology Available to the Underground Mining Industry for Control of Diesel Emissions''; and, the NIOSH Phase I Isozone study titled, ''The Effectiveness of Selected Technologies in Controlling Diesel Emissions in an Underground Mine—Isolated Zone Study at Stillwater Mining Company's Nye Mine'' all of which were developed following promulgation of the 2001 DPM final rule.

One other NIOSH document resulting from the DPM M/NM Partnership became available to MSHA in April 2004. That document is titled, ''An Evaluation of the Effects of Diesel Particulate Filter Systems on Air Quality and Personal Exposure of Miners at Stillwater Mining Case Study: Production Zone (Phase II Study).'' As stated in the final report:

> The objective of Phase II of this study was to determine the effects of those DPF systems being used on production vehicles at Stillwater Mine on workplace concentrations of EC and regulated gases in an actual mining application where multiple diesel-powered vehicles operated simultaneously during full-shift mining activities.

MSHA evaluated this evidence as it relates to feasibility and found that unlike the Phase I Isozone Study, the Phase II study does not contain any new significant information affecting the ability of the mining industry to comply with the requirements of this final rule. MSHA, therefore, finds this data to be cumulative in nature and has included it in the rulemaking record as supplemental information. MSHA discusses the Phase II study results in more detail in this section of the preamble. MSHA emphasizes that mine operators obtained access to this study on the date of publication since the study was generated by the DPM M/NM Partnership.

MSHA committed to implementing several initiatives related to

enforcement and enhancing the mining industry's ability to comply with the 2001 final rule. Among other things, MSHA agreed that it would not issue citations for potential violations of the interim concentration limit promulgated in the 2001 standard until after MSHA and NIOSH were satisfied with the performance characteristics of the SKC sampler and the availability of practical mine worthy DPM filter technology. MSHA also agreed to provide DPM sampling training for its inspectors, and to provide comprehensive compliance assistance to the industry through July 19, 2003. MSHA's compliance assistance activities included:

- Conducting compliance assistance meetings throughout the country to discuss how to comply with the DPM standard;
- Providing a compliance guide answering key questions;
- Conducting an inventory of existing underground diesel-powered equipment;
- Providing information to mine operators on feasible DPM controls; and,
- Obtaining baseline sampling results at each underground mine covered under the standard solely for the purpose of compliance assistance rather than for enforcement purposes.

Additional compliance assistance activities also were conducted, and are discussed later in this section of the preamble.

During the compliance assistance period, MSHA agreed that mine operators would not be cited for potential violations of the interim limit provided they took good-faith steps to develop and implement a written compliance strategy and cooperated with MSHA. Also, MSHA would issue a noncompliance citation for exceeding the interim concentration limit only if MSHA believed that an operator was not acting in good faith, or if an operator failed to cooperate in the compliance assistance. Per the agreement, after July 19, 2003, MSHA began to issue citations for violations associated with the interim limit. During the compliance assistance period (through July 19, 2003), MSHA did not identify any mines that failed to take good faith steps toward achieving compliance or cooperate with MSHA. Consequently, no citations for violations associated with the interim limit were issued prior to July 20, 2003.

MSHA provided DPM training to its inspectors and to the extent possible, completed its compliance assistance activities in accordance with the settlement agreement. During September and October 2002, seminars covering the rule, MSHA's enforcement policy, DPM sampling, and DPM engineering control technologies were held in Ebensburg, PA, Knoxville, TN, Lexington, KY, Des Moines, IA, Kansas City, MO, Albuquerque, NM, Coeur d'Alene, ID, Elko, NV, and Green River, WY. The DPM Compliance Guide was posted on the MSHA DPM Single Source Page and also issued as an MSHA Program Policy Letter (PPL #P03–IV–1, effective August 19, 2003). Extensive information on feasible controls for DPM was included in the Compliance Guide/Program Policy Letter and listed on MSHA's DPM Single Source Page for DPM. The inventory of diesel engines was completed September 30, 2002. Baseline DPM samples were not obtained at a remaining few mines until after July 20, 2003 primarily to allow time to cover sampling at intermittent operations. However, enforcement sampling at these mines was delayed until after completion of baseline sampling to provide these mine operators with further opportunity to implement controls, if necessary.

As discussed below in this section of the preamble, both MSHA and NIOSH are satisfied with the performance of the SKC sampler and on the availability of practical DPM filter technology.

*DPM Sampling Method.* Though not under substantive review in this rulemaking, existing § 57.5061(b) establishes that MSHA will continue to sample miners' personal exposures by using a respirable dust sampler equipped with a submicrometer impactor and analyze samples for the amount of EC using the NIOSH Analytical Method 5040, or any other method that NIOSH determines gives equal or improved accuracy in DPM sampling. The DPM sampling method is discussed in the section-by-section portion of this preamble under § 57.5060(a) addressing the permissible exposure limit. MSHA includes a more detailed discussion of its sampling method on its DPM Single Source Web page. Based on current information in the rulemaking record, MSHA concludes that it has a technologically feasible measurement method that operators and MSHA can use to accurately determine if miners' exposures exceed the interim PEL.

*Performance of the SKC Sampler.* MSHA and NIOSH are satisfied with the performance of the SKC sampler. The 31-Mine Study includes a comprehensive discussion of MSHA's and NIOSH's work with SKC that improved the performance of the sampler. In MSHA's final report on the 31-Mine Study, it concluded that SKC satisfactorily addressed concerns over earlier known defects in the DPM sampling cassettes and availability of cassettes to both MSHA and mine operators. Just prior to and during the 31-Mine Study, NIOSH and MSHA observed that the perimeter of the DPM deposit on the filter was not consistently circular and varied among the SKC samplers. This resulted in a variable and unpredictable deposit area. The cause of this was found and quite successfully remedied allowing NIOSH to express its satisfaction with the performance of the SKC sampler by letter of June 25, 2003, to MSHA that states, in part:

> Concurrent with the work of the partnership were research tasks to ensure that diesel particulate matter can be accurately measured in these mines. The SKC DPM cassette is a size selective sampler designed to collect DPM samples that are characterized by an aerodynamic diameter less than 0.8μm, while avoiding contamination with mineral dust. The use of the SKC sampler could not be recommended initially because of a problem relating to irregular deposition of DPM on the cassette sample. However, this problem has been solved, and we are now satisfied with the performance of the SKC sampler. The research regarding the performance of the SKC sampler has been documented, peer-reviewed, and is currently accepted for publication by Applied Occupational and Environmental Hygiene Journal.

*Baseline Sampling.* For the 2001 standard, MSHA based its feasibility projections on an average DPM concentration level of over $800_{TC}$ μg/m³. MSHA found in the 31-Mine Study that miners' average TC exposure was 345 μg/m³. MSHA's baseline sampling revealed that miners average EC exposure was 196 μg/m³. The average TC exposure measured as EC + OC was 293 μg/m³, and as calculated by EC × 1.3 was 255 μg/m³. MSHA believes that these lower averages probably result from the introduction of DPFs, clean engines, better maintenance, and the elimination of interferences as confirmed by MSHA's compliance assistance baseline sampling. The baseline sampling results are discussed in detail in Section V.

*DPM Enforcement.* MSHA believes that final §57.5060(d) adequately addresses feasibility issues related to meeting the interim limit of $308_{EC}$ μg/m³ under § 57.5060(a). Under these sections, MSHA has amended the type of exposure that will be regulated along with the methods of compliance with the interim PEL to provide mine operators with greater flexibility in reducing DPM exposures. This final DPM rule adopts MSHA's long-standing enforcement practice established for

other exposure-based standards applicable to M/NM mines. Also, MSHA underscores the fact that the enforcement scheme established in this final rule also is based on the DPM settlement agreement.

In spite of the changes in this final rule that increase flexibility, MSHA realizes that some mine operators will continue to need on-site technical assistance. MSHA is committed to assisting these operators in special mining situations that could affect the successful use of DPFs or other engineering control systems. Mine operators can request this assistance from their respective MSHA District Manager.

Additionally, MSHA concludes that the established hierarchy of controls for complying with the DPM interim limit adequately protects miners from exposure to DPM in those circumstances where MSHA found control methods to be infeasible under existing § 57.5060(d)(2) for certain activities including inspection, maintenance and repair activities. MSHA has removed from this final rule the requirement for mine operators to apply to the Secretary of Labor for relief from applying control technology to comply with the final DPM limit. Instead, MSHA's hierarchy of controls strategy will result in quicker responses to supplementing protection for miners exposed to the health risks associated with DPM.

MSHA believes that it has sufficiently accommodated the mining industry's needs with respect to complying with the DPM standard and has developed an appropriate and reasonable enforcement scheme under this rule. MSHA estimates that approximately 183 mines are covered under the standard. These mines produce commodities such as gold, limestone, trona, platinum, lead, silver, zinc, marble, gypsum, salt, and potash. Based on MSHA's baseline sampling results, over 70% of these underground mines were in compliance with the interim DPM limit.

MSHA is confident that engineering and administrative controls (including work practice controls) exist that are capable of reducing DPM exposures to the interim PEL of $308_{EC}$ μg/m³ in all types of underground M/NM mines. MSHA believes that virtually all mine operators will successfully attain compliance with the interim limit by choosing from among various currently available feasible engineering and administrative DPM control options, including but not limited to DPF systems, ventilation upgrades, oxidation catalytic converters, alternative fuels, fuel additives, enclosures such as cabs and booths with filtered breathing air, improved diesel engine maintenance procedures and instrumentation, diesel engines with lower DPM emissions, various work practices and administrative controls. MSHA has given the mining industry flexibility under the final standard in selecting the individual or combination of DPM controls that best suit a mine operator's specific needs, conditions, and operating practices.

MSHA received numerous comments concerning the technological feasibility of the 2003 NPRM. Some commenters opposed any changes in the 2001 DPM standard. A few of these commenters suggested that MSHA's current rulemaking record does not support revising the 2001 final rule. They believe that in order to justify a change that in their view reduces health protection, MSHA must first make a determination that the DPM limits established in the 2001 final rule are infeasible for the mining industry as a whole to attain. These commenters note that, to the contrary, MSHA fully substantiated its conclusions regarding feasibility in the 2001 final rule.

According to these commenters, during the period from August 2001 through January 2002, MSHA stated in the final report to the 31-Mine Study that the mean concentration of DPM was $345_{TC}$ μg/m³, substantially below the required concentration limit of $400_{TC}$ μg/m³. These commenters pointed out that these results were obtained at a time when MSHA believes few mining operations had begun to implement DPM controls, or where the implementation of such controls was in its early stages and had not yet achieved significant reductions in DPM exposure. Other supportive evidence noted by these commenters included the results of the baseline sampling indicating that only 30% of the mines tested were out of compliance.

MSHA agrees that it should utilize data from its final report on the 31-Mine Study and the baseline sampling in assessing technological feasibility, but MSHA does not consider the mean concentration obtained in the 31-Mine Study or the number of mines with baseline samples exceeding the interim limit to be the definitive data sources in this assessment. For example, although the mean concentration of DPM reported in the final report to the 31-Mine Study was only $345_{TC}$ μg/m³, the mean DPM concentration value does not reflect the wide range of sample results obtained between mines or within individual mines, some of which exceeded $1000_{TC}$ μg/m³. Likewise, although only 30% of the mines had baseline sampling results exceeding the interim limit, MSHA expects some of these mines may have encountered compliance difficulties due to implementation issues relating to such factors as DPF regeneration and retrofitting DPFs to existing pieces of equipment, and due to the costs of purchasing and installing DPM controls.

Therefore, in assessing technological feasibility, MSHA believes it should also consider data obtained subsequently from other sources, including MSHA's comprehensive compliance assistance work at mining operations, current agency enforcement experience, the NIOSH Diesel Emissions Workshops in Cincinnati and Salt Lake City, and the NIOSH Phase I Isozone Study. MSHA agrees with commenters who take the position that the interim DPM limit can be attained by the industry as a whole through implementation of feasible engineering and/or administrative (including work practice) controls. However, MSHA does not agree with commenters who oppose any changes to the 2001 final rule.

Some commenters suggested that the proposed modification to the 2001 standard would reduce health protection for miners, a consequence that § 101(a)(9) of the Mine Act prohibits. MSHA disagrees. Section 101(a)(9) of the Mine Act provides that: ''No mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard.'' MSHA interprets this provision of the Mine Act to require that all of the health or safety benefits resulting from a new standard be at least equivalent to all of the health or safety benefits resulting from the existing standard when the two sets of benefits are evaluated as a whole. *Int'l Union* v. *Federal Mine Safety and Health Admin.,* 920 F.2d 960, 962–64 (DC Cir. 1990); *Int'l Union* v. *Federal Mine Safety and Health Admin.,* 931 F.2d 908, 911 (DC Cir 1991).

In fact, MSHA believes that the interim EC limit established in this rulemaking is comparable to the existing TC limit. Correcting the surrogate for identifying miners' exposures to DPM is critical for protection of miners and will result in a valid DPM sample that MSHA can adequately substantiate. MSHA's hierarchy of controls strategy in the final rule is based on long-standing industrial hygiene practice in both the mining industry and general industry. As implemented in this final rule, the hierarchy of controls ensures that the most protective means of compliance (engineering and administrative controls) are used first,

and that respiratory protection is permitted only where MSHA determines that: Engineering and administrative controls are infeasible; controls do not produce significant reductions in DPM exposures; or controls do not reduce exposures to the interim DPM limit.

The DPM litigants raised their concerns to MSHA with implementation issues related to regeneration and retrofitting exhaust after-treatment controls on existing mining equipment. These, along with various other compliance concerns, eventually led to the 31-Mine Study. At that time, only a few mine operators in the U.S. had begun to implement after-treatment control technology on their underground diesel-powered equipment. As is often the case when unfamiliar technologies are integrated into an industry sector, the process was slow, and at least initially, the results were less-than-fully satisfactory. As noted elsewhere in this section, many mine operators, for example, experimented with DPF installations on a few pieces of equipment on a trial basis, with mixed results at best. MSHA does not dispute these findings, but believes that DPF failures were the result of inappropriate DPF selection for a given application. However at the time, these operators were convinced that DPF technology was fundamentally deficient for application in underground mining. In an effort to resolve a variety of issues raised by the industry that were believed to present potential compliance problems, MSHA agreed to conduct the 31-Mine Study.

Many commenters also claimed that MSHA's determination that the rule is technologically feasible assumed the widespread utilization of DPFs, which these commenters do not believe have proven mine worthy and which may be affected by the aforementioned implementation issues. In response, MSHA notes that while it continues to highly recommend use of DPFs, its technological feasibility determination was based on the application of a variety of engineering and administrative control approaches for obtaining compliance, and was not limited to DPFs. MSHA has determined that DPF systems are available and mine worthy for controlling miners' exposures to DPM. As discussed later in this section of the preamble, both MSHA and NIOSH are satisfied that DPF systems are currently available for most mining equipment, and that these systems can be successfully applied if mine operators make informed decisions regarding filter selection, retrofitting, engine and equipment deployment, operation, and maintenance, and specifically work through issues such as in-use efficiencies, secondary emissions, engine backpressure, DPF regeneration, DPF reliability and durability.

Implementation issues, such as DPF regeneration and retrofitting DPFs to existing pieces of equipment, primarily affect a small number of mines. Mines affected are those that will need to utilize DPFs to attain compliance because other control options, such as ventilation upgrades, low-emission engines, alternative diesel fuels, and cabs with filtered breathing air are either infeasible at these particular mines, or because these mine operators have already utilized these other control options to the maximum extent feasible but have not yet attained compliance. Since a variety of feasible control options are available, and implementation issues relating to DPFs affect a relatively small number of mines, the industry as a whole will not be impeded from attaining compliance with the interim PEL.

MSHA does not dispute this early experience with DPF installations in U.S. underground mines, and in fact, acknowledged these concerns in the final report of the 31-Mine Study. One of the major conclusions of the study states:

> Compliance with both the interim and final concentration limits may be both technologically and economically feasible for metal and nonmetal underground mines in the study. MSHA, however, has limited in-mine documentation on DPM control technology. As a result, MSHA's position on feasibility does not reflect consideration of current complications with respect to implementation of controls, such as retrofitting and regeneration of filters. MSHA acknowledges that these issues may influence the extent to which controls are feasible. The Agency is continuing to consult with the National Institute of Occupational Safety and Health, industry and labor representatives on the availability of practical mine worthy filter technology.

After completing the 31-Mine Study, however, MSHA obtained additional documentation on DPM control technology that it had previously lacked. This information includes data on both implementation issues and costs, and was obtained from such sources as MSHA's comprehensive compliance assistance activities, MSHA's enforcement experience, and NIOSH's Diesel Emission Workshops in Cincinnati and Salt Lake City. Also, MSHA now has in-mine data on the filter efficiency of DPFs in U.S. mines as a result of the NIOSH Phase I Isozone study (discussed in detail in this preamble).

*Effectiveness of the DPM Estimator.* MSHA's DPM Estimator is a Microsoft® Excel spreadsheet computer program that calculates the reduction in DPM concentration that can be obtained by implementing individual, or combinations of engineering controls in a given production area of a mine. MSHA has repeatedly advised the mining community throughout the DPM rulemakings that the Estimator is one of many tools that can be used to assist mine operators with assessing feasibility of compliance with the DPM limits. MSHA used the estimator to support its feasibility assessment for the 2001 final rule, as well as the feasibility section of the 31-Mine Study which is used to support this final rule.

The analyses in the 31-Mine Study were based on the highest DPM sample result obtained at each mine. Using the Estimator, new DPM levels were computed for this ''worst case'' sample result based on the application of one, or a combination of the following control technologies: DPFs, low emission engines, and upgraded ventilation. To adequately protect all miners even if the mine operator changes equipment deployment schemes in the future, the methodology for the technological feasibility analysis required all major emission sources at a given mine, plus similar spare equipment, to be provided with the same DPM controls that were specified for the equipment associated with the ''worst case'' sample result.

Likewise, the economic feasibility analysis for each mine was based on costing the same controls for all major DPM emission sources, and similar spare equipment, as were required to reduce the ''worst case'' sample result to the compliance level. The rationale for this approach is that if the same controls are applied to all major DPM sources and spare equipment as are required to attain compliance for the ''worst case'' exposures, all exposures in the mine will be reduced at least to the compliance level, if not lower, regardless of future equipment usage, equipment deployment, mine production levels, etc.

In the 31-Mine Study, DPFs were assumed to be capable of achieving an 80% reduction in DPM emissions. This 80% filtration efficiency value was based on laboratory tests. Since the 2001 final rule was promulgated, MSHA has obtained the results of the NIOSH Phase I Isozone Study conducted under actual in-mine testing, and which concludes that filter efficiency is about 75% for total DPM and ranged over 88% to 90% for EC for ceramic monolith wall-flow type DPFs of either silicon carbide or

cordierite composition. DPM reductions obtained by replacing older existing engines with new, low-emission engines are based on the DPM emissions of the new engine relative to the DPM emissions of the existing engine. For instance, if a new engine emits 0.10 grams per brake horsepower-hour (g/bhp-hr) of DPM and the existing engine emits 0.50 g/bhp-hr of DPM, the Estimator would compute a DPM reduction of 80% when the new engine replaces the existing engine. DPM reductions obtained through ventilation upgrades are based on the new ventilation airflow rate compared to the existing ventilation airflow rate. For example, if the new ventilation airflow rate is 80,000 cfm and the existing airflow rate is 40,000 cfm, the Estimator would compute a reduction in the DPM concentration of 50%.

The Estimator was peer-reviewed during the 2001 final rulemaking and was published both as an SME Preprint for the 1998 SME Annual Meeting (Preprint 98–146, March 1998) and in the April 2000 SME Journal. Its predictions have been compared to actual in-mine DPM measurements (before and after DPM controls were implemented) with good agreement. Indeed, one commenter who was critical of the Estimator, nonetheless, noted that, ''The math which forms the basis for the Estimator's calculations cannot be challenged ''total exhaust emissions from diesel equipment (in grams/hr) when diluted with mine ventilation air flows (in cubic feet per minute) yield an estimated DPM concentration (in micro-gram per cubic meter) if the emissions are perfectly mixed with the air flow.''

Despite its sound mathematical basis, this and other commenters stated that the Estimator was flawed, and hence, the technological and economic feasibility assessments were likewise flawed. These commenters specifically stated that the Estimator was flawed because two inputs utilized by the Estimator, DPM emissions (both raw and reduced via DPFs) and air flows, are subject to interpretation and assumptions. Furthermore, they believe that the Estimator's computations of DPM concentrations are valid only if engine emissions are perfectly mixed with the air flow, which they suggest does not occur in an actual mine.

MSHA disagrees with this conclusion. These commenters make an erroneous assumption with respect to MSHA's utilization of the Estimator. The Estimator actually incorporates two independent means of calculating DPM levels: one based on DPM sampling data for the subject mine, and one based on the absence of such sampling data. Where no sampling data exist, the Estimator calculates DPM levels based on a straightforward mathematical ratio of DPM emitted from the tailpipe (or DPF, in the case of filtered exhaust) per volume of ventilation air flow over that piece of equipment. This is referred to in the Estimator as the ''Column B'' option for calculating DPM concentrations. The commenters' observation that the Estimator fails to account for imperfect mixing between DPM emissions and ventilating air flows is a valid criticism of the ''Column B'' option. For this and other reasons, the Estimator's instructions urge users to utilize the ''Column A'' option whenever sampling data are available.

In the ''Column A'' option, the Estimator's calculations are ''calibrated'' to actual sampling data. Whatever complex mixing between DPM emissions and ventilating air flows existed when DPM samples were obtained, are assumed to prevail after implementation of a DPM control. This is an entirely reasonable assumption, and in fact, there is no engineering basis to assume otherwise. Indeed, comparisons of ''Column A'' Estimator calculations and actual DPM measurements taken in mines before and after implementation of DPM controls have shown good agreement, indicating that Estimator calculations do adequately incorporate consideration for complex mixing of DPM and air flows when the ''Column A'' option is used.

The Estimator was originally developed with both the Column A and Column B options because at that time, the specialized equipment required for DPM sampling, such as the submicron impactor, was not widely available. Consequently, few mine operators were able to obtain the in-mine DPM sample data required for utilizing the Column A option. Now that the required sampling equipment is readily available, MSHA strongly recommends that the Column A option be used exclusively, as MSHA did in the 31-Mine Study. Since all Estimator analyses conducted during the 31-Mine Study utilized the Estimator's ''Column A'' option, the comment regarding imperfect mixing is not relevant.

The Estimator utilizes raw (an unfiltered emission) tailpipe DPM emissions per se as an input data value only when a low-emission engine is specified as a DPM control. For most of the mines in the 31-Mine Study, unfiltered tailpipe DPM emissions were not factored into Estimator analysis because a change in engines was not specified. Where new engines were specified, MSHA based its estimate of unfiltered tailpipe emissions on laboratory dynamometer testing conducted according to the EPA 8-mode test duty cycle. This test is a common standard used by government and industry for diesel engine emissions analysis. Where actual test data were not available for a given engine, emissions were estimated based on the type of engine (make and model, model year, direct injection, pre-chamber, naturally aspirated, turbocharged, electronic controlled, etc.) and horsepower. Filtered emissions were assumed to be 20% of unfiltered tailpipe emissions, corresponding to 80% filter efficiency. As noted above, the 80% filter efficiency was a conservative assumption based on MSHA and other laboratory and NIOSH in-mine test data indicating DPM efficiencies of 80% to 87% for both cordierite and silicon carbide filters. Note that these efficiencies relate to DPM filtration. Higher filtration efficiencies are obtained for TC and EC. Air flows, where relevant for estimator analysis, were based on the sampler's comments, and/or the accompanying mine ventilation plans or maps.

A number of commenters suggested that MSHA's DPM sampling results in isolated sections of mines are assumed by MSHA to be representative of on-going exposure levels in those mines, despite the fact that results varied widely. In the 31-Mine Study, MSHA did not, in fact, assume a sample result from an isolated section of a mine was necessarily representative of on-going DPM exposure levels throughout that mine. The study methodology stipulated that the highest observed DPM level for a given mine would be the basis for specifying DPM controls for the entire mine. A key underlying assumption of this methodology is that DPM levels do vary, often significantly, from one part of a mine to another. However, to insure that study findings would be conservative, the study methodology required that the highest DPM level, not the average or lowest DPM level, was the basis for specifying controls.

Some commenters asserted that when analyzing sampling data for the 31-Mine Study, MSHA assumed that ventilation flows measured at the sampling location applied throughout the subject section of the mine. They also asserted that MSHA assumed effective ventilation for dilution existed throughout the mine, and that neither of these assumptions was necessarily valid. For most of the mines in the 31-Mine Study for which a DPM reduction was necessary, ventilation was not an issue, and consequently, MSHA did not specify any changes in ventilation. For these mines, DPM reductions were obtained

by utilizing DPFs and/or low-emission engines, and the only assumption regarding ventilation was that it would not be changed.

In the few cases where ventilation upgrades were specified, the upgrades were limited to auxiliary systems that supplied air to the sampled area only. Initial air flows utilized by the Estimator for those areas prior to implementing the upgrades were based on the comments and/or any accompanying ventilation plans or maps accompanying the sample. Where upgraded auxiliary ventilation was specified, MSHA frequently noted deficiencies in existing auxiliary ventilation system components such as inappropriately placed fans and blast-damaged or otherwise deteriorated and compromised vent bags. In these cases, the specified ventilation changes involved simply correcting the obvious deficiencies in the existing systems and increasing fan capacity.

MSHA recognizes that there has to be a sufficient air quantity present in the main ventilation system in order for an auxiliary system to function properly (i.e. without recirculation), and that DPM levels in the main ventilation system from which the auxiliary system draws its air must be sufficiently below the DPM limit to prevent miners' overexposures in the stopes.

Some commenters stated that in the 31-Mine Study, MSHA assumed that the only equipment needing DPM controls was the equipment operating while sampling took place. As noted above, the study methodology insured a conservative result by applying the same controls required to attain compliance for the equipment associated with the ''worst case'' sample to all similar DPM sources (and spares) in the entire mine, even if the subject ''worst case'' sample concentration was substantially higher than the remaining samples for that mine, and regardless of whether a particular piece of equipment was operating during sampling or not. For most mines in the study requiring DPM reductions, controls were specified for all or most of the normal production contingent of equipment, along with an allowance for spare equipment, particularly loaders and trucks, which are typically the largest source of DPM.

Some commenters stated that in the 31-Mine Study, MSHA assumed 80% DPF filtration efficiency, and gave no consideration to potential $NO_2$ problems related to DPFs. As noted above, the assumption of 80% filtration efficiency is conservative, and is based on actual laboratory and in-mine test data. Regarding $NO_2$ generation from DPFs and the associated health concerns, MSHA acknowledges that $NO_2$ can be produced by passive DPFs that are wash-coated with platinum-based catalysts. However, when such filters are utilized under reasonable ventilation conditions, the $NO_2$ increases should be manageable and should not constitute a serious health hazard or compliance problem for the mine operator. An example of successfully using highly platinum-catalyzed DPFs without creating hazardous $NO_2$ concentrations is Greens Creek mine which has installed such filter systems on its large trucks and loaders. During MSHA compliance assistance sampling at this mine in January 2002, $NO_2$ increases of around 1 ppm were observed downstream of stopes where 1 loader and 2 or 3 trucks were operating for 2 to 3 hours.

MSHA also notes that in situations where passive DPF regeneration is desired, but where ventilation may be insufficient to adequately dilute and carry away harmful $NO_2$ concentrations, alternatives to highly platinum-catalyzed DPFs exist. Examples include base metal catalyzed DPFs and lightly platinum-catalyzed filters used in conjunction with a fuel-borne catalyst, which have a regeneration temperature somewhat higher than highly platinum-catalyzed filters. These passively regenerating DPFs do not increase $NO_2$ concentrations compared to unfiltered exhaust emissions.

Even more importantly, however, in the 31-Mine Study, all DPFs were specified as active type regeneration systems, not passive type systems. Likewise, in the corresponding economic feasibility assessment, all costs for DPFs included an assumption that mine operators would opt for active regeneration. Without detailed on-site analysis and evaluation of the subject equipment and duty cycles, MSHA could not assume a DPF system would passively regenerate. Also, active filter systems are typically more costly than an equivalent passive system, so specifying an active system would be more conservative from a costing perspective. Since actively regenerated DPFs have no platinum wash-coatings applied to the filters (and in fact, have no wash-coatings at all), they do not produce any increased $NO_2$ emissions compared to unfiltered engines. $NO_2$ emissions and associated health concerns were not addressed in the 31-Mine Study because the DPM controls specified in the study did not affect $NO_2$ emissions.

Some commenters also stated that MSHA failed to specify any major ventilation upgrades (new main fans, new ventilation shafts, etc.) in the 31-Mine Study, and that by avoiding major ventilation upgrades, the resulting compliance cost estimates were unrealistically low. In responding, MSHA notes that it did not specify any major ventilation upgrades in the 31-Mine Study because, based on the study methodology, the analysis did not indicate the need for major ventilation upgrades in order to attain compliance with either the interim or final DPM limits at any of the 31 mines.

This does not mean that major ventilation upgrades would have been ill-advised, ineffective, or unbeneficial for any of the mines in the study. MSHA did note in the final report that strategies other than those specified in the study could also be successful, and there may be valid reasons why a mine operator might choose a different mix of controls (such as a major ventilation upgrade) for a given mine based on mine-specific factors to which MSHA's analysts were not privy at the time of the study. It was explicitly stated in the final report that the DPM controls specified for a particular mine did not necessarily represent the only feasible control strategy, nor the optimal control strategy for that mine. The purpose of specifying controls for each mine was simply to demonstrate that feasible controls capable of attaining compliance existed, and to provide a framework for costing such controls on a mine-by-mine basis.

Indeed, since the completion of the 31-Mine Study, MSHA has observed that mine operators in the stone industry, for example, have chosen to attain compliance without utilizing DPFs. These operators instead have opted to upgrade ventilation (usually by adding or re-positioning booster fans and installing or repairing ventilation control structures such as air curtains and brattices), install low-emission engines, utilize equipment cabs with filtered breathing air, initiate a variety of work practices that contribute to reducing personal exposures to DPM, and in a few cases, use alternative diesel fuels such as bio-diesel fuel blends and diesel/water emulsions.

Some of these mine operators may have had reasons other than DPM compliance alone that helped justify their decisions. For example, ventilation upgrades can also improve gaseous emission levels, dust levels, visibility, clearance of blasting smoke and gases, and inefficient or even counterproductive deployment of booster fans. Mine operators that have opted to replace older, dirty engines with newer, low emission engines benefit from greater fuel economy and better maintenance diagnostics. Cabs

with filtered breathing air improve operator comfort and productivity, as well as reducing dust and noise exposures.

*DPF Systems.*

DPFs suitable for any duty cycle are currently commercially available for most engine sizes and types used in underground M/NM mining. DPF options include silicon carbide and cordierite ceramic monolith type wall flow filters designed for passive regeneration, active on-board or active off-board regeneration, or passive/active regeneration. For most filters requiring active regeneration, the time required for filter regeneration varies from less than 1 hour to 8 hours, depending on system type. Another option that is suitable for smaller, light duty equipment is a high-temperature disposable pleated element filter.

Although every mine is unique, and virtually every DPF application has unique features, the variety of DPF systems available make it feasible to apply a DPF to most types of equipment or engines, and application or duty cycle. The only exception known to MSHA would be applying a DPF to a very old (pre-1970s vintage technology) engine having very high DPM emissions and a medium or light duty cycle. In theory, such an application would collect DPM, but due to rapid soot build-up on the filter media and corresponding rapid increase in engine back-pressure, such a DPF application would probably be impractical. MSHA has observed very few such engines in the underground M/NM mining industry, but in the few instances where emissions from such engines need to be controlled, mine operators are advised to choose a control option other than a DPF.

MSHA is aware of reports by mining companies and others that some DPFs have not performed satisfactorily in the field. These reports refer to problems such as short filter life (a matter of weeks in some cases), equipment that bogs down when filters are installed, and uncontrolled regenerations and similar problems resulting in damaged or destroyed filters. MSHA has determined that most DPF failures result from inappropriate filter selection due to the failure by mine operators to fully consider all filter selection criteria prior to ordering DPF systems. In a few cases, filter failures were traced to manufacturing defects that were later resolved, while in a few others, an unrelated component failure on the host equipment (such as a turbocharger failure) caused a failure in the downstream DPF.

Most problems with filter selection relate to the installation of a passively regenerating type filter on a machine that does not produce sufficient exhaust temperature for a sufficient portion of the duty cycle to initiate passive regeneration. A passive type filter that doesn't regenerate continues to trap soot until the backpressure on the engine causes the engine to ''bog down,'' or an uncontrolled regeneration occurs. The system may function satisfactorily for a while, either regenerating as expected, or at least partially regenerating. But if the machine's duty cycle lessens in severity, even for a single shift (for example, a production loader that is normally worked very hard might be used for a shift to perform road maintenance or clean-up duty), the filter may become overloaded.

MSHA's determination that DPFs are a technologically feasible DPM control option is based on two factors: Laboratory and in-mine testing which has documented their high filtration efficiency, and numerous successful applications in routine production mining situations where DPFs have been appropriately matched to machines and duty cycles. When DPFs are properly selected and maintained for an application, the result is optimal performance and maximum filter life.

In order to achieve satisfactory filter performance, filter life, and filtration efficiency, it is critical that a DPF be appropriately matched both to the diesel engine, and to the duty cycle and intended application of the subject equipment. For example, two identical machines may need different types of filter systems based on the machines' respective duty cycles. One machine that works hard due to the road grades that the machine must transverse during a shift may generate sufficient exhaust gas temperatures to support a passive regeneration DPF system. However, the second machine may run continuously on flat roads in the mine and, therefore, may not be capable of generating sufficient exhaust gas temperatures to support passive regeneration. Consequently, the second machine must use an active regenerating DPF system, or change out a disposable filter on a regular basis. Importantly, if the first machine, due for example to a breakdown of the second machine, assumes the second machine's duties, even on a temporary basis, it would be very possible if not likely, that its passive DPF system would fail to regenerate. Hence, when specifying a DPF system for a particular piece of equipment, mine operators should consider not only the intended application and duty cycle of the machine, but also other applications and duty cycles to which that machine may be occasionally assigned on a nonroutine basis.

In order to assist the mining industry in selecting an appropriate filter, the MSHA and NIOSH internet web sites include a comprehensive compliance assistance tool, the Filter Selection Guide. One of many MSHA DPM compliance assistance tools, the Filter Selection Guide provides mine operators with detailed step-by-step assistance in selecting appropriate DPF systems that are compatible with their specific equipment and duty cycles. Also, the Filter Selection Guide provides information on modifications and adjustments to diesel-powered equipment that mine operators may have to make to successfully apply DPF systems.

Prior to initiating the DPF selection process, mine operators should make certain that they are properly maintaining their engines, and that the engines are not consuming excessive amounts of crankcase oil. Operators should then obtain exhaust temperature logs or traces for several shifts, and use these traces to help select the appropriate DPF system for that machine and application. Exhaust temperature traces can be analyzed by mine personnel or DPF suppliers to assist in selecting a workable DPF system. Exhaust gas temperatures are an important factor in selecting a DPF because passive filter regeneration is possible only if sufficient exhaust gas temperatures are attained for specified minimum time periods throughout the engine's duty cycle. The exhaust temperatures that must be attained, and the corresponding DPFs, are listed in Table VII–1.

TABLE VII–1.—CERAMIC WALL-FLOW MONOLITH DPF REGENERATION OPTIONS

| DPF regeneration type | Temperature that exhaust must exceed at least 30% of the time for passive regeneration to occur | DPF media | Comments |
|---|---|---|---|
| Passive | >550°C | Uncatalyzed media; can be either cordierite or silicon carbide. | Exhaust temperatures >550°C rarely if ever occur; thus, passive regeneration of uncatalyzed DPFs is not a practical option. |
| | >390°C | Base metal catalyzed cordierite | No increase in $NO_2$. |
| | >340°C | Lightly platinum-catalyzed cordierite or silicon carbide with fuel additive. | Special provisions must be made to ensure additive is always present in fuel and that equipment w/o DPFs cannot be fueled with additive-containing fuel. No increase in $NO_2$. |
| | >325°C | Platinum-catalyzed cordierite or silicon carbide. | Lab results indicate significant NO to $NO_2$ conversion; field results are mixed; successful application depends on consistently achieving required exhaust temperatures and adequate ventilation to dilute and carry away $NO_2$. |
| Active | Not applicable | Uncatalyzed cordierite or silicon carbide | DPFs manually regenerated on-board or off-board depending on system design. |
| | Not applicable | Uncatalyzed silicon carbide or cordierite | Active/passive[1] type system uses fuel burner to assist regeneration at any exhaust gas temperature and duty cycle; regeneration initiated automatically based on exhaust backpressure. |

[1] MSHA is aware of another type of active/passive system utilizing an on-board electrical heating source to assist regeneration of sintered metal filter media, but is not aware of any underground mining applications of this system at this time.

As Table VII–1 indicates, passive DPF systems will regenerate successfully at or above the exhaust gas temperature specified by the manufacturer. However, these exhaust gas temperatures must be maintained for at least 30% of the shift to be sufficient for passive regeneration. An active regenerating system will work at any exhaust temperatures.

The tune of the engine will also be a factor for proper regeneration. If an engine goes out of tune and begins to emit higher DPM concentrations in the exhaust, the exhaust backpressure may increase too quickly. Therefore, MSHA and DPF manufacturers recommend that mine operators install backpressure monitoring devices on machines equipped with DPFs in order to properly monitor the condition and regeneration state of the filter.

In the DPM settlement agreement, MSHA agreed to a compliance assistance period of one year beginning July 20, 2002 and ending July 19, 2003. Among its many compliance assistance activities during this period, MSHA examined the mine worthiness of available DPF systems. In the preamble discussion to the 2003 NPRM, MSHA stated:

MSHA has found that most mine operators can successfully resolve their implementation issues if they make informed decisions regarding filter selection, retrofitting, engine and equipment deployment, operations, and maintenance. The Agency recognizes that practical mine-worthy DPF systems for retrofitting most existing diesel powered equipment in underground metal and nonmetal mines are commercially available and are mine worthy to effectively reduce miners' exposures to DPM. MSHA also recognizes that installation of DPF systems will require mine operators to work through technical and operational situations unique to their specific mining circumstances. In view of that, MSHA has provided comprehensive compliance assistance to the underground metal and nonmetal mining industry.

NIOSH also stated its position on the DPF systems currently available for most mining equipment during this period. By letter of June 25, 2003, to MSHA, NIOSH stated:

With regard to the availability of filters and the interim standard, the experience to date has shown that while diesel particulate filter (DPF) systems for retrofitting most existing diesel-powered equipment in underground metal and nonmetal mines are commercially available, the successful application of these systems is predicated on solving technical and operational issues associated with the circumstances unique to each mine. Operators will need to make informed decisions regarding filter selection, retrofitting, engine and equipment deployment, operation, and maintenance, and specifically work through issues such as in-use efficiencies, secondary emissions, engine backpressure, DPF regeneration, DPF reliability and durability. NIOSH is of the opinion that these issues can be solved if the informed decisions mentioned above are made. This view is supported by comments made by mine operators at the NIOSH-sponsored workshops entitled ''Diesel Emissions and Control Technologies in Underground Metal and Nonmetal Mines.'' Analysis of the recently completed Stillwater Mine experiments and related in-mine tests will also provide information regarding in-mine filter efficiency performance of these systems as compared to their performance in the laboratory.

Assuming that the results show comparable filter efficiency performance, metal/nonmetal mine operators in similar circumstances will be able to use the information with confidence to predict performance results in reducing DPM levels in particular applications.

MSHA believes that this document confirms that DPF systems are available and mine-worthy to reduce miners' exposures to DPM.

Some commenters stated that the intermittent duty cycles (bursts of heavy work, followed by idle time) common for large front-end loaders used in the stone mining industry are unlikely to produce sufficiently high exhaust temperatures for passive regenerating DPFs to be a feasible DPM control option. MSHA notes that during its 2003 compliance assistance visits, exhaust temperature monitoring conducted on a production loader indicated sufficient temperatures for a sufficient portion of the duty cycle to permit that loader to utilize a passively regenerating DPF system. Clearly, such limited testing was not definitive, and the mine operator would need to conduct additional temperature monitoring to

verify these results over the complete range of work activities performed by this loader. However, there was nothing particularly unusual about this loader or its duty cycle, so the commenter's suggestion that loaders in the stone industry, in general, cannot utilize passive regenerating DPFs, is inaccurate.

Also, MSHA notes that there are feasible alternatives to passive regeneration for filtering the exhaust of any size engine used in the stone mining industry. Mine operators could choose on-board or off-board active regeneration, including an on-board fuel burner type system that actively regenerates the filter during normal production operations without any intervention by the equipment operator, without shutting down the equipment, and without any increase in $NO_2$ generation.

Industry commenters related the experiences of four mining companies to support the position that DPF systems are not a technologically feasible DPM control option for attaining compliance with the interim DPM limit in underground mining applications. The four companies were the Stillwater Mining Company (Stillwater mine in Montana), Newmont Gold (Carlin East and Deep Post mines in Nevada), Kennecott Minerals (Greens Creek mine in Alaska), and Cargill Salt (Avery Island mine in Louisiana).

Commenters reported that platinum wash-coated passive DPFs have proven successful at the Stillwater mine. They indicated that the equipment best suited to utilizing passive systems includes 19 primary haulage trucks, eight locomotives, and two large LHDs which together, are estimated to account for about 35% of the mine's DPM emissions. This equipment tends to work in haulageways where there is frequently a good ventilation air flow. However, as noted elsewhere in this section of this preamble, the commenters noted problems with high $NO_2$ emissions from equipment fitted with platinum wash-coated passive DPFs. MSHA has determined that the $NO_2$ problems at this mine result from inadequate ventilation, and that high $NO_2$ levels at this mine pre-dated the use of platinum wash-coated passive DPFs.

These commenters indicated that the remaining 321 machines at this mine do not have high enough duty cycles and exhaust temperatures to utilize passive DPFs, and that active DPF systems are not considered feasible by the mine operator. As discussed in detail below in this section, MSHA believes that the mine operator's determination of infeasibility of active filters is based on a proposed active filtration concept that is not optimal for this mine.

These same commenters also discussed the technological and economic feasibility analyses for the Stillwater mine included in the 31-Mine Study. MSHA has acknowledged that the cost estimates contained in the 31-Mine Study final report significantly underestimate the probable DPM compliance costs for this mine. At the time the 31-Mine Study was conducted, MSHA's analysts had been supplied with inaccurate information regarding this mine's diesel equipment inventory. MSHA subsequently revised its analysis based on updated equipment inventory data. The revised estimate of compliance cost for the Stillwater mine is considerably higher than the estimate included in the 31-Mine Study. However, as discussed later in this section, it is nonetheless consistent with the estimated compliance cost for a precious metals mine of this size as detailed in MSHA's REA for the 2001 final rule.

The commenters indicated that Newmont has experimented with both passive and active DPFs in the Carlin East and Deep Post mines, and that a problem exists. The commenters state that engine backpressures range from 37 to 43 inches of mercury when DPFs are in use, and one of their engine suppliers, Caterpillar, will not warrant engines when backpressure exceeds 27 inches of mercury. In response, MSHA references the NIOSH/MSHA Filter Selection Guide, which states that DPF systems must be sized so that backpressure is within the engine manufacturer's specifications.

The commenters go on to relate Newmont's successes with DPFs, including both platinum wash-coated passive filters on haulage trucks and base metal wash-coated passive/active filters on smaller LHDs and jammers. Although elevated $NO_2$ emissions can be associated with platinum wash-coated DPFs, the trucks equipped with these filters are used to haul ore up well ventilated ramps to the surface, so the potential for $NO_2$ overexposure is minimized. The smaller LHDs and jammers are typically used in production areas with lower ventilation rates, so base metal wash-coated filters are used which do not generate $NO_2$. Because of the limited duty cycle of these smaller machines, total filter regeneration may not occur. However, the wash-coat promotes enough regeneration that the filters are able to function properly between set service intervals that coincide with the equipment's preventive maintenance schedule, at which time the filters are changed-out, and the ''dirty'' filters actively regenerated off-board.

The commenters also related Newmont's experience with ''failed'' DPFs, including a filter that was destroyed due to excess vibration and another that was destroyed when an upstream turbocharger failed and blew oil into the DPF. However, the commenter went on to describe the steps taken by Newmont to successfully correct the vibration problem (shock absorbing filter mounts), and the other destroyed DPF was clearly caused by the failed turbocharger, not an integral failure of the DPF. MSHA has repeatedly advised the mining community that a certain amount of applications engineering will be required to insure the successful deployment of DPFs on underground mining equipment. The vibration failure example illustrates that as mine operators obtain experience with DPFs, problems will inevitably be encountered, but they can be readily solved by applying reasonably simple hardware solutions.

These commenters also questioned MSHA's assumptions regarding the feasibility of auxiliary ventilation system upgrades discussed in the 31-Mine Study, however, the upgrades specified for Carlin East in the 31-Mine Study related to achieving the final DPM limit. Compliance with the interim limit was projected without ventilation upgrades.

These commenters concluded that overall DPM compliance costs are too high for Newmont Gold. Newmont estimates that the, ''purchase and installation of DPFs, including downtime on production vehicles, will be $1.9 million for its two mines—Deep Post and Carlin East.'' No further cost breakdown is provided, so MSHA could not assess the reasonableness of this estimate. However, accepting this estimate as submitted, and assuming a two-year DPF service life, Newmont's estimate of its DPF costs implies a yearly cost of $1.05 million for the two mines ($1.9 million annualized over two years at a 7% discount rate). MSHA notes in the REA for the 2001 final DPM rule that its estimated compliance cost for a medium-sized gold mine employing 20 to 500 miners is $171,900 per year based on a diesel equipment fleet size of 24 pieces of diesel equipment. This estimate was based on analysis indicating about 78% of overall compliance costs would relate to DPFs. Adjusting MSHA's estimated annual cost to correspond to the combined 166 pieces of equipment at Newmont's two mines yields an estimated annual DPF-related compliance cost of about

$927,000, which is only 12% less than Newmont's estimate of its annual DPF-related compliance cost.

The same commenters described DPF installations on haulage trucks and loaders equipped with Detroit Diesel Series 60 engines rated at 450 horsepower and 350 horsepower, respectively, at the Kennecott Greens Creek mine in Alaska. Regarding the trucks, the same commenters reported that, ''After initial problems, mainly caused by incorrect installation and sizing of filters, the mine has successfully equipped its fleet of six Toro trucks with DPFs.'' This experience confirms two important aspects of DPF utilization that MSHA has emphasized repeatedly in its compliance assistance communications with the industry, including (1) the likely need for a certain amount of applications engineering to resolve implementation and installation issues, and (2) the need to appropriately match the DPF to the machine and duty cycle.

With respect to installations on two identical Toro 1250 loaders, it was noted that the platinum wash-coated DPF on one unit consistently passively regenerated, while the DPF on the other unit, which had a lesser duty cycle and exhaust temperatures that were 40 to 50°C lower, did not. This experience does not illustrate the failure of DPF technology. Rather, it confirms MSHA's consistent advice that the successful deployment of passively regenerating DPFs requires careful determination of exhaust temperatures to assess whether passive regeneration is feasible for that particular machine and in that application. Indeed, in this example, the filter functioned precisely as designed. The failure of the filter to passively regenerate on the second machine could have been reliably predicted based on the exhaust temperature data.

In their comments, industry also relates Greens Creek's successful application of an active DPF system on an Elphinstone R1300 3½-yd LHD with a Cat engine. This loader is used for relatively light duty clean up work, and is therefore not a suitable candidate for application of a passively regenerating DPF.

It should be noted that industry also commented that, ''Those engines in the 250–350 horsepower, and greater-than 350 horsepower ranges are considered unsuitable for DPFs with present technology. This general conclusion of unsuitability for DPF usage for these large engines comes from use of DPFs in real mine situations.'' These statements are directly contradicted by Greens Creek's successful experience filtering the exhaust from 350 horsepower and 475 horsepower engines.

Industry also presented the experience of Cargill Salt's Avery Island mine in Louisiana which installed two DCL Mine X DPF filters on a Cat 992G loader equipped with a Cat 3412 engine rated at 650 horsepower. One 15 inch diameter by 15 inch long filter was connected to each bank of the V–12 engine. This model DPF is wash-coated with a platinum catalyst to facilitate passive regeneration. The mine reported that there are no problems with elevated $NO_2$ levels, and visible emissions have been reduced. However, the mine also reported that the loader has lost almost all of its power, to such an extent that the loader is only used for clean-up duty.

These symptoms—no elevated $NO_2$ levels, visible emissions reduced, and loss of power—are all typical of a mismatch between the duty cycle of the application and the performance specifications of the DPF. In order to passively regenerate, this DPF requires exhaust temperatures of about 325°C or higher for at least 30% of its duty cycle. An insufficiently demanding duty cycle produces lower exhaust temperatures which are not sufficient to ignite and burn off accumulated DPM. Such a filter continues to collect DPM, resulting in lower visible emissions, but as the filter loads, even for a single work shift, backpressure on the engine increases, resulting in loss of power. Although these commenters report that mine mechanics worked closely with the local Caterpillar dealer in installing the system, it is very likely that this experience illustrates an inappropriate DPF application rather than a failed filter system.

Normally, the local Caterpillar dealers and any other engine manufacturer's dealers work more with issues concerning the engine installation and repairs than with DPM filter applications. Since engine manufacturers at this time do not install a DPF to the engine at the time of engine production, the local engine dealers are not usually familiar with DPF systems that are installed as retrofits on the engine.

However, even in the case of the Greens Creek experience, where the mine operator worked with the engine manufacturer, the vehicle manufacturer, and the filter manufacturer at the onset to incorporate a DPF on a new machine, the mine still initially had a failure of the DPF because of regeneration issues. As Greens Creek reported,

> the unit (DPF) was used on a waste rock backhaul route, with loads being carried down the ramp or on relatively flat hauls. Had the unit been used for ore haulage uphill routes, it would have achieved the high exhaust temperatures for the designed passive regeneration.

This mine's experience continues to emphasize that the mine must understand the duty cycle of the machine to which the DPF is being equipped to see if the duty cycle can support the regeneration needed for the DPF. In the case of Greens Creek, the waste rock backhaul vehicle did not have a sufficiently demanding duty cycle to generate the exhaust gas temperature needed for regeneration for a passive regeneration system. In such instances, the mine operator needs to go to another method of regeneration for the vehicle's DPF as discussed elsewhere in this preamble. Mine operators should also refer to the M/NM Filter Selection Guide on MSHA's Web site for assistance in choosing the appropriate DPF system for its particular circumstances.

Industry also discussed various issues relating to compliance problems for stone mines, such as feasibility of filters for large engines, biodiesel fuel, and ventilation. These issues are addressed elsewhere in this preamble in sections that deal specifically with these topics. Some commenters stated that MSHA presumed that operators would retrofit DPFs on existing diesel-powered equipment as the primary method of compliance. These commenters questioned whether implementation issues with retrofitting and regeneration would make DPFs infeasible. In response, MSHA has determined on the basis of in-mine tests conducted by NIOSH, MSHA, individual mining companies and others, and on the experiences of mining companies that have implemented DPM filtration on a routine production basis, that DPFs are a practical, mine-worthy, and effective means for reducing exposure to DPM in underground M/NM mines. Further, MSHA has determined that use of DPFs independently or in conjunction with other feasible and effective DPM engineering and administrative controls will enable most mine operators to attain compliance with the DPM interim limit. However, MSHA agrees with the commenters that implementation issues with retrofitting and regeneration may present compliance difficulties for some mines, and additional time may be required at some mines due to the cost of purchasing and installing controls.

Many commenters have cited problems with DPFs which they believe support the contention that DPFs are neither technologically nor economically feasible. As noted above,

some commenters provided examples from several underground mines that experienced failed DPFs. Commenters indicated that a ceramic filter, using passive type regeneration would be the only type filter that would be acceptable to them. Commenters also stated that ceramic DPFs that require active regeneration, a fuel borne catalyst, a catalyst that could have the potential to increase $NO_2$ emissions, and any kind of filter for engines less than 50 horsepower or greater than 250 horsepower were infeasible for use in underground M/NM mines. Some commenters described installations that produced high exhaust backpressure on engines that could lead to voiding engine warranties or render a vehicle unusable. A commenter also stated that the number of regeneration stations that would be required to be built and maintained would make active regeneration infeasible.

Other commenters stated that when DPFs are appropriately sized and fitted to equipment, and there is a good match between the equipment application/duty cycle and the DPF regeneration method, long filter life and significant DPM reductions will result. Several commenters indicated that, after an initial trial-and-error ''learning period,'' they had experienced success with passive type DPFs and were using them on a routine production basis.

Some commenters stated that DPFs continue to be a feasible technology for significantly reducing DPM exposures. One commenter reported the successful application of an on-board active regeneration DPF. This system includes an exhaust backpressure monitor that warns the equipment operator when DPF regeneration is required. This is a feature MSHA recommends for all DPF installations.

As noted above, MSHA acknowledges the numerous documented examples of failed DPF applications in the underground M/NM mining industry. However, MSHA believes such failures are the result of inappropriate filter selection, manufacturing defects, and unrelated failures of equipment components (such as turbochargers) that have caused damage to DPFs. MSHA is confident that proper filter selection will result in satisfactory long term DPF performance, and NIOSH agrees with MSHA that DPFs are technologically feasible for most mining equipment after some technical and operational problems are solved, and that these problems can be solved in most cases.

To help mine operators avoid having to rely on costly and time consuming trial-and-error methods for DPF selection, the Filter Selection Guide was developed. It is the result of a joint effort of MSHA and the Diesel Team from the NIOSH Pittsburgh Research Laboratory. The Filter Guide provides mine operators with information on feasible and available DPFs. NIOSH will work with MSHA to maintain the Filter Guide on the internet.

MSHA continues to urge mine operators to thoroughly evaluate each application to insure that the appropriate DPF and regeneration system is chosen. Such an evaluation is well within the technical capabilities of most mine operators to perform. For the few operators that would be unable to independently perform this evaluation, technical assistance can be obtained from mining equipment manufacturers, engine manufacturers, DPF manufacturers, and MSHA.

As noted earlier, selection of an appropriate DPF for a given application requires consideration of such factors as engine type, model, and horsepower, as well as the intended usage of the equipment and related equipment duty cycles. Mine operators are fully capable of obtaining this information for every piece of equipment that is a candidate for DPF installation. In addition, the engine's DPM emission rate and exhaust temperatures must be obtained. For MSHA-approved engines, DPM emission rates are determined by MSHA and included with the engine approval. For non-approved engines, DPM emission information can be obtained from the engine manufacturer or estimated based on the characteristics of the engine (direct injection, pre-chamber, make and model, model year, naturally aspirated, turbocharged, electronically controlled, etc.). To obtain exhaust temperatures, various inexpensive (approximately $200) data logging thermocouple systems are commercially available that can be attached to the exhaust system to provide detailed exhaust temperature profiles over time periods ranging from several hours to several shifts. During its compliance assistance mine visits in the spring and summer of 2003, MSHA noted that several mine operators had acquired exhaust temperature data logging systems and were using them to systematically measure exhaust temperatures on equipment that might need to be equipped with a DPF in the future.

DPFs collect significant amounts of DPM from the engine's exhaust, thus lowering DPM exposures. This fact was not disputed by the commenters. The results from MSHA's compliance assistance work with Kennecott at their Greens Creek Mine, NIOSH's isolated zone tests conducted at the Stillwater Mine, NIOSH's production zone tests at the Stillwater mine, MSHA's laboratory data, laboratory and in-mine test results from Canadian and European studies, and various other industry applications prove that DPFs provide high efficiency reductions in both DPM and EC. For EC, the data indicate filtration efficiencies as high as 90% to 99+%.

MSHA disputes commenters' views that if passive regeneration cannot be successfully employed (due, for example, to an insufficient duty cycle and correspondingly low engine exhaust temperatures), then DPM filter technology is infeasible. Passive regeneration is only one of many regeneration schemes available to the mine operator. Clearly, not all machines or all applications are suitable for passive regeneration. One commenter stated that one of his firm's two loaders was able to use a passive regeneration DPF due to the exhaust gas temperatures reached during its duty cycle, while the other could not or was marginal. This experience demonstrates precisely what MSHA's consistent message to the industry has been—that successful application of passive regeneration DPFs depends on matching the filter to the application, and mine-worthy systems are commercially available for most any machine and any duty cycle.

It is important to note that a sufficiently heavy duty cycle does not, by itself, guarantee that a passive regeneration DPF will function properly and provide satisfactory long-term performance. It is an essential prerequisite, but the other steps in the DPF selection process must also be followed rigorously. Without the necessary exhaust temperatures for the specified amount of time, passive regeneration is impossible, regardless of how carefully the other steps in the selection process are followed. However, once the necessary exhaust temperature profile has been verified through sufficient in-mine temperature monitoring, users are urged to carefully complete the remaining steps in the selection process.

For whatever reason, if a particular machine requires a DPF, but is an unsuitable candidate for application of a passive regeneration system, the mine operator has the option of using a combination passive/active regeneration scheme or to use a purely active regeneration system. Because the option exists for utilizing either passive, active/passive, or active regeneration systems, MSHA maintains that a suitable DPF system is available for any size diesel engine and any application in the underground M/NM mining industry. The mine operator may need to address

various implementation issues regarding retrofitting and regeneration, but MSHA is confident these issues can be resolved.

*NIOSH's Phase I Isozone and Phase II Production Zone Studies Related to DPFs at the Stillwater Mine.* NIOSH conducted a series of in-mine tests on DPF systems at the Stillwater Mining Company's underground platinum mine at Nye, MT. The tests were conducted in two phases. The Phase I tests were conducted from May 19–30, 2003, and the Phase II tests were conducted from September 8–12, 2003. The purpose of Phase I was to assess the effectiveness of DPM control technologies in an isolated zone. The purpose of Phase II was to assess the capability of DPFs to effectively control the exposure of underground miners to DPM in actual in-mine production mining scenarios.

NIOSH issued two final reports on these studies. The final report for Phase I was entitled ''Effectiveness of Selected Technologies in Controlling Diesel Emissions in an Underground Mine—Isolated Zone Study At Stillwater Mining Company's Nye Mine,'' and the report was released on January 5, 2004. NIOSH included the following in its discussion of the objective of the study:

> The objective of this study was to determine the in-situ effectiveness of the selected technologies available to the underground mining industry for reducing particulate matter and gaseous emissions from diesel-powered equipment. The protocol was established to determine the effectiveness of those technologies in an underground environment under operating conditions that closely resemble actual production scenarios.
>
> The study was designed to provide Stillwater, and the general mining community, with better insights into the performance of control technologies and enable them to identify the appropriate devices for reducing diesel emissions. The focus of the Stillwater research was on technologies that offer solutions for reducing DPM emissions. This report provides the results and assessment of the following control technologies: diesel particulate DPFs, disposable paper DPFs, diesel oxidation catalytic converter, and reformulated fuels.

The Phase II final report was entitled, ''An Evaluation of the Effects of Diesel Particulate Filter Systems on Air Quality and Personal Exposures of Miners at Stillwater Mine Case Study: Production Zone,'' and the report was released April 1, 2004. The objective of Phase II was to determine the effects of DPF systems installed on production equipment at the Stillwater Mine on workplace concentrations of EC and regulated gases in an actual production mining application where multiple diesel-powered vehicles operated simultaneously during full shift mining activities. The effects of DPF systems were examined by comparing ambient concentrations of EC, CO, $CO_2$, NO, and $NO_2$ in a production area for two different test conditions. For the baseline condition, all vehicles that operated within the ventilation split were equipped with standard exhaust systems—a diesel oxidation catalyst (DOC) and muffler—but without DPFs. For the second condition, three of the vehicles, an LHD and two haulage trucks had their DOC and muffler systems replaced with DPF systems.

The NIOSH Phase II study conducted at the Stillwater Mine is similar to the in-mine tests conducted by MSHA in January 2003 as a part of its compliance assistance program at the Kennecott Greens Creek Mine near Juneau, AK, which is discussed elsewhere in this preamble.

*NIOSH Phase I study.* The majority of the control devices tested were DPFs. Phase I also tested biodiesel fuel and the differences between #1 diesel fuel (D1) and #2 diesel fuel (D2). DPFs included both ceramic and high temperature disposable (synthetic media) filters. NIOSH reported that some problems did occur during the tests, mainly dealing with ventilation issues in the isolated zone and an occasional vehicle passing nearby the intake to the isolated zone. However, these problems were minor and did not compromise most tests.

As reported, NIOSH chose to normalize the data based on MSHA's nameplate gaseous ventilation rates. One commenter stated that he understood why NIOSH normalized the Phase I data to the MSHA nameplate, however, the commenter felt this was a disservice to the miners since M/NM mines do not have to comply with the ventilation rates on the approval plates. Indeed, engines in M/NM mines are not required to be MSHA approved and ventilation rates are not available for non-MSHA approved engines. MSHA agrees with the commenter that the Phase I report had the correct intent to normalize the data for reporting purposes. MSHA also agrees that the results may not be typical for operations in the M/NM sector because the ventilation schemes used by many M/NM mines do not comply with approval plate quantities for MSHA approved engines.

The Phase I report shows that the EC reduction in the isolated zone with one system was 88%, and that two other systems gave greater than 96% EC reductions when the measured concentrations were normalized by ventilation rate. NIOSH reported that several tests were discarded and not reported due to unexplainably low $CO_2$ concentrations found at low ventilation rates.

The filter media used in all the DPF systems during the Phase I test was either Cordierite, Silicon Carbide, or the disposable high temperature synthetic material. (An analysis conducted by an MSHA contracted laboratory indicated the synthetic material is fiberglass.) All the DPF media have very similar efficiencies for EC reductions. Even though NIOSH did not report the EC reduction efficiencies of all the DPF systems tested in Phase I, MSHA believes, based on its own evaluations, that the efficiencies for EC reductions of those DPFs not reported would have been approximately equal to the results obtained for DPF systems that were reported.

Many commenters agreed that the Phase I study accomplished its objective by showing that DPM filters are viable for reducing DPM from diesel engines and that the filter systems performed as designed. However, some of these commenters stated that the elaborate test setup in the Phase I study was only a replication of a laboratory type environment that did not represent actual mine conditions. Commenters pointed out that some of the control technologies did not perform as well as expected during the study.

MSHA agrees that the Phase I study demonstrated that DPM filters are an effective tool for reducing DPM emitted from diesel engines. The Phase I study did involve an elaborate test setup, but this test setup was primarily aimed at controlling the ventilation conditions so that extraneous DPM from upstream diesel traffic would be eliminated, thereby enabling a meaningful and accurate determination of the DPM reductions obtained by the various DPFs tested. In other respects, however, the test setup was quite realistic, in that the testing occurred underground and involved a realistic simulation of a production mining operation. For example, in testing of LHDs, the test protocol required a production LHD to repeatedly follow a proscribed duty cycle involving loading at a muckpile, tramming up a 9% grade along the main haulageway a distance of approximately 1,000 feet with a loaded bucket, various forward and reverse maneuvers over short travel distances at each end of the haulageway, and raising and lowering a loaded bucket to simulate loading a haulage truck. Other than the removal of existing exhaust system components (DOC and muffler) to accommodate installing the subject DPFs, and the installation of certain monitoring instrumentation, the equipment used in

the study was unmodified and in ''as is'' condition from the mine's equipment inventory. Although this testing was based on simulated mining operations, the suggestion that it replicates a laboratory environment is an inaccurate characterization.

MSHA believes that the Phase I Isozone data is sound science, establishing with certainty that DPFs can be implemented on a broad scale in mines in the U.S. and that DPFs are capable of achieving significant reductions in miner's DPM exposures. MSHA notes that these data are consistent with the results of other similar tests, including both laboratory tests conducted by MSHA, NIOSH and others, and a Canadian in-mine isolated zone test in which NIOSH also participated. MSHA discussed the results of this Canadian test in the preamble to the 2001 final rule.

One commenter stated that the Phase I isolated zone test should have been completed long before the DPM rule was rushed to publication. MSHA does not agree with the commenter. In fact, MSHA used the results of the above mentioned Canadian isolated zone study in its original 2001 DPM rule to show the effectiveness of DPFs. The recent NIOSH isolated zone testing confirmed the results obtained by the Canadians. As noted above, the pertinent data that were derived from the Canadian study on the efficiencies of DPFs were referenced in the preamble to the 2001 final rule.

At the end of the Phase I report, NIOSH indicated that the Stillwater mine had at that time over one dozen DPFs in use for a combined total of over 22,000 operating hours. NIOSH reported that only one of these DPFs had failed (runaway regeneration), and that the other systems have been virtually maintenance free. Again, even though Stillwater's experiences with DPFs on a routine production mining basis have been with heavily platinum-catalyzed passive systems, the commercially available DPF media are the same for passive systems using other catalyst wash coats as well as for active regeneration systems that utilize uncatalyzed filter media. Moreover, all DPF media basically provide equivalent filtration efficiencies for DPM, TC, and EC.

*NIOSH Phase II study.* The Phase II study confirmed and expanded on the results obtained in the Phase I study. In the final report, NIOSH indicated that greater EC reductions were observed in the field than were obtained in the laboratory for whole diesel particulate:

> * * * laboratory determination of DPF efficiencies, based on reductions in total DPM mass (fairly equivalent to TPM [Total Particulate Matter]), substantially underestimates the ability of DPF systems to reduce EC emissions, the metric used by MSHA for compliance,* * *

which highlights the high EC filtration efficiency for DPFs.

MSHA believes that the Phase II study helped to confirm existing agency data that shows that it is technologically feasible to reduce miners' exposures to DPM to the $308_{EC}$ μg/m³ interim PEL. The Phase II study utilized three machines (1 LHD and 2 Haul Trucks) equipped for the first three days with highly platinum-catalyzed Englehard DPX® DPFs, and the last day without the DPFs, but with DOCs. The equipment engaged in normal production activities in a typical production mining area of the Stillwater mine, as opposed to the simulated mining tasks that were conducted in an isolated zone in the Phase I study. Personal sampling on equipment operators was conducted, as well as area sampling upstream and downstream from the working area where the equipment was operating. Tests were conducted with and without DPFs installed so that the capability of the DPFs to reduce personal DPM exposures and DPM levels in the ambient mine air could be quantified.

The results of the personal EC samples from the three machine operators equipped with filters were provided in the final report. NIOSH did not report Day 1 results due to inadequate sampling locations. The EC results for personal samples for Day 3 showed that the DPM exposures of all three miners were well below $308_{EC}$ μg/m³, and in fact, well below 160EC μg/m³. Day 2 showed exposures also below $308_{EC}$ μg/m³, but almost double the results of Day 3. However, it appears that the ventilation air flow through the working area on Day 2 was about half the ventilation air flow for Day 3. Thus, the differences in measured DPM levels are not contradictory, but rather, demonstrate the effectiveness of increased ventilation flow as an engineering control to reduce DPM levels in the ambient air. The EC reduction efficiencies of the DPFs based on personal exposures comparing test days with and without the filters in place were approximately 71% for the LHD operator and 78% for the haul truck drivers. These reductions are very similar to the results obtained for personal exposures in the Greens Creek study conducted by MSHA in January 2003.

NIOSH reported that some of the filters used during the Phase II testing at Stillwater may have been compromised. However, NIOSH indicated in the Phase II final report that, ''* * * even when the DPF systems are performing below expectations, they can significantly reduce the EC concentrations when compared to conditions when DPF systems were not used.'' Significantly, MSHA made a very similar observation in its report on Greens Creek. During testing at Greens Creek, there were obvious visible cracks in some of the ceramic media. But analysis of DPM concentrations in the equipment exhaust indicated that EC filtration efficiency was still quite high (>90%) despite the cracks. Clearly, even compromised DPM filters can reduce personal DPM exposures to levels below the interim PEL.

NIOSH reported increased $NO_2$ concentrations during the study when using DPFs, and suggested that the source of the increase was the platinum catalyst used as a wash coat for the Cordierite filter media. The platinum wash coat on the filter is used for regeneration purposes and does not affect filter efficiency for EC measurements. Therefore, the reduction observed in EC concentrations from the Phase II study should be expected when any filter is installed that has a Cordierite filter media. As discussed elsewhere in this preamble, a Silicon Carbide filter media is also used in many DPF systems and EC filtering efficiency for Silicon Carbide is very similar to Cordierite.

As noted above, NIOSH reported increases in $NO_2$ concentrations when highly platinum-catalyzed DPFs were used. NIOSH stated in the Phase I final report that ''* * * if the required MSHA ventilation rates were maintained during the tests, the average concentration of $NO_2$ over the test periods would have not exceeded 3 ppm, the long term exposure limit for $NO_2$.'' The greatest increase in $NO_2$ during the Phase I study came from the highly platinum-catalyzed DPF. When this filter was used, the ceiling limit of 5 ppm was briefly exceeded each time the equipment repeated the duty cycle. These $NO_2$ peaks were noted at the downstream sampling location and at about the same levels at a sampling location on the equipment near the operator's position.

NIOSH stated in the Phase II report that tests 2 and 3 (with DPF installed) were terminated when the multi-gas monitor carried by the equipment operator indicated that the 5 ppm $NO_2$ ceiling limit had been exceeded. NIOSH

reported that they also believe the $NO_2$ level may have been above 5 ppm for personal exposure on test 4 when the DPFs were not installed on the machines (DOCs were installed on test 4).

Although tests 2 and 3 were terminated earlier than planned, these tests lasted between approximately 2¾ hours and 4¾ hours, respectively. MSHA believes that these tests were sufficient in duration to demonstrate the differences in EC exposures with and without DPFs. At most mines, mucking operations in an individual stope or development end are usually completed within 2–4 hours. In fact, the Greens Creek report results were based on approximately 2–3 hours of sample time, which was the total time required to muck out the subject stopes.

From the intake side to the return side of the Phase II test zone, average $NO_2$ increase as reported were 1.2 ppm for Day 2, and 1.1 ppm for Day 3 with DPFs. The average $NO_2$ increase was 1.1ppm for Day 4 with DOCs. It is significant to note that these increases are consistent with the $NO_2$ increases observed during the Greens Creek tests, and would not be expected to result in hazardous $NO_2$ exposures in mines with adequate ventilation. It should also be noted that there was no significant difference between average $NO_2$ increases with and without DPFs in the test area (the DPFs were replaced by DOCs on Day 4).

As stated above, NIOSH noted that Phase II tests 2 and 3 were terminated early due to excessive $NO_2$ levels measured in the cabs of the test equipment. Due to the layout of the area where Phase II tests were conducted, it is likely that the vehicles experiencing the highest $NO_2$ levels were operated for part of the duty cycle in a lower quantity of ventilation air than was available in the main haulageway. The observed personal overexposures to $NO_2$ occurred when the haul trucks were in this poorly ventilated area where the intake air split at an orepass and a development section. MSHA believes that if the air flows to these locations had been maintained at levels near the nameplate value, the overexposure to $NO_2$ would very likely not have occurred.

It should be noted that MSHA has documented very low ventilation air flows in several stopes at the mine where NIOSH's Phase II study was conducted. Ventilation measurements obtained by MSHA during a compliance assistance visit to the mine in June 2004 identified significant leakages from most of the auxiliary stope ventilation systems that were evaluated. In the six stopes for which ventilation air flow measurements could be obtained at both the auxiliary fan location and at the end of the vent bag, the average air flow at the fan location was 24,400 cfm and the average flow at the end of the vent bag was 5,100 cfm. In one stope, auxiliary ventilation system leakage was 89% and in another, leakage was 85%. Even in stopes where auxiliary system leakage was relatively low, significant recirculation was observed. With stope ventilation flow rates compromised to this extent due to auxiliary system leakage and recirculation, it is not surprising that both high gaseous emission levels and high DPM emissions have been measured at this mine.

The NIOSH Phase II data show that gaseous contaminant levels and ventilation flows had stabilized in the test area a short time after the testing was initiated (within approximately the first 30 minutes), indicating that roughly steady-state conditions had been achieved. If tests 2 and 3 had not been terminated prematurely (*i.e.*, if the poorly ventilated area had been sufficiently ventilated), it is therefore likely that the reported DPM and gaseous emission levels could have been maintained indefinitely, or at least until mining operations were completed in the test area.

As stated earlier, MSHA advised mine operators through the issuance of a PIB that the use of highly platinum-catalyzed DPFs has the potential to increase concentrations of $NO_2$. The increases in $NO_2$ observed during the Stillwater Phase I and Phase II tests demonstrate that mine operators who choose to use highly platinum-catalyzed DPFs must maintain sufficient ventilation in areas where the machines operate, and must monitor for any increases in $NO_2$. This advice is particularly important for mines that had experienced $NO_2$ problems prior to the introduction of platinum wash-coated DPFs, as was the case at the Stillwater mine. Where $NO_2$ levels cannot be adequately controlled by ventilation, alternatives to highly platinum-catalyzed passive filter systems are commercially available which do not increase ambient $NO_2$ levels. An example that is particularly well suited to heavy duty applications is the fuel burner type active regenerating DPF. A system of this type is currently installed and under evaluation at the Stillwater mine.

The results of these studies support MSHA's position that feasible control technology exists that is commercially available to effectively reduce miner exposures to DPM. As with any new mining machinery, mine operators will need to thoroughly evaluate their needs prior to ordering DPF systems to insure that each system is appropriate to the piece of equipment, engine, application, and duty cycle. Failure to appropriately consider these factors will likely result in poor filter performance, poor engine performance, possible engine and filter damage, or all of the above. Alluding to this issue, NIOSH states in the Phase II study final report that, ''Due to the nature of the study, Phase II did not address other and no less important matters relating to the application of control technologies in underground mines. These matters include selection of DPF regeneration strategies, economic, logistical, and technical feasibility of implementation of various DPF systems on mining vehicles, and the reliability and durability of the systems in mine settings.''

MSHA has consistently stated that the application of commercially available DPF systems is a task that requires mines to evaluate machine installations on a case by case and application by application basis. NIOSH agrees. Consequently, NIOSH and MSHA jointly developed an on-line Internet-based Filter Selection Guide which is discussed elsewhere in this preamble. NIOSH's written response to MSHA in this rulemaking supports the use of DPFs as a control device that can significantly reduce DPM exposures, but also states that the mine operator must evaluate each machine prior to selection and installation of DPM filter systems to insure a successful match between filter and application. When properly selected and installed for an application, DPFs are both durable and mine worthy. Almost without exception, failed DPFs that have been reported to MSHA were the result of inappropriate filter selection, manufacturer defect, or the failure of an unrelated component (usually the turbocharger) that affected the DPF.

*Active Regeneration DPFs.* The active regeneration systems discussed below are normally not catalyzed so they do not produce an increase in $NO_2$.

TABLE VII–2.—SCENARIOS FOR ACTIVE REGENERATION.

| System name | Regenerating location | Regenerating controller location | Comments |
|---|---|---|---|
| On-board | On Equipment | On Equipment | Requires on-board source of electric power. |
| On-board | On Equipment | Designated and fixed-location. | Requires equipment to come to a specific regeneration site. |
| Off-board | Off equipment | Fixed-location | DPFs are exchanged and must be small enough to be handled by one person. Increases number of DPFs needed. |
| On-board | On-equipment | On-equipment during operation. | System is complex yet fuel burner provides advantage of regeneration during equipment use. |

Scenarios for active regeneration systems are listed in Table VII–2. The second system listed in Table VII–2 is an on-board active system that requires about one to two hours of machine down time for regeneration, which might be available between shifts at some mines. To regenerate these filters, the piece of equipment must be parked at a designated location during the regeneration period so that the filter can be connected to electrical power and compressed air. MSHA recognizes that presently in some mines, production equipment is not necessarily brought to a central location at the end of each shift. At such mines, operators may need to make operational changes to accommodate such DPF regeneration designs.

Alternatively, mine operators may choose off-board active regeneration type filters, wherein, for example, the equipment operator removes the DPF at the end of the shift and brings it to a central station for regeneration. The next operator of that piece of equipment takes a regenerated DPF to the equipment at the start of the next shift. This system enables uninterrupted equipment operation, and does not require the equipment to travel to a central location for filter regeneration at the end of the shift. Where active off-board filters are used, the size and weight of the filter element is a significant factor in filter selection and overall system feasibility, as mine personnel need to be capable of removing the filter at the end of the shift and transporting it to a central regeneration station. Multiple DPFs may be installed on a machine in place of a single large filter in order to decrease the size and weight of individual DPFs.

*Engine malfunctions and effects on DPF.* Normally in mining, engine malfunctions are indicated by excessively smoky exhaust. That indicator will not occur when a DPF system is installed. Malfunctions such as excessive soot emissions, intake air restriction, fouled injector, and over-fueling, may result in an abnormal rise in back pressure in systems that do not spontaneously regenerate. Also, these conditions could lead to abnormal changes in back pressure in passive systems because the malfunction may raise exhaust temperatures causing the excess soot to be burned off. These malfunctions may be detected during the usual 250-hour maintenance and emissions checks conducted upstream of the DPF using carbon monoxide (CO) as an indicator. The other major filter malfunction is excessive oil consumption that is sometimes associated with blue smoke that could be masked by the performance of the DPF. However, excessive oil consumption leads to a rapid increase in baseline backpressure due to ash accumulation. Excessive oil consumption can be detected if records are kept on oil usage.

*Detecting malfunctioning DPF.* As noted above, the DPF can be damaged mainly by thermal events such as thermal runaway. Shock, vibration, or improper ''canning'' of the filter element in the DPF can also lead to leaks around the filter element. A Bacharach/Bosch smoke spot test can be used to verify the integrity of a DPF. Smoke spot numbers below ''1'' indicate a good filter; smoke numbers above ''2'' indicate that the DPF may be cracked or leaking. Smoke spot and CO tests during routine 250 hour preventative maintenance are good diagnostic practices. Note that although a smoke spot number above ''2'' may indicate a cracked or leaking filter, such a result does not necessarily mean the filter has ''failed'' and is not functioning adequately. In MSHA evaluations of DPF performance at the Greens Creek mine, filters that tested with smoke numbers above ''2'' of 7 were still shown to be over 90% effective in capturing EC, based on subsequent NIOSH 5040 analysis of the smoke spot filters.

*Low DPM-Emitting Engines.* Through its 2003 and 2004 compliance assistance mine visits and a review of its nation-wide inventory of diesel engines used in underground M/NM mines, MSHA has determined that hundreds of low DPM emission engines have been introduced into underground M/NM mines in recent years. MSHA notes that, for many mines in the stone sector, use of low emission engines has been one of the primary means of achieving compliance with the interim PEL.

EPA and European on-highway and non-road engine emission standards have forced engine manufacturers to reduce both DPM and gaseous emissions from their engines. Mine operators can purchase newer design engines with low DPM emissions in their new diesel-powered equipment as well as retrofitting such engines in their older equipment.

As noted earlier in this section of the preamble, the amount of DPM reduction that can be obtained by switching to low DPM emitting engines depends on the emission rate of the original engine compared to the emission rate of the replacement engine. For example, if the original engine emits 1.0 gram of DPM per horsepower per hour of operation, and the replacement engine emits 0.2 grams of DPM per horsepower per hour of operation, the engine replacement would achieve an 80% reduction in emitted DPM. Other benefits of newer technology engines include better fuel economy and more efficient maintenance diagnostics. The improved maintenance diagnostics associated with electronic engine monitoring systems enable lower overall equipment operating costs as well as allowing mine operators to better monitor their engines and provide the appropriate maintenance to keep exhaust emissions as low as possible.

During the compliance assistance visits to mines that had at least one baseline DPM sample result exceeding the interim DPM limit, MSHA observed numerous new or nearly new pieces of equipment powered by Original Equipment Manufacturer (OEM)-installed MSHA-Approved engines that had very high DPM emissions. The operators at these mines indicated that they were unaware of the DPM

emissions of the engines that were supplied in the equipment they had just purchased. They believed that by specifying an MSHA-Approved engine, they would be in full compliance with the rule. While it is true that MSHA-Approved engines satisfy the requirements of § 57.5067, not all MSHA-Approved engines are necessarily low in DPM emissions. Non-Approved EPA Tier 1 (for engines less than 50 horsepower or 175 horsepower and greater) and Tier 2 (for engines of 50 horsepower or greater, but less than 175 horsepower) engines are also compliant with § 56.6067, but they have lower DPM emissions. During the compliance assistance visits, and in subsequent discussions with the Equipment Manufacturer's Association (EMA), MSHA emphasized the need for modern low DPM emission engines to be installed in new machines earmarked for the underground mining industry.

*Ventilation Upgrades.* Several commenters expressed the view that ventilation system upgrades, though potentially effective in principle, would be infeasible to implement for many mines. Specific problems that could prevent mines from increasing ventilation system capacity include inherent mine design geometry and configurations (drift size and shape), space limitations, and other external prohibitions, as well as economic considerations.

MSHA acknowledges that ventilation system upgrades may not be the most cost effective DPM control for many mines, and for others, ventilation upgrades may be entirely impractical. However, at many other mines, perhaps the majority of mines affected by this rule, ventilation improvements would be an attractive DPM control option, either implemented by itself or in combination with other controls.

Indeed, MSHA observed during its DPM compliance assistance visits that ventilation upgrades have been implemented at many mines in the stone sector for DPM control, directly contradicting the commenters' assertion that ventilation upgrades are infeasible. Nearly every stone mine visited by MSHA had completed, had begun, or was planning to implement ventilation system upgrades.

At many high-back room-and-pillar stone mines, MSHA observed ventilation systems that were characterized by (1) inadequate main fan capacity (or no main fan at all), (2) ventilation control structures (air walls, stoppings, curtains, regulators, air doors, brattices, etc.) that are poorly positioned, in poor condition, or altogether absent, (3) free standing booster fans that are too few in number, too small in capacity, and located inappropriately, and (4) no auxiliary ventilation for development ends (working faces). At some mines, the ''piston effect'' of trucks traveling along haul roads underground, along with natural ventilation pressure, provide the primary or only driving forces to move air.

In naturally ventilated mines, temperature-induced differences in air density between the surface and underground result in natural air flows through mine openings at different elevations. Warmer and lighter mine air rises up out of a mine during the colder winter months, which draws in cooler and heavier air at lower elevation mine openings. In the summer, cooler and denser mine air flows out of lower elevation openings, which draws warmer less dense air into higher elevation openings. Under the right conditions, such air flows can be significant, but they are usually inadequate by themselves to dilute and carry away DPM sufficiently to reduce miners' exposures to the interim limit.

The other principal shortcoming of natural ventilation is the inherent lack of a method of controlling air flow quantity and direction. Ventilation air flows can slow or stop when temperature differences between the surface and underground are small (common in the spring and fall), and the flow direction reverses between summer and winter, and sometimes even between morning and afternoon.

Mine operators normally supplement natural ventilation with booster fans underground. However, if overall air flow is inadequate, as is usually the case with naturally ventilated mines, and when mine elevation differences or surface and underground temperature differences are small, booster fans are largely ineffective.

The all too frequent result of these deficiencies is a ventilation system that is plagued by insufficient dilution of airborne contaminants, short circuiting, recirculation, and airflow direction and volume that are not controllable by the mine operator. These systems are barely adequate (and sometimes inadequate) for maintaining acceptable air quality with respect to gaseous pollutants (CO, $CO_2$, NO, $NO_2$, $SO_2$, etc.), and are totally inadequate for maintaining acceptable concentrations of DPM. Mines experiencing these problems could benefit greatly from upgrading main, booster, and/or auxiliary fans, along with the construction and maintenance of effective ventilation control structures.

MSHA believes that ventilation upgrades alone, along with the normal turnover of engines to newer, low-polluting models, may be sufficient for many stone mines to achieve compliance with the interim DPM limit. Consequently, MSHA has urged the mining industry to utilize mechanical ventilation to improve overall air flows and to enable better control of ventilating air.

Ventilation fan upgrades for the stone mining sector are usually relatively inexpensive due to the low mine resistance associated with large openings. In many of these mines, a 250,000 cfm air flow can be obtained at less than 1 inch of water gage pressure. This air flow can be provided by a 50 horsepower motor. The major cost in these applications is usually distribution of the air flow underground to insure that adequate air quantities reach the working faces rather than short-circuiting to a return or recirculating around free-standing booster fans. Good air flow distribution requires such practices as installing or repairing ventilation control structures (brattice line, air curtains, etc.) or changes in mine design to incorporate unmined pillars as air walls.

Deep multi-level metal mines have entirely different geometries and configurations from high-back room-and-pillar stone mines. They typically require highly complex ventilation systems to support mine development and production. These systems are professionally designed, they require large capital investments in shafts, raises, control structures, fans, and duct work, and they are costly to maintain and operate. At these mines, high ventilation system costs provide a major economic incentive to operators to optimize system design and performance, and therefore, there are typically few if any feasible upgrades to main ventilation system elements that these mines haven't already implemented, or would have implemented anyway, whether or not the DPM rule existed. Accordingly, and though it remains an option that might be attractive in new development, MSHA expects very few mines of this type to implement major ventilation system upgrades to achieve compliance with this rule.

Despite the built-in incentives to design and operate efficient ventilation systems, however, MSHA has observed aspects of ventilation system operation at such mines that can be improved, usually relating to auxiliary ventilation in stopes. Auxiliary fans are sometimes sized inappropriately for a given application, being either too small (not

enough air flow) or too large (causing recirculation). Auxiliary fans are sometimes poorly positioned, so that they draw a mixture of fresh and recirculated air into a stope. Auxiliary fans are sometimes connected to multiple branching ventilation ducts, so that the air volume reaching a particular stope face may be considerably less than the fan is capable of delivering. Perhaps most often, the ventilation duct is in poor repair, was installed improperly, or has been damaged by blasting or passing equipment to the extent that the volume of air reaching the face is only a tiny fraction of that supplied by the fan. MSHA believes that these and similar problems exist at many mines, even if the main ventilation system is well designed and efficiently operated.

An example is the mine where NIOSH conducted its Phase II Production Zone study of DPFs. As noted earlier, several auxiliary stope ventilation systems were evaluated by MSHA during an extended compliance assistance visit to this mine in June 2004. In the six stopes for which ventilation air flow measurements could be obtained at both the auxiliary fan location and at the end of the vent bag, the average air flow at the fan location was 24,400 cfm and the average flow at the end of the vent bag was 5,100 cfm. Auxiliary ventilation system leakage was 89% in one stope and 85% in another. Even in stopes where auxiliary system leakage was relatively low, significant recirculation was observed.

Optimized auxiliary ventilation system performance alone, as one commenter noted, will not necessarily insure compliance with the DPM interim limit. Auxiliary ventilation systems simply direct air to a stope face so that the DPM generated within the stope can be diluted, transported back to, and carried away by the main ventilation air course. If this air is already heavily contaminated with DPM when it is directed into a stope, as could happen at mines employing series or cascading ventilation, its ability to dilute newly-generated DPM is diminished. In these situations, the intake to the auxiliary system must be sufficiently clean to achieve the desired amount of dilution, requiring implementation of effective DPM controls upstream of the auxiliary system intake. Such upstream controls might include a variety of approaches, such as DPM filters, low-polluting engines, alternate fuels or fuel blends, and various work practice controls, as well as main ventilation system upgrades at the few mines where they might be feasible. Toward the return end of a series or cascading ventilation system, if the DPM concentration of the auxiliary system intake is still excessive, other engineering control options would include enclosed cabs with filtered breathing air on the equipment that operates within the stope, or remote control operation of the equipment in the stope to remove the operator from the stope altogether.

*Environmental Cabs With Filtered Breathing Air.* Cabs on mobile equipment and control rooms or booths for stationary installations, if provided with filtered breathing air, can be highly effective for reducing personal DPM exposures. MSHA has determined that environmental cabs can reduce operator exposures to DPM by 50% to 80%. In addition, such cabs and booths can significantly reduce exposures to harmful noise and dust, and they can also improve equipment operator comfort and productivity.

The majority of equipment used in underground M/NM mining, especially in stone mines, have suitable cabs installed. However, MSHA has observed that many cabs, due to poor maintenance and operating practices, fail to provide effective control of DPM exposure. Typical problems are broken windows, ineffective door seals, inoperative AC systems and fans, plugged or missing air filters, openings into the cab where hoses or cables enter, and lack of company policies requiring doors and windows to be maintained in the closed position during operations.

Some cab ventilation and filtration systems are undersized for the volume of air they should be moving. During MSHA's compliance assistance visits in 2003, MSHA observed numerous pieces of equipment, especially face drills, that were equipped with undersized cab air filtration systems. Research has shown that cab ventilation systems should be sized to achieve approximately one-half to one air change per minute in their respective cabs. For example, a 100 cubic foot cab should be ventilated by a system having the capacity to move 50 to 100 cubic feet per minute. Cabs should also be sealed to obtain a positive pressure greater than 0.2 inches of water gage.

*MSHA DPM-Related Compliance Assistance.* As noted earlier, MSHA has engaged in extensive DPM-related compliance assistance since the existing rule was issued in 2001, and these activities are continuing. Compliance assistance has included seminars at various locations throughout the country, hands-on sampling training workshops, the online Filter Selection Guide, a compliance guide, a ''single source'' internet Web site devoted to underground M/NM DPM issues, DPM baseline sampling at all mines affected by the rule, online listings of MSHA-Approved diesel engines and DPF efficiencies, the Estimator, and on-site compliance assistance visits at dozens of mines, among others.

MSHA continues to consult with the M/NM Diesel Partnership (the Partnership). The Partnership is composed of NIOSH, industry trade associations, and organized labor. MSHA is not a member of the Partnership due to its ongoing DPM rulemaking activities. The primary purpose of the Partnership is to identify technically and economically feasible controls to curtail particulate matter emissions from existing and new diesel-powered vehicles in underground metal and nonmetal mines.

MSHA's diesel testing laboratory located in Triadelphia, WV has been active in evaluating many DPM control technologies. An example is the investigation to characterize $NO_2$ emissions from catalyzed DPFs. As a result of this work, MSHA provided information to the mining community on the effects of catalyzed DPF's on $NO_2$ production. MSHA's laboratory determined under steady state engine operating conditions, that a heavily platinum-catalyzed DPF would increase the $NO_2$ concentration measured in the raw exhaust after the exhaust gas passed through the DPF. The increase in $NO_2$ was compared to the required gaseous ventilation rate for the test engine without the DPF installed. The laboratory data showed that the gaseous ventilation rate would increase with a highly platinum-catalyzed DPF installed. MSHA's laboratory also tested DPFs that were either specially catalyzed with platinum (lower wash-coat platinum content) or a base metal wash-coat (no platinum used). The results of the laboratory tests showed no increase in the gaseous ventilation quantity when compared to the quantity without the DPFs installed. MSHA provided the industry with a Program Information Bulletin (PIB) P02–04, ''Potential Health Hazard Caused By Platinum-Based Catalyzed Diesel Particulate Matter Exhaust Filters,'' dated May 31, 2002. This PIB is located on MSHA's web page at the following internet address: *http://www.msha.gov/regs/complian/PIB/2002/pib02–04.htm*. The PIB states that mine operators that choose to use catalyzed DPFs that have shown an increase in $NO_2$ in the laboratory need to ensure that the machines installed with these filters have adequate ventilation, and recommends that personal monitoring for $NO_2$ should be performed.

MSHA also provides an updated list on the internet of DPFs that have been

evaluated by MSHA. The internet address is: *http://www.msha.gov/01–995/Coal/DPM-FilterEfflist.pdf*. This list is divided into three tables. Table I includes paper and synthetic filters, mainly intended to be disposable. These DPFs are only used when the exhaust gas temperature is maintained to below 302°F, as is required in inby areas of gassy mines. This is normally accomplished by the use of an exhaust gas heat exchanger. Temperature sensors and backpressure sensors must be used with these filters to protect the DPF from exhaust gas temperatures that would exceed 302 °F or backpressures that would exceed the engine manufactures allowable limit. Table II lists ceramic and high temperature disposable pleated element media DPFs that do not increase the concentration of $NO_2$ in the exhaust. Table III lists the DPFs that are platinum-catalyzed and have been determined in the laboratory to increase $NO_2$ concentrations above the test engine's gaseous ventilation rate.

MSHA's laboratory has also conducted limited tests on several control technologies other than DPFs. Evaluations have been conducted on an Ecomax which consists of a series of magnets installed on the fuel system lines, Rentar, an in-line fuel catalyst installed in the machine's fuel line, and the Fuel Preporator, a system for removing collected air from the fuel system design for better fuel combustion. The test results of the laboratory evaluations were inconclusive in demonstrating significant reductions in whole diesel particulate, however the data did not show any adverse effects on the raw DPM exhaust emissions.

NIOSH also analyzed the Rentar and Fuel Preporator for their EC reduction potential. NIOSH's results were consistent with MSHA's results, and showed no significant EC reductions and no adverse effects on the engine emissions.

MSHA's laboratory evaluated the changes in engine exhaust emissions when operating at high altitudes (greater than 1000 feet in elevation). MSHA used two electronic fuel injected engines for the test, a Mercedes 904 and a Deutz BF4M 1013FC. MSHA first conducted field tests at engine laboratories located at 4000 feet and 6700 feet. Next, MSHA brought the two test engines to its laboratory. Using an altitude simulator setup, MSHA verified the accuracy of the simulator and ran various tests to evaluate the effects of altitude on the gaseous emissions and DPM. This high altitude work led to the development of guidelines that MSHA is using for approving diesel engines under 30 CFR, part 7, subpart E for engine operation above 1000 feet.

MSHA received comments suggesting that its compliance assistance visits at various mine sites support the position that the DPM rule, even at the $400_{TC}$ μg/m³ interim limit, is economically and technologically infeasible. MSHA did visit a number of mines that were not in compliance with the interim DPM limit to provide compliance assistance, but at each such mine, the operator was presented with recommendations for utilizing feasible engineering and work practice controls for attaining compliance. MSHA determined that these mines were out-of-compliance not because it was infeasible for them to attain compliance, but because the respective mine operators had not yet fully implemented all feasible controls that were available to them.

MSHA's compliance assistance work at the Greens Creek mine included an evaluation of DPM reductions obtained using heavily platinum-catalyzed ceramic DPFs that relied on passive regeneration. The machines were equipped with engines ranging from 300 to 475 horsepower. The results of this testing showed that personal DPM exposures for the subject equipment operators (loaders and haulage trucks) were reduced by 57% to 70% when the DPFs were installed. The use of the ceramic DPFs reduced the average engine emissions by 96%.

The Greens Creek report also showed that high DPM reductions (>90%) occurred even when a ceramic filter was compromised by cracking around the edges. This cracking was determined to be caused by a manufacturing defect related to the ''canning'' process (securing the ceramic filter in a stainless steel ''can'' for installation on the subject diesel equipment). Through discussions with the manufacturer, Greens Creek resolved the problem, and DPFs delivered since then have performed satisfactorily without any cracking. In addition, the use of environmental cabs reduced the DPM concentrations (*i.e.*, concentration inside the cab versus outside the cab) by 75% when DPFs were used and 80% when DPFs were not in use.

As expected, $NO_2$ increases were observed during these tests because the mine operator was using heavily platinum-catalyzed DPFs. However, the increases were so small (about 1 ppm in the downstream air flow compared to the upstream air flow in the area where a loader and two or three trucks were operating) that it was unclear whether the cause was data variability, slight changes in ventilation rate, or the use of heavily platinum-catalyzed DPFs. Greens Creek stated in its comments to this rulemaking that a 1–2 ppm increase in $NO_2$ is experienced when highly platinum-catalyzed DPFs are used, but that this increase has been manageable for the mine.

MSHA agrees that a highly platinum-catalyzed filter may increase $NO_2$ levels based on engine duty cycle and ventilation. $NO_2$ is formed from NO in the engine's exhaust in the presence of the catalyst. This reaction occurs at exhaust gas temperatures of approximately 325°C. This temperature is also the temperature at which the platinum catalyst will allow for passive regeneration. Manufacturers of platinum-catalyzed DPFs have normally wash-coated their filters with large amounts of platinum to make sure that the DPFs will regenerate. This large concentration of platinum, in combination with the relatively long retention time of the exhaust gas in the filter, results in the formation of $NO_2$.

Manufacturers have been evaluating wash-coat formulations containing less platinum loading to lower the $NO_2$ effects. Catalytic converters are also wash-coated with platinum; however, the loading used on catalytic converters is lower than ceramic DPFs, and due to faster movement of the exhaust gas through the catalytic converter compared to the ceramic filter, $NO_2$ increases are minimal. One manufacturer provides an exhaust gas recirculation system (EGR) that reduces both oxides of nitrogen ($NO_X$) and DPM when used in combination with a DPF.

Mine operators also have the option of using DPFs that are not heavily wash-coated with a platinum catalyst. One manufacturer offers a lightly platinum-catalyzed DPF that is used in conjunction with a platinum-cerium fuel-borne catalyst (Fuel additive). This system has a slightly higher passive regeneration temperature requirement than heavily platinum-catalyzed DPFs, but it produces no excess $NO_2$. Other options which do not produce excess $NO_2$ include base metal catalyzed passive regenerating DPFs, and various on-board and off-board active regenerating DPFs. As noted earlier, part of the DPF selection process involves an evaluation of potential $NO_2$ problems along with related ventilation issues. Where $NO_2$ exposures could be problematic, MSHA recommends that heavily platinum-catalyzed DPFs be avoided.

Table VII–1 provides information in the ''Comments'' column on the effects of DPF catalysts on $NO_2$ emissions. MSHA has tested in their laboratory the types of DPFs listed, and has posted on

its website a list of the DPFs that can cause $NO_2$ increases from the engine and those catalytic formulations that do not significantly increase $NO_2$.

MSHA is currently not aware of problems with overexposure to $NO_2$ at mines using platinum-catalyzed DPFs on a routine production basis, where the overexposures are uniquely related to the DPFs. One mine operator that had been experiencing frequent overexposures to $NO_2$ noted that these overexposures ceased after a major ventilation upgrade, despite increased use of heavily platinum-catalyzed DPFs.

PIB #02–04 alerted mine operators that the platinum-catalyzed DPFs identified on MSHA's website could increase $NO_2$. MSHA continues to advise mine operators to monitor for any increases in ambient $NO_2$ concentrations with the addition of platinum-catalyzed DPFs to their inventory.

When NIOSH's Phase II study tests 2 and 3 were terminated prematurely due to high $NO_2$ levels, the overexposures were determined to be due mainly to insufficient ventilation. As discussed previously, the average increase in $NO_2$ from the use of platinum-catalyzed DPFs in the test area was approximately 1 ppm, but brief 3–5 ppm spikes were also observed. As stated above, mine operators are advised to sample for $NO_2$ when platinum wash-coated DPFs are used to ensure miners are not overexposed. Mine operators who use platinum-catalyzed DPFs should maintain ventilation systems that are able to remove or dilute the $NO_2$ to a non-hazardous level, and they must be aware of localized areas where $NO_2$ could build up more quickly and create a health hazard for exposed miners.

As discussed in the Greens Creek report, the use of catalyzed DPFs at that mine did not produce substantial increases in $NO_2$ levels. MSHA is continuing to work with filter manufacturers to evaluate catalytic formulations on $NO_2$ generation.

*Stillwater mine DPM compliance.* In its comments addressing the 2003 NPRM, Stillwater Mining Company (SMC) provided discussion and several tables detailing its estimated DPM-related compliance costs. In its April 2004 comments in response to the February 20, 2004 limited reopening of the public record on this rulemaking, SMC provided further discussion and another compliance cost summary table which grouped cost elements into major categories. These estimates totaled about $114 to $117 million over a 10 year period.

Using the Stillwater compliance cost estimates and other information obtained by MSHA during visits to the Stillwater mine, MSHA analyzed and evaluated Stillwater's estimated costs and developed a compliance cost estimate for this mine based on an alternative DPM control strategy. This analysis and evaluation is discussed below, and a summary is provided in Table VII–3. MSHA conducted this analysis and evaluation to demonstrate both to Stillwater and to other mines having some of the same or similar equipment, mine layouts, and operating practices that their choice of control strategy can significantly impact overall compliance costs, and therefore, the feasibility of compliance.

MSHA's estimated yearly compliance costs for this mine, which are based largely on the itemized cost estimates provided by Stillwater, are between $1.24 million and $2.09 million per year. The lower end of this range relates to estimated compliance costs not including a recent $9 million ventilation upgrade. As discussed below, although Stillwater included the cost of this upgrade in its estimated DPM compliance costs, MSHA believes this cost item should not be considered DPM-related, or is only partially attributable to DPM compliance because the ventilation system at this mine required a major upgrade anyway, independent of DPM issues. MSHA's $2.09 million yearly compliance cost estimate includes the $9 million ventilation upgrade.

Although Stillwater's DPM-related compliance costs will be significant, they are not substantially different from expectations based on MSHA's 2001 REA. In the REA for the 2001 final DPM rule, MSHA determined that annual compliance costs would be about $128,000 for an average underground M/NM mine. However, Stillwater's mining operations are not representative of an average mine. Its fleet of 350+ pieces of diesel equipment is many times larger than the average mine's. MSHA's estimated yearly DPM-related compliance costs for large precious metals mines included in the REA was $659,987, based on a fleet size of 133 diesel vehicles. Stillwater's fleet is about 2.6 times larger than the 133 vehicle basis for this estimate. Thus, yearly compliance costs of 2.6 × $659,987, or $1.72 million for Stillwater would be consistent with the 2001 REA's compliance cost estimate for a precious metals mining operation of this size.

If the cost of Stillwater's recent ventilation system upgrade is not included as a DPM compliance cost, which as noted below, is a reasonable determination based on long-standing ventilation system deficiencies at this mine, Stillwater's estimated yearly compliance cost would be $1.24 million. As noted in the preceding paragraph, by way of comparison, an estimated compliance cost of $1.72 million for a precious metals mine of this size would be consistent with the 2001 REA. If, however, the entire ventilation system upgrade is considered DPM-related, MSHA's estimated yearly compliance cost of $2.09 million for Stillwater would be about 22% higher than expected, based on the 2001 REA. If the entire ventilation system upgrade is considered DPM-related, but the annual savings resulting from the associated reduction in ventilation fan power consumption is deducted from the annualized cost of the upgrade, MSHA's estimated yearly compliance cost of $1.57 million for Stillwater would be about 9.5% less than expected, based on the 2001 REA.

For MSHA's analysis and evaluation, Stillwater's DPM compliance costs were grouped into six major cost categories. The analysis and evaluation of these six major cost categories is discussed below:

1. Ventilation. As noted above, a $9 million ventilation upgrade was recently completed at the Stillwater mine, and the cost of this upgrade was included by Stillwater in its DPM compliance cost estimate. However, MSHA believes this upgrade would have been necessary with or without a DPM rule due to ongoing air quality problems and plans for increased mine development. Thus, this expenditure should not be considered a DPM compliance cost, or at most, only partially a DPM compliance cost.

Total ventilation at the mine prior to the upgrade was about 627,000 cfm, corresponding to approximately 52 cfm/actual utilized horsepower. After the upgrade, total ventilation volume increased to 840,000 cfm, which is about 69 cfm/actual utilized horsepower.

Most of Stillwater's diesel equipment has MSHA nameplate ventilation rates between 50 and 70 cfm/horsepower. These laboratory derived values indicate the ventilation necessary to maintain compliance with MSHA exposure limits for CO, $CO_2$, NO, and $NO_2$. Taking into account such practical in-mine factors as varying equipment duty cycles, imperfect mixing, use of DOCs, etc., acceptable air quality can sometimes be attained at ventilation rates somewhat less than the nameplate values. However, other factors, including out-of-tune engines, marginal auxiliary ventilation system performance, on-shift

blasting, and heavy concentrations of diesel equipment in particular sections of a mine can result in chronic localized noncompliance with gaseous emission limits.

For example, Stillwater has had a persistent problem with $NO_2$ overexposures for many years, indicating inadequate ventilation. Per company policy, whenever an $NO_2$ monitor (carried by equipment operators) exceeded 5 dpm at the operator's location, that operator was removed to the surface. The mine operator has frequently removed miners to the surface for this reason over recent years. Thus, the ventilation upgrade was overdue, even without consideration for DPM levels underground.

Other considerations also factored into the decision to carry out the ventilation upgrade, including planned production tonnage increases, the need to utilize trucks to haul ore up grade from below the level of the shaft bottom, an excessive number of booster fans (sometimes competing with each other for limited air), and the desire to increase the number of ventilation intakes into the mine (resulting in more fresh air escape routes and lower intake air velocities to improve miner comfort and dust conditions). By any number of measures, mine development had overreached the old ventilation system. The ventilation upgrade accomplished all of the above objectives, and resulted in a reduction of total fan power consumption by 1,000 horsepower.

Even if this ventilation upgrade could be entirely attributed to DPM compliance, the cost must be annualized over the expected 20+ year life of the asset, so the yearly cost (using a 7% discount rate) would be about $850,000. This yearly cost is partially offset by savings in electricity costs resulting from the 1,000 horsepower reduction in fan power consumption, so the ventilation upgrade actually resulted in a net annual cost to Stillwater of only about $197,000 (1,000 hp × 24 hours/day × 365 days/year × 0.745 kw-hr/hp-hr × 10¢/kw-hr = $652,620; $849,536 − $652,620 = $196,916).

2. Diesel Engines and Engine Upgrades. Only a portion of the expense of new diesel engines and engine upgrades should be considered a DPM compliance cost. Diesel engines have a finite life and need to be renewed and replaced periodically. Some new engines and engine upgrades would have been necessary with or without a DPM rule. Also, new, low-emission engines enable improved operating efficiencies due to lower fuel consumption and better maintenance diagnostics, resulting in significant operating cost savings that partially offset purchase costs.

Like the ventilation upgrade, however, even if the total cost of engines and engine upgrades was attributable to DPM compliance, these costs (estimated by Stillwater at $1.2 million) must be annualized over the expected 10 year life of an engine, resulting in a yearly cost of about $171,000 (using a 7% discount rate).

3. Soot Traps, Filters, Passive DPFs. The mine currently has fewer than 30 passive regeneration DPF systems and only one passive/active regeneration DPF system (fuel burner) in use, and reports no operational problems at this time, except one filter destroyed by a failed turbo-charger.

In its comments to the 2003 NPRM, Stillwater outlined a plan for utilizing a combination of passive and active DPFs to control DPM in its mine. Passive filters would be used where equipment duty cycles and corresponding exhaust temperatures suggested the application would be successful, and active filters would be utilized on the remaining equipment. Stillwater reports $160,000 in passive filter costs to date. Assuming a filter life of two years, this results in a yearly cost of about $88,500 (using a 7% discount rate).

4. Engine Test Equipment. The engine test equipment has a 5-year life, resulting in an annualized cost of about $68,000 (using a 7% discount rate).

5. Emissions expenditure. The basis for Stillwater's ''Emissions expenditure'' line item cost of $43,000/month is unclear. As noted above, the mine currently has fewer than 30 passive regeneration DPF systems and only one active regeneration DPF system in use, and reports no operational problems at this time, except one filter destroyed by a failed turbo-charger. Engine-related emissions expenses are addressed in the diesel engines, engine upgrades, and engine test equipment line items above. However, ''emissions expenditures'' of $516,000 per year ($43,000 per month × 12 months) are included as submitted by Stillwater in MSHA's estimated compliance cost.

6. Active Regeneration Systems. Based on Stillwater's existing knowledge base relating to equipment duty cycles and exhaust temperatures, their plan for controlling DPM emissions included passive filters for only a small percentage of the mines' fleet: the large loaders and ore haulage trucks. In contrast, about 200 vehicles were expected to require active regeneration DPF systems.

For costing the active systems, Stillwater made the following assumptions:

a. Regeneration of the DPFs would be accomplished on-board the vehicles. Vehicles equipped with DPFs would travel from their normal work areas (stopes, develop ends, haulageways, etc.) to specially excavated regeneration stations provided with the necessary means of connecting the filters to power and compressed air. Upon arrival at a regeneration station, the filters would be ''plugged in'' to electrical power and compressed air utilities to accomplish regeneration.

b. In addition to including the costs of filters and associated regeneration equipment, Stillwater's active DPF cost estimates also included excavating the regeneration stations and installing the required electrical power and compressed air.

c. To insure reasonable travel distances to regeneration stations as mine workings advance over time, Stillwater's cost estimate was developed in the context of a 10-yr mine plan that included the excavation of new regeneration stations periodically over the 10 years.

Stillwater's total estimated costs for active filter systems, regeneration equipment, and regeneration stations was about $104.4 million over the 10-yr period of the mine plan. Of this total, $100.8 million (96.6%) was for excavation of the regeneration stations, and $3.6 million was for active filter systems and regeneration equipment.

Neither the number of active systems required at Stillwater, nor the estimated total cost of implementing active filters as specified in Stillwater's comments is disputed by MSHA. However, MSHA does not believe the particular plan developed by Stillwater is the optimal means of utilizing active DPM filters at this mine. Various alternative approaches for utilizing active filters exist which would be far less costly.

Since excavating regeneration stations accounted for over 96% of the total cost of implementing Stillwater's active filter plan, alternatives that do not include such excavation costs would have a significant cost advantage over Stillwater's plan. It is somewhat curious that Stillwater developed its active DPF plan on the basis of this particular on-board active regeneration system, despite the extraordinarily high cost of excavating the regeneration stations, and Stillwater's prior experience with premature failure of the on-board heating elements built into the filters.

A lower cost alternative to Stillwater's approach utilizes an on-board fuel burner system to regenerate filters. The ArvinMeritor® system has been on trial at this mine since February 2004 with excellent results. This system actively

regenerates the filter media during normal equipment operations, and does not require the host vehicle to travel to a regeneration station to regenerate its filter.

Another less costly alternative would be to utilize off-board regeneration instead of on-board regeneration. In off-board regeneration, a dirty filter is removed and replaced with a clean filter at the beginning of each shift. During shift change, the dirty filters are then transported by the equipment operator or a designated filter attendant to a central regeneration station or stations.

Such stations could be a fraction of the size of the regeneration stations envisioned in Stillwater's plan, because they would only need to accommodate the filters, not the host vehicles. Since the host vehicles would not need to travel to the regeneration stations, the travel distance from normal work areas to the regeneration stations would be less important, greatly lessening the need for frequent construction of new regeneration stations as the workings advance. It is very likely that such stations could be co-located in existing underground shops, unused muck bays, unused parking areas, or other similar areas.

Off-board regeneration might not be practical on larger machines due to the size of the filters. For larger machines that are not suitable for passive regenerating filters, the fuel burner approach might be preferable. But many of the machines targeted for active filtration are quite small, having 40 to 80 horsepower engines. Active filters for these engines are correspondingly small, and could be easily and quickly removed and replaced using quick disconnect fittings.

Another lower cost option would be to utilize disposable high-temperature synthetic fabric filters, especially on smaller, light duty equipment such as pickups, boss buggies, and skid steers. Depending on equipment utilization, such filters might only need to be replaced once or twice per week.

In Table VII–3, the line for active filters shows the 10-year cost of Stillwater's plan for utilizing active filters along with MSHA's estimate of the yearly cost of alternatives to Stillwater's plan. MSHA's cost estimate for this line item is based on Stillwater's estimated cost for active filter systems, minus the cost of excavating regenerations stations, or $3.6 million over 10 years. Annualizing these active filter costs over the two-year expected life of these filters using a discount rate of 7% results in a yearly cost of about $398,000.

TABLE VII–3.—STILLWATER'S AND MSHA'S DPM COMPLIANCE COST ESTIMATES

| Cost item | Stillwater's cost estimate | MSHA cost estimate | MSHA comments |
|---|---|---|---|
| Mine Ventilation Upgrade | >$9 million | $0 | This upgrade necessary with or without DPM rule to address ongoing air quality problems and plans for mine development. |
| | | $849,536/yr [1] | Even if upgrade necessary for DPM compliance, this capital cost annualized over expected 20+ year life of the asset. |
| | | $327,440/yr [1] | Annualized cost over expected 20+ year life of the asset minus annual power cost savings. |
| Engine upgrades, other misc. expenses. | >$1.2 million | $170,853/yr [1] | Some engines/upgrades part of normal turnover of engines and not DPM compliance cost. Cost of engines/upgrades annualized over 10 year expected engine life. |
| Test Equipment | >$280,000 | $68,289/yr [1] | Cost of test equipment annualized over 5 year expected equipment life. |
| Soot traps, filters, passive DPFs. | $160,000 | $88,495/yr [1] | Cost of DPFs annualized over 2 year expected filter life. |
| Emissions expenditure | $43,000/month | $516,000/yr [1] | Cost element is unclear based on current filter use. |
| Active DPF systems, regeneration equipment, and regeneration station excavation. | $104.4 million over 10 years. | $398,226/yr [2] | Less costly approaches for implementing active regeneration were overlooked. Approaches that do not require excavation of regeneration stations save $100.8 million over 10 years. $3.6 million would still be required for filters and regeneration equipment, however, this expense would be incurred over 10 years. |
| Grand Total | $104.4 million over 10 years for active DPFs, plus $10–$13 million for other costs over 10 years. Total cost $114–$117 million over 10 years. | Annual cost of $1.24 to $2.09 million.<br>$1.24 million if cost of ventilation upgrade is not included;.<br>$2.09 million if cost of ventilation upgrade is included;.<br>$1.57 million if cost of ventilation upgrade is included minus power cost savings. | Certain cost elements should not be considered DPM compliance costs. However, even including *ALL* listed costs for ventilation, passive and active DPFs, engines/engine upgrades, test equip, and emissions expenditures, MSHA estimates total yearly cost for DPM compliance will not exceed $2.09 million. Excluding ventilation, estimated total yearly cost is $1.24 million. Including ventilation but considering power cost savings, estimated total yearly cost is $1.57 million. Estimated yearly compliance cost of $1.72 million for a precious metals mine of this size would be consistent with 2001 REA. |

Notes:

[1] Cost estimate based on commenter's estimated cost, annualized over the expected life of the item using a 7% discount rate. The annualization factor for a capital expenditure is 9.4% for 20 years, 14.2% for 10 years, 24.4% for 5 years, and 55.3% for 2 years.

[2] Cost estimate based on commenter's estimated cost for active systems minus the cost of excavating regeneration stations, annualized over the expected life of the active systems.

*Kerford Limestone DPM compliance.* Kerford Limestone reported the results of a consultant's study that indicated compliance with the DPM limit for that mine would cost $348,000 for engine improvements, $1.15 million for ventilation upgrades, and $25,500 to $38,500 per year for DPFs. They reported investing $975,000 to date toward DPM compliance.

Kerford's engine costs of $348,000, when annualized over 10 years at a discount rate of 7%, results in a yearly cost of about $49,500. The $1.15 million ventilation cost, when annualized at the same discount over the expected 20+ year life of this asset, results in a yearly cost of about $108,600. When these two yearly costs are added to the maximum estimated annual DPF cost of $38,500, the total yearly cost for Kerford is about $196,600.

Without commenting specifically on the reasonableness of Kerford's itemized cost estimates or whether the overall DPM control strategy proposed by its consultant was optimized for this mine, MSHA notes that Kerford's self-reported total yearly compliance cost of about $196,000 is not excessive for an underground stone mine in its size category. By way of comparison, a yearly compliance cost of over $300,000 for a stone mine of this size would be consistent with MSHA's REA for the existing 2001 final rule.

MSHA's REA for the existing 2001 final rule estimated compliance costs for a medium sized (20 to 500 employees) stone mine to be $150,738. However, this estimate was based on a fleet size of 9.5 pieces of production equipment for this industry sector and mine size category. Kerford operates 19 pieces of production equipment. Adjusting the REA estimate of $150,738 for the larger fleet size at Kerford results in an estimated yearly compliance cost of $301,476. Thus, Kerford's estimated $196,600 yearly compliance cost is only about 65% of the level that would be expected for an underground stone mine of this size, based on the 2001 REA. The cost is virtually unchanged in the REA supporting this final rule.

It was suggested by a commenter that MSHA underestimated Kerford Limestone's compliance costs by over $1 million, and it was further suggested that this underestimate, if extrapolated to the entire underground stone mining industry, resulted in industry-wide compliance costs exceeding $100 million. However, Kerford Limestone's yearly compliance costs, using its own cost estimates, are substantially less than expected, based on the 2001 REA for a medium sized underground stone mine.

*Bio-Diesel tests at Carmeuse Black River and Maysville mines.* Commenters stated that in-mine tests with bio-diesel fuel produced measurable reductions in ambient DPM concentrations, but did not bring the subject mine into compliance. These comments refer to MSHA's compliance assistance work at the Carmeuse Black River and Maysville stone mines in Kentucky. At both mines, the use of bio-diesel fuel produced reductions in DPM. The recycled vegetable oil (RVO) with a 50% blend of bio-diesel to standard diesel fuel showed a 69% reduction in DPM, based on TC, for the area samples at the Maysville mine. Personal samples collected at the Black River Mine showed a 44% reduction in DPM with RVO at a 35% blend of bio-diesel to standard diesel fuel. The Virgin Soy Oil (VSO) mixtures showed reductions, but they were not as effective as the RVO at similar blends.

The Maysville mine was in compliance with the interim limit based on the baseline samples and the samples taken with bio-diesel. In contrast, the Black River Mine was not in compliance with the interim limit based on the samples taken, even with the reduction in DPM using bio-diesel. One main difference between the two mines was that the Maysville mine had significantly more ventilation than Black River. This result indicates that the Black River mine will have to implement additional DPM controls to come into compliance, such as ventilation upgrades, cleaner engines, or DPFs.

These commenters did not dispute the DPM reductions obtained. However, they indicated the following: That Deutz Corporation's Technical Circular does not approve the use of bio-diesel blends above 20%; that a 50% bio-diesel fuel presented insurmountable equipment problems; and that the cost of bio-diesel has increased significantly, adversely impacting the feasibility potential of the 20% mixture.

MSHA reviewed Deutz's Technical Circular (0199–3005en), and discussed this issue with Deutz. The Technical Circular provides a general statement that bio-diesel fuel is approved for Deutz brand engines. The Technical Circular does not mention any limitation on the use of bio-diesel above a certain percentage blend. Deutz requires that all fuels used in their engines meet Deutsches Institute für Normung e.V. (DIN) specifications (German National Standards). The Deutz Technical Circular provides the DIN specifications for bio-diesel fuel.

Comments regarding equipment problems relate to reports of bio-diesel fuel causing clogging of fuel filters, resulting in excessive equipment downtime. One commenter expressed concern that Tier 2 engines used fuel filtering systems that would not be compatible with bio-diesel. MSHA understands that engine manufacturers are working with the filter manufacturers to provide the best filtration for all engines. MSHA is not aware of any unique changes for EPA Tier 2 engines as related to fuel filtering systems or for utilizing bio-diesel fuel. As the engine technology continues to improve, especially in the area of the fuel system components, better fuel filtration systems will be utilized by the engine manufacturers.

There are frequent references in the technical literature to bio-diesel fuels initially cleaning old sediments out of fuel lines, thereby causing fuel filters to clog. It follows that fuel filters should be changed more frequently when bio-diesel is first used in a fuel system. However, the commenter suggests an entirely different type of incompatibility that is not limited to the transition period when bio-diesel is first used. This may or may not be a unique situation that may take additional work to resolve. The mine may have to install an additional by-pass filtering system on the machine to allow the operator to switch to another set of fuel filters instead of shutting down production if a fuel filter clogs.

MSHA is not aware of long term filter clogging with the use of bio-diesel fuel. However, through the NIOSH List-Server, mine operators have the opportunity to share experiences like the filter clogging problem with the mining community, and possibly receive a solution. A mine operator may use the List-Server to ask others in the mining community if their problem has been observed in other situations. Interested parties can respond, thus sharing experiences and solutions in a timely manner. The List-Server was established by the diesel team at NIOSH, Pittsburgh in response to the expressed and obvious need for a means to disseminate and share information and experiences concerning the application of available technologies for the reduction of miner exposures to DPM and gaseous emissions in underground mines.

Regarding the cost of bio-diesel, MSHA acknowledges that users pay a premium for bio-diesel over standard diesel fuel. The cost for bio-diesel can vary based on such factors as market price swings in the cost of feed-stocks, state tax incentives, proximity to production facilities, etc., but normally, where bio-diesel is available, the

premium is about one cent per gallon per percent bio-diesel in the fuel blend. At higher percentage bio-diesel blends, this premium can result in significantly higher overall fuel costs for the end-user. Depending on mine-specific factors, however, use of bio-diesel may be a cost-effective DPM control option, either used by itself or in conjunction with other controls. Since the rule is performance oriented, the mine operator is free to choose the means of compliance.

Based on these results and other data, MSHA's believes that bio-diesel is a feasible DPM control. In the case of the Black River mine, bio-diesel would have to be used in combination with other controls for the mine to achieve compliance, or the mine operator may choose to abandon bio-diesel altogether and rely entirely on other controls for attaining compliance. MSHA disagrees with the commenters' assertion that a 50% bio-diesel blend presents ''insurmountable equipment problems.'' Bio-diesel is recognized by the EPA as an alternative clean fuel, engine manufacturers do not recommend against its use, and clogging can be prevented by the use of by-pass filtering systems.

*Water Emulsion Fuel:* As discussed under the MSHA compliance assistance activities, we conducted tests at four mines to evaluate water emulsion fuel. These tests included a test at a small clay mine that used older technology engines, two single level limestone mines that used clean burning engines, and one multilevel limestone mine that used clean burning engines. Summer (20% water) and winter (10% water) blends of fuel were tested at two mines. Only summer blends of fuel were tested at the other two mines. MSHA evaluated the reduction in total mine DPM emissions by taking measurements at the mine exhaust openings, with and without the water emulsion fuel in use, and comparing these to similarly made measurements when standard No. 2 diesel fuel was used. Table VII–4 summarizes the reductions in emissions measured for the tests.

For clean burning engines the reduction in DPM emissions (as EC) ranged from 63 to 81 percent. For older engines the reduction in DPM emissions (as EC) was approximately 49 percent. Personal exposures were also reduced, however, this reduction was more variable than the reduction in engine emissions. This variability was attributed to the use of cabs, location in the mine and the specific ventilation rates at the work area in the mine.

TABLE VII–4.—EMISSION REDUCTIONS FOR WATER EMULSION FUEL TESTS

| Mine | Percent reduction in EC (winter blend) | Percent reduction in EC (summer blend) |
|---|---|---|
| Clay | | 49 |
| Limestone | 77 | 81 |
| Limestone | 63 | 73 |
| Multilevel Limestone | | 80 |

For each mine test, equipment operators reported a noticeable loss of horsepower. However, this horsepower loss, even in the multilevel limestone mine, did not adversely effect production. In fact, during several of the mine tests, production was significantly above normal. The water emulsion fuel was favorably received by the employees. Workers reported that visibility improved. The water emulsion fuel has the same per gallon cost as No. 2 diesel fuel. Several operators reported as much as a 20 percent increase in fuel usage to compensate for the power loss.

During the water emulsion fuel tests, a potential operating problem was observed when the fuel was used in Deutz engines. Simply put, some engines would not run. The source of this problem was traced by the engine and fuel manufacturers to a high efficiency water separator in the engine fuel line. The engine and fuel manufacturers have indicated that the problem can be corrected by replacing the standard high efficiency water separator with a less efficient unit.

We believe that the use of water emulsion fuels provides a significant reduction in diesel engine emissions over a broad range of applications. Currently the biggest impediment to the use of the emulsified fuel is distribution. The manufacturer is making efforts to make the fuel more widely available.

MSHA has not tested the fuel at high altitude mines (above 5000 feet). At these elevations there are potential problems due to additional horsepower loss, steep grades and low winter temperatures. MSHA is working with the fuel manufacturer and mining industry to evaluate these concerns.

*Combining DPM Controls Into An Overall Strategy.* The DPM rule allows mine operators flexibility in choosing engineering and administrative controls that are appropriate for site-specific conditions and operating practices. During its compliance assistance visits, MSHA urged mine operators to combine various engineering and administrative controls, including work practices, into an integrated DPM control strategy for their mines. For example, in stone mines where haulage trucks transport broken stone out of the mine to a surface crusher, and where the truck drivers are protected by effective environmental cabs with filtered breathing air, MSHA recommends that the main ramp used by the haulage trucks to travel out of the mine be maintained as an exhaust air course. Typically, the combined horsepower of the production loader and haulage trucks at a stone mine exceeds the horsepower of all other equipment combined. When haulage trucks travel loaded upgrade out of the mine, they generate significant amounts of DPM. If the ramp used by these trucks is maintained as an intake air course, the fresh air supply for the entire mine can become contaminated. Maintaining this ramp as an exhaust air course and requiring the loaded trucks to haul up this ramp as an administrative control enables the mine operator to provide better ventilation air quality along the face line. Depending on mine layout and ventilation, it may be possible to maintain all ramps traveled by the haulage trucks as exhaust air courses. It is especially important, however, that the ramps used for upgrade loaded haulage be maintained as exhaust air courses. This combination of engineering (cabs and ventilation) and administrative controls (loaded trucks haul up the ramps used as exhaust air course) particularly benefits powder crew workers who are required to work most of their shift outside of a protective cab.

Some commenters stated that the industry has exhausted the ''easy'' methods of DPM control, and reducing DPM to lower limits would be prohibitively expensive. MSHA is not entirely certain what is meant by ''easy'' methods, but suspects the commenter was referring to DPM controls other than major ventilation upgrades (new main fans, new ventilation shafts, etc.) and DPFs, which are either more costly than other options, or are perceived as more costly. At some mines, ''easy'' could also mean ''familiar,'' indicating the methods and strategies with which these mine operators have had actual first-hand experience. Based on this meaning, easy upgrades appear to be: Ventilation fans (main or booster), airflow distribution systems, environmental cabs, modern engines and alternate fuels.

By either definition, MSHA believes that only a small portion of the industry has exhausted these control methods. For example, based on compliance assistance mine visits, baseline sampling results, and other data, MSHA

has observed that many mines have not yet implemented relatively low cost ventilation upgrades, and that at most mines that have initiated such programs, not all necessary upgrades have been completed.

Another example involves environmental cabs with filtered breathing air. As noted above, even though most major pieces of production equipment in stone mines are provided with cabs, the corresponding health benefits are seldom fully realized due to open or broken windows, company policies that permit equipment to be operated with its doors open, inoperative or poorly maintained AC systems and cab pressurizing fans, damaged door seal gaskets, etc.

A final example relates to the failure to employ effective work practices such as utilizing return air courses as truck haulage roads when the truck drivers are protected by environmental cabs with filtered breathing air.

MSHA determined that compliance costs were economically feasible for the M/NM mining industry. In the REA for the 2001 final DPM rule, MSHA determined that annual compliance costs would be about $128,000 for an average underground M/NM mine. Some mines, in particular mine size and commodity groups, because of mining methods used, equipment deployments, etc., would be expected to incur higher than average compliance costs. For example, the REA estimated yearly compliance costs for large precious metals mines to be $660,000. Based on its compliance assistance mine visits, baseline sampling results, and other data, MSHA believes that most mines have expended far less than the expected $128,000 yearly for DPM compliance. Though expenditures will undoubtedly need to rise in the future as the familiar and less costly DPM control methods are exhausted, they are not expected to exceed levels previously determined by MSHA to be economically feasible.

*C. Economic Feasibility*

MSHA has determined that a PEL of 308 micrograms per cubic meter of air ($308_{EC}$ μg/m$^3$) is economically feasible for the M/NM mining industry. Economic feasibility does not guarantee the continued viability of individual employers, but instead, considers the industry in its entirety. It would not be inconsistent with the Mine Act to have a company which turned a profit by lagging behind the rest of an industry in providing for the health and safety of its workers to consequently find itself financially unable to comply with a new standard; *See United Steelworkers of America* v. *Marshall,* 647 F.2d 1189, 1265 (1980). Although it was not Congress' intent to protect workers by putting their employers out of business, the increase in production costs or the decrease in profits would not be sufficient to strike down a standard. *See Industrial Union Dep't.,* 499 F.2d at 477. On the contrary, a standard would not be considered economically feasible if an entire industry's competitive structure were threatened. *Id.* at 478; *See also, AISI–II,* 939 F.2d 975, 980 (DC Cir. 1991); *United Steelworkers,* 647 F.2d at 1264–65; *AISI–I,* 577 F.2d 825, 835–36 (1978). This would be of particular concern in the case of foreign competition, if American companies were unable to compete with imports or substitute products. The cost to government and the public, adequacy of supply, questions of employment, and utilization of energy may all be considered when analyzing feasibility.

MSHA has also determined that there will be a small cost savings in economic impact on the mining industry under this final rule, because the requirements for meeting the PEL are similar to those in the existing DPM enforcement policy for the 2001 DPM standard. Specifically, MSHA will continue to require mine operators to establish, use and maintain all feasible engineering and administrative control methods to reduce a miner's exposure to the PEL. The final rule affords mine operators the flexibility to choose either engineering or administrative controls, or a combination of controls to reduce a miner's exposure. In the event that controls do not reduce a miner's exposure to the PEL, are not feasible, or do not produce significant reductions in DPM exposures, the operator must use and maintain controls to reduce the miner's exposure to as low as feasible and supplement controls with respiratory protection. Mine operators must establish a respiratory protection program when controls are infeasible. If MSHA confirms that mine operators have met all of the abovementioned requirements for addressing a miner's overexposure, and the miner's exposure continues to exceed the PEL (not counting respirators), MSHA will not issue a citation for an overexposure. Instead, MSHA will continue to monitor the circumstances leading to the miner's overexposure, and as controls become feasible, MSHA will require the mine operator to install and maintain them to reduce the miner's exposure to the PEL.

MSHA believes that it has established in this final rulemaking that the new interim PEL is comparable to the TC interim concentration limit. Therefore, in determining the economic feasibility of engineering and administrative controls that the M/NM underground industry will have to use under this final rule, MSHA evaluated the cost of controls that are used to comply with the existing DPM TC interim concentration limit to that of the newly promulgated EC interim PEL. These controls include DPFs, ventilation upgrades, oxidation catalytic converters, alternative fuels, fuel additives, enclosures such as cabs and booths, improved maintenance procedures, newer engines, various work practices and administrative controls. MSHA's evaluation includes costs of retrofitting existing diesel-powered equipment and regeneration of DPFs.

On the basis of evidence in the rulemaking record, including MSHA's current enforcement experience, MSHA has determined that this final rule results in a cost savings of $3,634 per year, primarily due to MSHA's determination to delete the DPM control plan.

In highly unusual circumstances where the use of further controls may not be economically viable, the standard provides for a hierarchy of control strategy that allows specifically for the cost impact to be considered on a case-by-case basis. MSHA's DPM enforcement policy, therefore, takes into account the financial hardship on an individualized basis which MSHA believes effectively accommodates mine operator's economic concerns, particularly those of small mine operators.

Whether controls are feasible for individual mine operators is based in part upon legal guidance from decisions of the independent Federal Mine Safety and Health Review Commission (Commission) involving enforcement of MSHA's noise standards for M/NM mines, 30 CFR 56.5–50 (revised and recodified at 30 CFR 62.130). According to the Commission, a control is feasible when it: (1) Reduces exposure; (2) is economically achievable; and (3) is technologically achievable. *See Secretary of Labor* v. *A. H. Smith,* 6 FMSHRC 199, 201–02 (1984); *Secretary of Labor* v. *Callanan Industries, Inc.,* 5 FMSHRC 1900, 1907–09 (1983).

In determining the economic feasibility of an engineering control, the Commission has ruled that MSHA must assess whether the costs of the control are disproportionate to the ''expected benefits,'' and whether the costs are so great that it is irrational to require implementation of the control to achieve those results. The Commission has expressly stated that cost-benefit analysis is unnecessary to determine whether a control is required.

Consistent with Commission case law, MSHA considers three factors in determining whether engineering controls are feasible at a particular mine: (1) The nature and extent of the overexposure; (2) the demonstrated effectiveness of available technology; and (3) whether the committed resources are wholly out of proportion to the expected results. A violation under the final standard will entail an agency determination that a miner was overexposed, that controls are feasible, and that the mine operator failed to install or maintain such controls. According to the Commission, an engineering control may be feasible even though it fails to reduce exposure to permissible levels contained in the standard, as long as there is a significant reduction in a miner's exposure. *Todilto Exploration and Development Corporation* v. *Secretary of Labor,* 5 FMSHRC 1894, 1897 (1983).

MSHA will consistently utilize its longstanding enforcement procedures under its other exposure-based standards at M/NM mines. As a result, MSHA will consider the total cost of the control or combination of controls relative to the expected benefits from implementation of the control or combination of controls when determining whether the costs are wholly out of proportion to results. If controls are capable of achieving a 25% reduction, MSHA will evaluate the cost of controls and determine whether their costs would be a rational expenditure to achieve the expected results.

MSHA emphasizes that the concept of ''a combination of controls'' is not new to the mining industry. It is MSHA's consistent practice not to cost controls individually, but rather, combine their expected results to determine if the 25% significant reduction criteria, as discussed earlier in this section, can be satisfied.

MSHA heavily weighs the potential benefits to miners' health when considering economic feasibility and does not conclude economic infeasibility merely because controls are expensive. Mine operators have the responsibility for demonstrating to MSHA that technologically feasible controls are so costly as to result in a significant economic hardship.

In situations where MSHA finds that the mine operator has not installed all feasible controls, MSHA will issue a citation and establish a reasonable abatement date. Based on a mine's technological or economic circumstances, the standard gives MSHA the flexibility to extend the period within which a violation must be corrected. If a particular mine operator is cited for violating the DPM PEL, but that operator believes that the standard is technologically or economically infeasible for that operation, the operator ultimately can challenge the citation in an enforcement proceeding before the independent Commission.

MSHA found that most of the practical and effective DPM controls that are available, such as DPFs, enclosed cabs with filtered breathing air, alternative diesel fuels, and low-emission engines, will achieve at least a 25% reduction in DPM exposure. Though this final rule affords each mine operator the flexibility to select the DPM control or combination of controls that are appropriate to their site-specific conditions, MSHA believes that the most cost effective DPM controls are DPF systems. MSHA believes that there are a number of available DPFs that do not increase production of $NO_2$.

MSHA estimates that DPFs for the M/NM underground mining industry range in cost from $5,000 to $12,000 per filter. This range of cost is consistent with the reported DPF costs from the NIOSH Phase I Study. A typical example is a 15″ x 15″ Engelhard DPX platinum-catalyzed DPF used on 475 horsepower haulage trucks at a multilevel metal mine in Alaska that costs $8,700.

The average life expectancy of a DPF is approximately 8,000 hours. Some commenters, however, have reported life expectancies of between 2,000 and 4,000 hours, while some other commenters have reported life expectancies for longer than 8,000 hours. However, in most of these cases the shortened DPF life was due to a malfunction of another piece of equipment, installation problems or a manufacturer's defect, depending on the type of DPF selected by an operator. MSHA's 8,000 hour estimate is based on an operation and maintenance guide prepared by DCL Incorporated and two technical papers given at the Mining Diesel Emission Conference in Toronto, Canada, November 1999. (*See* MSHA's REA for 2001 final rule.) Support for this estimate is provided by NIOSH in its publication titled ''Review Technology Available to the Underground Mining Industry for Control of Diesel Emissions'' (George H. Schnakenberg, PhD, Information Circular 9462, 2002) which reports that average ceramic DPF service life at Agrium's Canadian potash mines is 5 years. This publication also references reports of a few Engelhard DPFs that have been in service 10 years.

MSHA believes that the requirements for engineering and administrative controls clearly meet the feasibility requirements of the Mine Act, its legislative history and related case law.

The trends in DPM control technology development to date, especially DPFs, indicate that manufacturers are creating more innovative designs. MSHA believes that more cost effective control methods are on the horizon. This reasoning is supported by a recently published EPA final rule for the control of emissions from nonroad diesel engines. The ''Clean Air Nonroad Diesel—Final Rule'' (Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 69 FR 38958 (2004)) sets emission standards for airborne contaminants, including DPM, for all diesel engine horsepower ranges. For engines up to 750 horsepower, the requirements will be phased in from 2008 through 2014. For engines above 750 horsepower, the final compliance date is extended to 2015. EPA's Clean Air Nonroad Diesel Rule is a comprehensive national program to reduce emissions from future non-road diesel engines used in industries such as construction, agriculture and mining. To meet these emission standards, engine manufacturers will produce new engines with advanced emission-control technologies similar to catalytic technologies used in passenger cars. Exhaust emissions from these engines will decrease by more than 90%. Because the emission-control devices can be damaged by sulfur, the EPA is also adopting a limit to decrease the allowable level of sulfur in nonroad diesel fuel by more than 99% from current levels (from approximately 3,000 parts per million [ppm] now to 15 ppm in 2010). This will be consistent with the on-highway fuel sulfur requirements. New engine standards take effect, based on engine horsepower, starting in 2008. Both the EPA and the diesel engine manufacturers agree that clean engine technology alone cannot achieve EPA's newly mandated emission limits; manufacturers will also have to use advanced technology options such as DPFs.

MSHA believes DPFs are currently commercially available for any engine, application, or duty cycle used in underground M/NM mining. These new EPA rules, however, will undoubtedly be technology forcing and result in an increase in the variety, features, and capabilities of DPFs from which mine operators may choose, as well as lower the cost of DPFs and promote other technological innovation in this field.

In spite of these trends in new technology, MSHA recognizes that, in a few cases, individual mine operators, particularly small operators, may have economic difficulty in achieving full

compliance with the interim limit immediately because of a lack of financial resources to purchase and install engineering controls. MSHA's revised enforcement strategy is designed to accommodate this problem. Under this enforcement strategy, MSHA allows mine operators with feasibility issues the necessary time to reduce exposures to the interim PEL.

MSHA also has demonstrated that the effective date for this final rule does not pose an economic burden for underground M/NM mine operators. As stated earlier, the EC surrogate standard is comparable to the existing TC surrogate standard which has been in effect since July 2002, and has been enforced by MSHA since July 20, 2003. Consequently, MSHA cannot justify affording mine operators additional time to comply with an exposure limit currently enforced. MSHA believes that the startup date is justified by the rulemaking record and the mining industry's present capability of complying with the existing interim limit.

Moreover, MSHA has afforded the underground M/NM mining industry additional consideration in relieving the financial impact of this final rule by delaying the period of time that was allowed for compliance with the 2001 comparable TC concentration limit. In response to concerns raised by the mining industry and the terms of the DPM settlement agreement, MSHA allowed as much as 2½ years for a DPM compliance phase-in strategy.

Specifically, on March 15, 2001, MSHA published a notice delaying the effective date of the final DPM rule of January 19, 2001, (66 FR 5706) until May 21, 2001 (66 FR 15032). By notice of May 21, 2001, (66 FR 27863), MSHA delayed the final rule another 45 days, until July 5, 2001. Furthermore, by notice of July 5, 2001, (67 FR 9180), MSHA delayed § 57.5066(b), Maintenance standards, relating to ''tagging'' requirements. MSHA also clarified that the interim concentration limit at § 57.5060(a) and its related provisions in the final rule would not apply until after July 19, 2002, pursuant to its original effective date. By notice of July 18, 2002, MSHA stayed the effectiveness of: § 57.5060(d), permitting miners to work in areas where DPM exceeds the applicable concentration limit with advance approval from the Secretary; § 57.5060(e), prohibiting the use of PPE to comply with the concentration limits; § 57.5060(f), prohibiting the use of administrative controls to comply with the concentration limits; and, § 57.5062, addressing the DPM control plan. These provisions were stayed pending completion of this final rule.

Finally, in the DPM settlement agreement, MSHA agreed to enforce: § 57.5060(a), addressing the interim concentration of 400 micrograms of TC per cubic meter of air; § 57.5061, addressing compliance determinations; § 57.5070, addressing miner training; and § 57.5071, addressing environmental monitoring. However, to further assist the mining industry in instituting engineering controls, MSHA gave the mining industry an additional year, from July 20, 2002, until July 20, 2003, to begin to develop a written strategy of how they intended to comply with the interim DPM concentration limit. Operators with DPM levels above the concentration limit were to begin to order and install controls to reduce miners' exposures by July 20, 2003. Concurrently, MSHA provided comprehensive compliance assistance to M/NM underground operators. MSHA retained the discretion to take appropriate enforcement actions against operators who refuse either to cooperate in good faith with MSHA's compliance assistance, or to take good-faith steps to develop and implement a written compliance strategy for their mines. Mine operators had the obligation to develop a strategy to control DPM emissions and order engineering controls. MSHA began enforcing the interim limit at M/NM underground mines on July 20, 2003, under the terms of the settlement agreement.

MSHA received a number of comments in response to its proposed economic feasibility discussion. Several commenters wanted MSHA to define ''economic feasibility.'' They believe that controls should be considered economically feasible if implementation would not bankrupt the company or force the mine to close. They also believe that MSHA's 2003 NPRM did not indicate how MSHA will enforce the new language and wanted access to records of feasibility determinations made by MSHA. MSHA has chosen not to define ''economic feasibility'' nor ''technological feasibility'' since the Supreme Court has done so in the OSHA *Cotton Dust* decision. As stated earlier in this part, the Supreme Court defined ''feasibility'' as ''capable of being done'' (*American Textile Manufacturers' Institute* v. *Donovan* (OSHA Cotton Dust), 452 U.S. 490, 508–509 (1981)). This preamble also discusses how the independent Commission explains the Secretary's burden of proof in establishing technological and economic feasibility of controls.

Commenters criticized the high costs of DPM controls associated with attempts to achieve a significant reduction. These commenters stated that mine ventilation systems cost more than $100 million and provide a benefit only of a 3% to 4% DPM reduction, whereas a less-than $100 million administrative control could achieve a 21% to 22% reduction.

First, MSHA disputes the assertion that a ventilation system costs $100 million. MSHA assumes mines already have some form of ventilation, since ventilation is needed whether or not DPM is a consideration. The existing system may be minimal, and rely partly or largely on natural ventilation, but a basic ventilation network must be present per existing MSHA ventilation regulations (§ 57.8518 through § 57.8535) and air quality standards (§ 57.5001 through § 57.5039) to support normal mining operations. Thus, in the context of the final rule, the question is not whether a ventilation system needs to be provided for compliance, but rather, whether an upgrade to an existing ventilation system is needed. If so, mine operators must examine whether major additions (new shaft, new main fan, etc.) are required, versus relatively minor improvements such as booster fans, auxiliary ventilation system upgrades, or repair or extensions to existing ventilation control structures. Even in an extreme case where a new ventilation shaft and main fan installation could be justified solely on the basis of DPM compliance, such upgrades cost far less than $100 million. Costs in the range of $5 million to as much as $20 million would be more accurate.

MSHA also notes that the level of DPM reduction obtained through a ventilation upgrade is proportional to the ratio of new ventilation air flow to the existing ventilation air flow. If overall air flow is doubled, DPM levels would be roughly cut in half. Of course factors such as imperfect mixing and effective distribution of air flow underground would ultimately determine the actual DPM reduction achieved. Major ventilation upgrades costing $5 to $20 million would typically result in DPM reductions of at least 20% to 30% or more, which is far greater than the 3% to 4% reduction that commenters estimated for a ventilation upgrade costing $100 million.

It is also significant to note that some DPM controls that may be easier fixes for controlling DPM exposures may actually be quite high in overall life-cycle costs compared to other approaches that mine operators perceive

to be higher cost options. For example, if the operator of a stone mine determined that compliance could be achieved by installing a 150 horsepower fan costing $25,000, this control option might appear to be advantageous compared to installing DPFs with an expected filter life of two years on the mine's production loader and three haulage trucks at a cost of $60,000 (4 filters × $15,000 per filter = $60,000). However, if the total cost of the ventilation upgrade is considered, including power costs to operate the fan 12 hours per day 6 days per week, the annual cost for ventilation surpasses the cost for filters. The $60,000 cost for DPFs, annualized over the two-year filter life is $33,186 (using a 7% discount rate). The fan power cost alone would be over $40,000 annually at $0.10 per kilowatt-hour (150hp × 12 hours/day × 6 days/week × 52 weeks/year × 0.745 kw-hr/hp-hr × .10 $/kw-hr).

One commenter suggested that MSHA's failure to specify major ventilation upgrades for any mine in its 31-Mine Study results in a serious underestimate of compliance costs for those mines and the industry as a whole. This commenter states that the trona mines have already attained compliance with the final limit because of their high ventilation air flow rates, and that similarly high flows will be required at many other mines to attain compliance.

MSHA notes that the final rule is performance oriented, and allows mine operators great latitude to choose the DPM control or controls that are most efficient and cost effective for a given mine. The trona mines are required to ventilate at very high rates for reasons other than DPM compliance to address methane issues, for instance. For them, ventilation is the logical DPM control because the control is already in place. Other type mines have more and varied choices, and selecting the optimum DPM control strategy involves evaluation of a broad range of factors such as current DPM levels, equipment and engines used, equipment deployments, mine layout, existing ventilation system, availability of alternate diesel fuels, and many more.

For reasons of financial self-interest, mine operators would be unwise to implement high cost controls that achieve very little DPM reduction, such as a $100 million ventilation system that reduces DPM levels by only 3% to 4%. Such a choice would preclude less costly and more effective options available, such as DPFs, low emission engines, alternative diesel fuels, and cabs with filtered breathing air.

As stated earlier, the final rule incorporates economic feasibility in its hierarchy of controls enforcement scheme. MSHA, likewise, could not require a mine operator to implement a control or combination of controls where the costs are wholly out of proportion to the expected results. MSHA would judge a ventilation upgrade costing $100 million, or even $5 to $20 million that achieves a DPM reduction of 3% to 4% as infeasible because the cost is wholly out of proportion to the expected results, and it is likely a mine operator would consider it a poor DPM compliance strategy for the same reason. The commenter suggests a lower cost administrative control that achieves a 21% to 22% reduction would be a better choice. MSHA agrees, if this control in combination with other controls would result in at least a 25% reduction.

As noted previously, with some DPFs, filter efficiency is as high as 99+% for EC. MSHA, however, believes that both economic and technological feasibility must be considered. Whereas filter efficiency is a major component of technological feasibility, MSHA must consider all aspects of feasibility including implementation issues and cost of compliance to the mining industry. As stated earlier in this preamble, MSHA believes that some mine operators would need more time to meet a lower DPM limit presently based on economic feasibility and implementation issues with DPFs.

Establishing a lower interim limit in this final rule would present complications with respect to economic feasibility, particularly where ventilation upgrades would be needed to meet a lower limit. Moreover, MSHA envisions that mine operators would have to filter larger numbers of diesel-powered equipment in order to meet a lower limit. Such a requirement could impose higher costs for the mining industry before experience is gained at the current level and the mining industry is given adequate time to meet a lower standard.

Some commenters objected to MSHA's assessment of the number of mining operations that will need costly ventilation upgrades. These operators believe that a large number of mines will have to make ventilation improvements, provide cab improvements, add other engineering controls, implement other administrative controls, replace engines, and utilize DPFs. In response, the DPM rulemaking record does not sustain this position. MSHA found in its baseline sampling that only 37% of the mining operations covered by this DPM rule had miners overexposed to DPM. Consequently, at 63% of the mines sampled, MSHA found no overexposures to DPM. MSHA conducted this sampling in the same manner as it does its enforcement of the 2001 interim limit DPM rule. MSHA collected roughly 1,194 samples at 183 mines. Additionally, MSHA responded to each mine operator's request for compliance assistance and technical support for resolving engineering control implementation issues. The results of MSHA's work are included in the rulemaking record. Overall, the mining industry has been successful in reducing average DPM levels as demonstrated in the comparison of baseline sampling and 31-Mine Study data shown in Chart V–5.

Also, in the 31-Mine Study, MSHA established that most mining operations would not need major ventilation changes, but rather, could implement less costly ventilation upgrades and DPFs. In most instances, the ventilation upgrades require no more than adding booster fans or auxiliary ventilation, and repairs or extensions to ventilation control structures such as brattice lines or air walls.

A commenter suggested that ventilation costs for complying with the DPM rule for the Kerford Limestone mine were projected to be $1.15 million, plus $348,450 for engine replacements, plus an additional $25,500 to $38,500 for DPF maintenance. According to the commenter, this mine has invested $975,000 since October 2001, primarily for ventilation improvements including sinking a shaft, consultant costs, a new blasting truck, and a new engine for a bolter. The commenter points out that in the 31-Mine Study, MSHA projected that first-year compliance costs for this same mine would be only $77,600, and suggests the discrepancy is an example of MSHA's underestimate of DPM compliance costs.

MSHA notes that 13 DPM samples were taken during the 31-Mine Study at the Kerford mine. Sample results ranged from $143_{TC}$ μg/m³ to $490_{TC}$ μg/m³. Per the 31-Mine Study methodology, DPM controls were specified based on the highest sample result. However, since the highest sample result only exceeded the interim DPM limit by about 23% ($490_{TC}$ μg/m³ versus the interim DPM limit of $400_{TC}$ μg/m³), the controls necessary to attain compliance at this mine were not very extensive. Indeed, MSHA's analysis indicated that controlling DPM emissions from the mine's three loaders (two loaders used in normal operations plus one spare) using active DPF systems with filter efficiencies of 80% would enable the

mine to attain compliance with the interim limit. MSHA estimated the first year cost of three filter systems for the subject loaders plus an oven for regenerating the filters (active off-board regeneration) to be $77,600.

MSHA has not seen the consultant's report that indicates new engines, DPFs, and a major ventilation upgrade would be required for the Kerford mine to comply with the interim DPM limit. However, these recommendations appear excessive based on MSHA's analysis in the 31-Mine Study and also on the fact that compliance for this mine requires only a relatively small reduction in DPM levels from $490_{TC}$ μg/m³ to $400_{TC}$ μg/m³.

As noted in the 31-Mine Study final report, MSHA is not suggesting that its findings represent the optimum compliance strategy for this or any mine. Rather, MSHA maintained merely that the controls specified in the final report are feasible and would be expected to attain compliance. MSHA suspects that the combination of controls recommended by Kerford's consultant, though capable of attaining compliance, is not the optimum and most cost effective approach available.

As discussed in the Technological Feasibility section of this preamble, MSHA also notes that the total yearly cost represented by the consultant's recommended engine, ventilation system, and DPF expenditures is roughly in line with MSHA's 2001 REA estimate for an average mine, even though Kerford Limestone is substantially larger than average. The engine costs of $348,000, when annualized over 10 years at a discount rate of 7%, results in a yearly cost of $49,500. The $1.15 million ventilation cost, when annualized over the expected 20+ year life of this asset, results in a yearly cost of $108,600. When these two yearly costs are added to the maximum estimated annual DPF cost of $38,500, the total yearly cost for Kerford is about $196,600. When compared to the MSHA REA's estimated compliance cost of over $300,000 for a stone mine of this size, Kerford's costs are significantly less.

Some mines, in particular mine size and commodity groups, because of their mining methods used, equipment deployments, etc., would be expected to incur higher than average compliance costs of $128,000 per year. For example, the REA estimated yearly compliance costs for large precious metals mines to be $660,000. Based on its compliance assistance mine visits, baseline sampling results, and other data, MSHA believes that most mines have expended far less than the expected $128,000 yearly for DPM compliance. Though expenditures will undoubtedly need to rise in the future as the easy DPM control methods are exhausted, they are not expected to exceed levels previously determined by MSHA to be economically feasible.

Another mine that disputed MSHA's estimated DPM compliance cost estimates is the Stillwater Mine. MSHA estimated in the 31-Mine Study that DPM filters would be required on all LHDs and haulage trucks at this mine in order to attain compliance with the interim limit. Accordingly, MSHA estimated Stillwater's first year costs to be $470,100 and annual costs to be $108,163 for three loaders and twelve trucks used in normal mining production operations plus three more spare loaders and four more spare trucks. In its comments on the 2003 NPRM, Stillwater indicated that its total diesel equipment inventory consists of over 350 pieces of diesel equipment, including over 90 loaders and 40 haulage trucks, plus miscellaneous production equipment and spares. MSHA has since acknowledged that it had an inaccurate inventory of diesel equipment for the Stillwater mine when the 31-Mine Study was conducted. On the basis of the newly obtained inventory data, MSHA raised its compliance cost estimate for this mine to $935,000 to cover DPFs for the total production fleet.

In its comments on the 2003 NPRM, Stillwater submitted its own compliance cost estimates. This estimate included a $9 million ventilation upgrade, $160,000 for passive DPFs, $1.2 million for engine upgrades, $280,000 for engine test equipment, $43,000 per month in emissions expenditures, over $100 million over ten years for active DPFs, plus various miscellaneous costs. Combining these items resulted in an estimated annual compliance cost for Stillwater of $11 to $12 million.

Clearly, the most significant cost item listed by Stillwater is active DPF systems. However, almost 97% of Stillwater's estimated active DPF systems costs are for excavation of parking areas. Stillwater's active DPF system implementation plan specified on-board active filter regeneration, wherein a vehicle would travel to a regeneration station and its DPF would be connected to electrical power and compressed air for regeneration. To insure reasonable travel distances between normal working areas and regeneration stations, Stillwater's active filter cost estimate was developed in the context of a ten-year mine plan, wherein new regeneration stations would be excavated periodically with the advance of the mine workings.

As discussed in detail in the Technological Feasibility section of this preamble, MSHA analyzed and evaluated the Stillwater compliance cost estimate, and determined that compliance could be attained at a much lower cost. Since the cost of excavating regeneration stations was such a significant component of Stillwater's overall cost estimate, MSHA focused on eliminating this cost element. As explained in the Technological Feasibility section, MSHA described three feasible alternative approaches for utilizing active filtration that do not require excavation of regeneration station parking areas. Although MSHA disputed several of the remaining cost items, MSHA nonetheless accepted these costs as submitted by Stillwater in developing an alternate compliance cost estimate for this mine. The inclusion of these disputed items accounts for MSHA's estimated compliance cost of $1.57 million for the Stillwater mine being somewhat higher than the revised 31-Mine Study cost estimate of $935,000.

As noted in the Technological Feasibility section of this preamble, MSHA's estimate of $1.57 million in annual DPM compliance cost is significant. However, it is less than MSHA estimated in the REA for the 2001 final DPM rule for a large precious metals mine. The REA estimated annual compliance costs of $660,000 based on a fleet size of 133 vehicles. Adjustment for Stillwater's fleet size of 350+ vehicles results in an estimated compliance cost of $1.7 million.

Several other commenters suggested that MSHA's compliance cost estimates, in general, were unrealistically low. However, without specific examples to evaluate and analyze, such comments are difficult to refute. MSHA has supported its cost estimating methodologies in general, and where specific examples have been provided by commenters, MSHA has fully supported its compliance cost estimates, such as the above discussions of the Kerford and Stillwater mines.

Except for general comments regarding the DPM Estimator, MSHA did not receive information to dispute the technological and economic feasibility for mines using room and pillar mining methods to meet the $308_{EC}$ μg/m³ limit. These mines include stone, salt, trona and potash mines. When additional controls were necessary to attain DPM compliance, these mines have typically elected to meet the interim limit by upgrading ventilation, using cabs with filtered breathing air,

use of alternative fuels, and using equipment with clean engines. The comments received from mines in these sectors of industry focused on the difficulties of installing after-filters on large, high horsepower equipment and the increasing cost of bio-diesel fuel. These issues, along with the DPM Estimator, are discussed in detail in the Technological Feasibility section of this preamble.

## VIII. Summary of Costs and Benefits

The provisions in this final rule will increase compliance flexibility with the existing final rule, and continue to reduce significant health risks to underground miners. These risks include lung cancer and death from cardiovascular, cardiopulmonary, or respiratory causes, as well as sensory irritations and respiratory symptoms. In Chapter III of the REA in support of the 2001 final rule, MSHA demonstrated that the rule will reduce a significant health risk to underground miners. This risk included the potential for illnesses and premature death, as well as the attendant costs to the miners' families, to the miners' employers, and to society at large. Benefits of the January 19, 2001 final rule include reductions in lung cancers. MSHA estimated that in the long run, as the mining population turns over, a minimum of 8.5 lung cancer deaths per year will be avoided. MSHA noted that this estimate was a lower bound figure that could significantly underestimate the magnitude of the health benefits. For example, the estimate based on the mean value of all the studies examined in the 2001 final rule was 49 lung cancer deaths avoided per year. MSHA uses the 2001 risk assessment for support of this rule.

This final rule results in net cost savings of approximately $3,634 annually, primarily due to reduced recordkeeping requirements. All MSHA cost estimates are presented in 2002 dollars. This represents an average annual savings of $20 per mine for the 177 underground metal/non-metal mines that would be affected by this 2003 NPRM. Of these 177 mines, 66 have fewer than 20 workers, 107 have 20 to 500 workers; and 4 have more than 500 workers. The cost savings per mine for mines with fewer than 20 workers will be $74. The cost increase per mine for mines having 20 to 500 workers and more than 500 workers will be $10 and $10, respectively. In the 2001 REA, MSHA estimated that the costs per underground dieselized metal or nonmetal mine for the existing rule to be about $128,000 annually, and the total cost to the mining sector to be about $25.1 million a year, even with the extended phase-in time. Nearly all of those anticipated costs would be investments in equipment to meet the interim and final concentration limits.

## IX. Section-By-Section Discussion of the Final Rule

### *A. Section 57.5060(a) Interim DPM Limit*

MSHA's existing interim DPM limit at § 57.5060(a), which became applicable July 20, 2002, restricts TC concentrations in underground mines to $400_{TC}$ μ/m³. The concentration limit applies to areas where miners normally work or travel. In the 2001 final rule, MSHA chose TC as the surrogate for measuring DPM concentrations.

Consistent with the 2003 NPRM, final § 57.5060(a) changes the surrogate from TC to EC, which renders a more accurate measurement. In addition, MSHA is basing the interim limit on a miner's personal exposure rather than on an environmental concentration, which results in a PEL. The new interim limit restricts a miner's personal exposure for a full shift to $308_{EC}$ μg/m³. MSHA believes that this new interim limit is comparable to the existing TC limit.

Because EC comprises only a fraction of TC, MSHA used a conversion factor to adapt the former interim concentration limit of TC to a new EC PEL. MSHA proposed to use a factor of 1.3, to be divided into $400_{TC}$ μg/m³, which produces a reasonable estimate of TC without interferences. The final EC limit is based on the median TC to EC (TC/EC) ratio of 1.3 that was observed for valid samples in the 31-Mine Study and the DPM settlement agreement. The 1.3 factor also is supported by information provided by NIOSH indicating that the ratio of TC to EC in the 31-Mine Study is 1.25 to 1.67. Most commenters to MSHA's 2003 NPRM supported an interim EC PEL of $400_{TC}$ μg/m³ divided by 1.3 = $308_{EC}$ μg/m³.

Also in the 31-Mine Study, MSHA concluded that the submicron impactor that MSHA used for DPM sampling was effective in removing carbonaceous mineral dust from the DPM sampler, and therefore, its potential for interfering with the MSHA sampling analysis. The remaining carbonate interference is removed from the sample analysis by subtracting the 4th organic peak. No reasonable method of sampling was found in the 31-Mine Study that would eliminate interferences from sources of oil mist and ammonium nitrate fuel oil (ANFO). Moreover, MSHA could not determine DPM levels in the presence of ETS with TC as the surrogate. Using EC as the surrogate will enable MSHA to directly sample miners, such as those who smoke, operate jackleg drills or load ANFO, for whom valid personal samples would be difficult to obtain with TC as the surrogate for DPM.

MSHA has found that EC consistently represents DPM. Compared to using TC as the DPM surrogate, using EC accomplishes the following: Imposes fewer restrictions or caveats on sampling strategy (locations and durations); produces a more accurate measurement; and inherently will be more precise than TC. Furthermore, NIOSH, the scientific literature, and the MSHA laboratory tests (see NIOSH letter dated April 3, 2002 and July 31, 2000 comment to the proposed rule for the 2001 rule) indicate that DPM, on average, is approximately 60% to 80% EC, firmly establishing EC as a valid surrogate for DPM.

Under the new standard, MSHA is not reducing the protection from that afforded miners under the former interim TC concentration limit, since the old TC and new EC limits are comparable in exposure reduction. Establishing a standard that focuses control efforts on diminishing the DPM level in air breathed by a miner is supported by some commenters in labor. Some commenters stated, ''We agree that personal sampling gives a better representation of real exposure, and we support the change.''

MSHA has determined that this new interim limit is both technologically and economically feasible for the M/NM mining industry to achieve. Although the risk assessment indicates that a lower DPM limit would enhance miner protection, it would be infeasible at this time for the underground M/NM mining industry to reach a lower interim limit. MSHA will continue to monitor the feasibility of the affected mining industry to comply with a lower EC exposure limit. MSHA believes that it is critical to gain compliance experience, both from the standpoint of DPF efficiency and implementation issues raised by the mining industry during this rulemaking, in order to address a final DPM limit.

Most commenters supported the value of $308_{EC}$ μg/m³ for the interim PEL. Some commenters suggested a limit of $320_{EC}$ μg/m³ as the preferred PEL. Some of these commenters cited research by Cohen, Borak and Hall in support of their position. The evidence in the rulemaking record, however, overwhelmingly supports MSHA's decisions on the appropriate interim DPM limit of $308_{EC}$ μg/m³. MSHA's review of the cited publication by these authors demonstrated no reference to a value of $320_{EC}$ μg/m³. A $320_{EC}$ μg/m³

limit value would have resulted from using a conversion factor of 1.25, and represents the high end of the range reported by NIOSH. MSHA disagrees with using a limit of $320_{EC}$ μg/m³ and believes that the limit of $308_{EC}$ μg/m³ is the appropriate limit based on the evidence contained in the rulemaking record.

Another commenter stated that mine data gathered since the current final rule was promulgated requires MSHA to lower the 2001 interim limit. This commenter believes that all of industry could reach compliance with the interim concentration limit without significant economic investment and that the control technology is available to reduce DPM to below the 2001 interim limit for feasible costs.

MSHA agrees that most of the M/NM mining industry has the capability of reaching the new interim PEL. MSHA, however, does not agree that compliance with the new PEL can be accomplished in every instance and circumstance due to implementation issues that vary from mine to mine.

During MSHA's compliance assistance visits, on many occasions it was observed that mines had purchased new equipment or installed modern engines in existing equipment. Several mines were using or testing alternative fuels and many mines had made upgrades to their ventilation systems by improving airflow distribution systems. MSHA mostly observed that mines had not begun to install DPM filters to reduce miners' exposures, as recommended by MSHA as the most cost-effective method of compliance. The DPM standard does not specify that mine operators must use a specific type of control, but MSHA recommended DPFs as a very effective method for controlling DPM. MSHA chose to leave that decision to the individual mine operator's judgment.

Most commenters from industry and labor continued to strongly support the change in the surrogate from TC to EC. These commenters stated that given the interferences known to be present in underground mining environments, using EC as the surrogate would improve the accuracy of MSHA samples. Some commenters criticized MSHA for not realizing earlier that EC was a more appropriate surrogate than TC and that use of EC would lower sampling costs of the mining industry. At the time that the 2001 final rule was promulgated, MSHA's rulemaking record supported TC as the more appropriate surrogate. Following completion of the 31-Mine Study, MSHA obtained sufficient data to change the surrogate.

Some other commenters opposed changing the surrogate. One commenter stated that the change is without foundation because the record does not support MSHA's claim that the amount of EC is an accurate surrogate for the amounts of DPM that need to be measured under actual mining conditions. MSHA disagrees. MSHA supports using EC as the most suitable surrogate for measuring DPM. Moreover, this commenter believes that the record does not support MSHA's claim that there is no solution to interference issues that arise when TC is used as the surrogate for DPM. MSHA disagrees with this comment, as well. Data in the rulemaking record from the 31-Mine Study demonstrates that there is no ''reasonable'' solution to interference issues when using TC as the surrogate.

Another commenter stated that MSHA should consider using a better surrogate than EC, since most DPM studies were conducted on whole DPM which would measure exposure to the most relevant substance. In addition, this commenter believes that a substance other than EC could be the ultimate carcinogenic agent in DPM. Many organic compounds in DPM are known carcinogens, and there is no stable EC:TC ratio. This commenter also believes that interferences from ETS introduce less variability than EC. Furthermore, the commenter states that the interference problem could be solved another way since Harvard investigators have successfully adjusted DPM measurements for ETS. Since the commenter did not provide a specific reference cite for the Harvard investigation, MSHA was unable to verify this claim. MSHA based its decisions in this final rule on the best data available to MSHA. That data demonstrates that measuring EC for determining DPM exposures will allow MSHA to sample miners' exposures in the presence of ETS without interference issues. No adjustment has to be made in the sample analysis because ETS does not affect the measurement of EC. During the 31-Mine Study, NIOSH found that there was no reliable marker for cigarette smoke in the presence of DPM.

Some commenters suggested that MSHA establish an ''action level * * * at which additional sampling and some controls kick in.'' These commenters recognized that it would be difficult for MSHA to enforce an action level below the PEL. MSHA believes that the best method of protecting miners from exposure to DPM is through the primary use of reliable controls. In Section VII of its feasibility analysis, MSHA determined that the rulemaking record has little evidence at this time to lower the PEL due to implementation and cost issues for the mining industry. Also, MSHA's air quality standards for M/NM mines do not include requirements for regulating action levels for other airborne contaminants. Furthermore, pursuant to § 57.5071 of the DPM rule, mine operators are required to monitor as often as necessary to effectively determine whether the concentration of DPM in any area of the mine where miners normally work or travel exceeds the applicable limit. In MSHA's experience at M/NM mines, this approach to worker protection is more effective and practical than establishing an ''action level'' that the commenters recognize may be unenforceable.

Several comments were received on the use and development of the error factor for DPM sampling. One commenter stated that error factors give the benefit of doubt to mine operators and exposes miners to DPM above an already inadequate exposure limit. This commenter also stated that miners' health should be given precedence over mine operators' property rights. MSHA believes that it has the burden of proving that a sample is above the PEL for enforcement purposes. Establishment of an error factor assists MSHA and reviewing courts in knowing when that burden has been met. Mine operators should review their sample results and make decisions on the level of controls required or when improvements to controls might be necessary. However, MSHA's practice has been to cite only when an exposure sample exceeds the standard times the error factor.

MARG submitted data and a consultant's comments on the sampling and analytical variability of EC measurements. These comments will be referred to below as the ''Borak/Sirianni analysis.'' The Borak/Sirianni analysis examined three bodies of EC sampling data. The first of these consisted of 25 groups of four or five simultaneous EC concentration measurements collected by MARG and summarized in Table 1 of the appendix submitted with the Borak/Sirianni analysis. This dataset, identified below as the ''MARG basket data,'' is a portion of the data obtained in the MARG study which was conducted in seven underground nonmetal mines (Cohen HJ, Borak J, Hall T, *et al.:* Exposure of miners to diesel exhaust particulates in underground nonmetal mines, *Am Ind Hyg Assoc J* 63:651–658, 2002). The second body of data, identified below as the ''baseline paired punches,'' consisted of two analytical EC results on each of 223 samples from MSHA's compliance

assistance database. The third body of data examined in the Borak/Sirianni analysis was a relatively small subset (63 samples out of over 800) of the paired-punch EC data available from the 31-Mine Study. This dataset will be identified below as the ''31-Mine Study Subset.''

Based on the Borak/Siriani analysis, MARG concluded that ''* * * the [measurement] system is not accurate and not feasible.'' MSHA disagrees. Our analysis of the same data shows variability of the EC measurements presented to be well within acceptable limits. As will be shown below, the Borak/Sirianni analysis is mathematically invalid.

Each of the datasets is discussed below, first with respect to deficiencies in the Borak/Sirianni analysis and then with respect to what the submitted data actually reveal about sampling and analytical variability.

MARG Basket Data

The submitted MARG basket data consisted of 25 groups of four or five samples in which at least one EC measurement fell within the range of 75 $\mu g/m^3$ to 200 $\mu g/m^3$. Neither MARG nor the Borak/Sirianni analysis explained whether MARG collected additional basket data falling outside of this range. Additionally, no explanation was provided as to why the submitted data were restricted in this way, if more data were collected.

Unfortunately, the samples were collected without the submicron impactor. The sample results are, therefore, not appropriate to use in this rulemaking. The study reference does not indicate the type of filter holder and cyclone attachment configuration or if the mineral-dust-related carbonate that occurs in the organic portion of the analysis was subtracted off the OC determination.

When using a filter holder with an internal cyclone connection, the cyclone nozzle acts as an impactor jet and mineral dust is deposited in the center of the filter. This gives a high level of mineral dust in the center of the filter, and a non-uniform deposit of material on the filter surface. A non-uniform deposit precludes any analysis of duplicate sample punch repeatability. Additionally, three of the seven mines produced either limestone or trona. Both of these minerals contain carbonates which are evolved in the organic portion of the analysis. Failure to remove this mineral dust by use of an impactor may affect the split point between OC and EC. The referenced study indicates that up to 15 $mg/m^3$ of total mineral dust was present at one of the mines.

MARG did not provide individual sample results for this dataset. Nor did MARG provide any information on sampling times or filter loadings ($\mu g/cm^2$), both of which affect expected analytical variability. Only summary data, consisting of the EC measurement range, mean, standard deviation (SD), and coefficient of variation (CV), were provided for each group of ''four or five'' samples. There was no indication of which groups contained four and which groups contained five samples. Despite the statistical instability of estimated SDs, CVs, and means based on as few as four or five measurements, no confidence intervals or other measures of statistical uncertainty were provided for the summary statistics.

The Borak/Sirianni analysis consisted of tabulating ''the number and proportion of baskets corresponding to CV ranges of 0–4.99, 5–9.99, >10 and >12.5%. More specifically, Borak/Sirianni observed that ''32% of baskets containing at least one sample in the 75–200 $\mu g/m_3$ range had a CV ≥ 12.5%.'' Although they presented no mathematical evaluation of this finding s statistical significance, Borak/Sirianni concluded that it was ''inconsistent with the NIOSH criteria for appropriateness of analytical methods and does not meet guidelines presented in the proposed Final Rule.'' [9]

The Borak/Sirianni analysis of these data appears to be founded on an elementary misconception: That a high percentage of individual baskets with CV > 12.5% (based on four or five measurements per basket) provides evidence of a high sampling and analytical CV. Actually, as demonstrated below, the Borak/Sirianni finding reflects statistical instability (i.e., lack of reliability) in CV estimates calculated using only four or five measurements. CV estimates based on a limited number of measurements display random variability around the true CV value underlying the measurement process. It should, therefore, be expected that many of the CV estimates based on individual baskets will fall below, many will fall above, and none or few will fall exactly on the true CV. More specifically, the Borak/Sirianni finding is entirely consistent with a measurement process satisfying the NIOSH accuracy criterion.

To illustrate this point, MSHA generated a dataset of 10,000 simulated measurements randomly drawn from a log normal distribution having mean = 126 and CV = 12%.[10] More than 96% of these measurements fell within ±25% of the 126 mean or ''reference value,'' thereby showing that the simulated measurement process satisfied the NIOSH Accuracy Criterion. The 10,000 ''measurements'' were then grouped into simulated ''baskets'' of four or five measurements each,[11] and a separate unbiased estimate of the CV was calculated from the data within each basket. This resulted in 2,250 separate CV estimates of the same underlying CV, with each calculation based on four or five measurements. Figure IX–1 displays the cumulative distribution of the individual CV estimates. Despite the fact that the underlying CV was 12% for all these data, 808 (35.9%) of the CV estimates based on individual baskets exceeded 12%. This demonstrates that the corresponding Borak/Sirianni finding (32%) is consistent with meeting the NIOSH Accuracy Criterion.

As mentioned earlier, MARG did not provide filter loadings ($\mu g/cm^2$) or sampling times for the basket data. Figure IX–2, which is derived from the paired-punch comparison of EC results from the 31-Mine Study,[12] shows how NIOSH Method 5040 analytical uncertainty is expected to vary with different filter loadings. In the range of EC concentrations exhibited by MARG's basket data, sampling times substantially less than 480 minutes could substantially increase variability in the analytical results due to relatively low filter loadings. Even if we assume, however, that MARG's basket samples were all taken for at least 480 minutes, the submitted data do not show excessive sampling and analytical variability. A crude estimate of the

[9] The proposed rule does not, in fact, present any such guidelines.

[10] The simulated data were generated and analyzed using SYSTAT Statistical Software, Version 10. A computer file containing this dataset, along with a number indicating the ''basket'' to which each ''measurement'' was randomly assigned, is being placed into the public record under the name SYMBASKETS.txt. The mean value of 126 was chosen to coincide with the overall mean concentration for the MARG basket data, but this choice has no substantive bearing on the results. The CV value of 12% was chosen in order to exemplify an unbiased measurement process that satisfies the NIOSH accuracy criterion.

[11] Since the Borak/Sirianni analysis did not reveal how many of MARG's baskets contained four and how many contained five samples, the 10,000 simulated measurements were divided equally into baskets of four and five. This resulted in 1250 simulated ''baskets'' of four measurements each and 1000 ''baskets'' of five measurements each.

[12] Analytical imprecision of EC measurements is quantified, based on paired-punch results from the 31-Mine Study, in the technical document on MSHA's Web site cited as Reference #4 in the Borak/Sirianni Analysis. In the notation of that document, the quantity plotted in Figure IX–2 is CVμ [X] calculated using $\sigma\tau = 0.256$. $\sigma\tau$ incorporates both intra- and inter-laboratory analytical variability.

overall CV can be obtained by pooling results from all 25 baskets. The average of the 25 CV values given is 10.8% at a mean EC concentration of 126 μg/m³. For a dpm sample, collected with the submicron impactor (filter area 8.04 cm²), for 480 minutes at a flow rate of 1.7 Lpm, the concentration in μg/m³ is approximately 10 times the filter loading in μg/cm² (8.04 × 1000/480/1.7 = 9.85). As a result, the 126 μg/m³ corresponds to a mean EC filter loading of 12.8 μg/cm². Figure IX–2 shows that, at this loading, the CV expected for analytical variability alone is approximately 10%. Since variability within baskets reflects not only analytical variability but also variability in the volume of air pumped and in location within each basket, an overall CV of 10.8% is neither surprising nor excessive.

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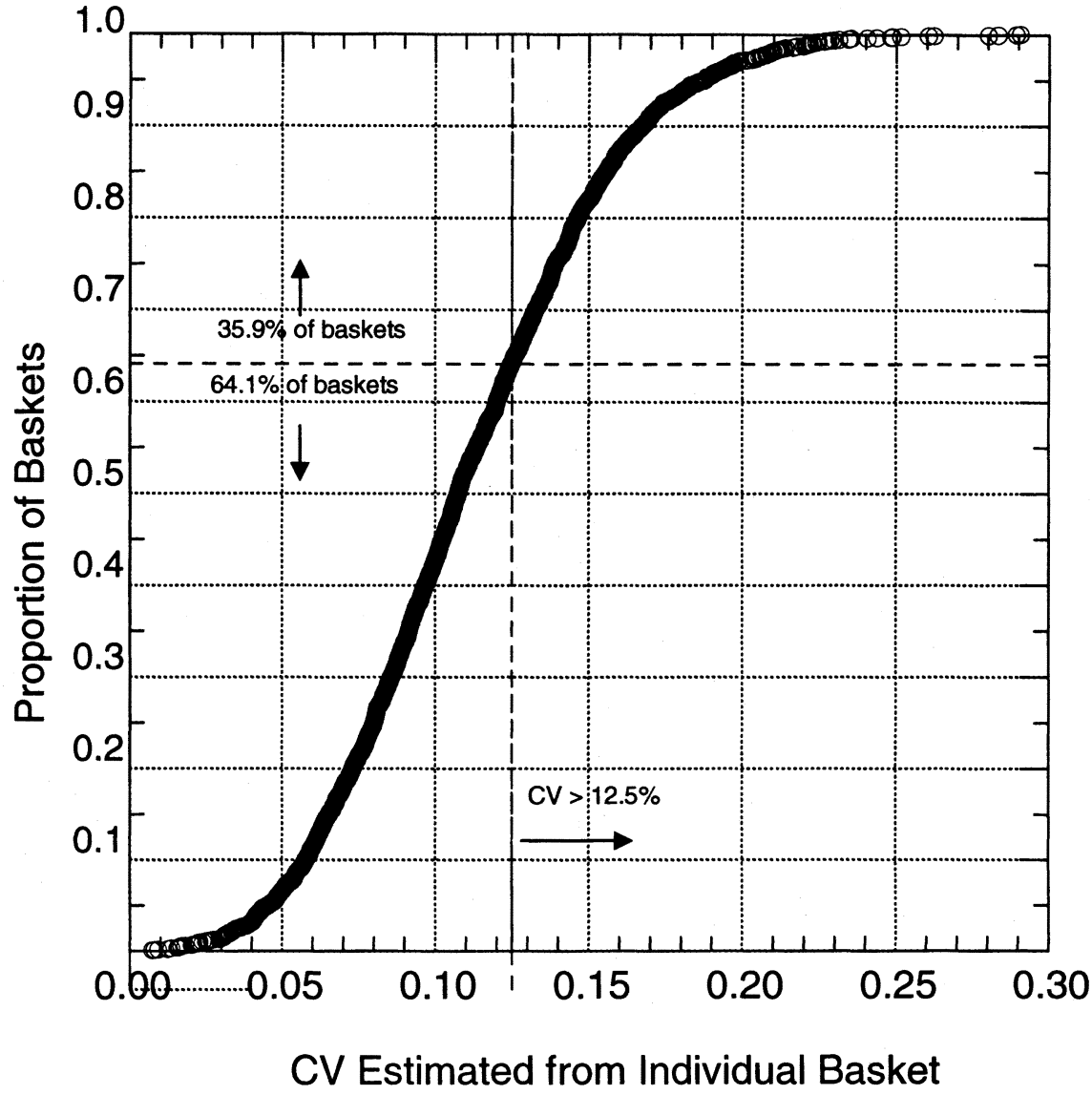


**Figure IX-1. Distribution of individual CV estimates, calculated from simulated basket data satisfying NIOSH Accuracy Criterion. Dataset consists of 10,000 simulated measurements randomly drawn from lognormal distribution (mean = 126, CV = 12%) and grouped into "baskets" of 4 or 5 measurements. NIOSH Accuracy Criterion is met because 96.25% of the 10,000 measurements fall within the range 126±25%.**

MARG provided no indication that any of the analytical results for its basket data were averaged over two punches, as per MSHA's procedure for samples used to cite noncompliance with the DPM standard (2003 NPRM, 68 FR 48672). It should, therefore, be noted that the analytical component of variability observed in these data would

have been reduced by a factor equal to if such averaging had been performed √2. For example, if the analytical portion of variability amounted to a CV of 10%, then this would have been reduced to 7.1% if two punches had been averaged for every measurement.

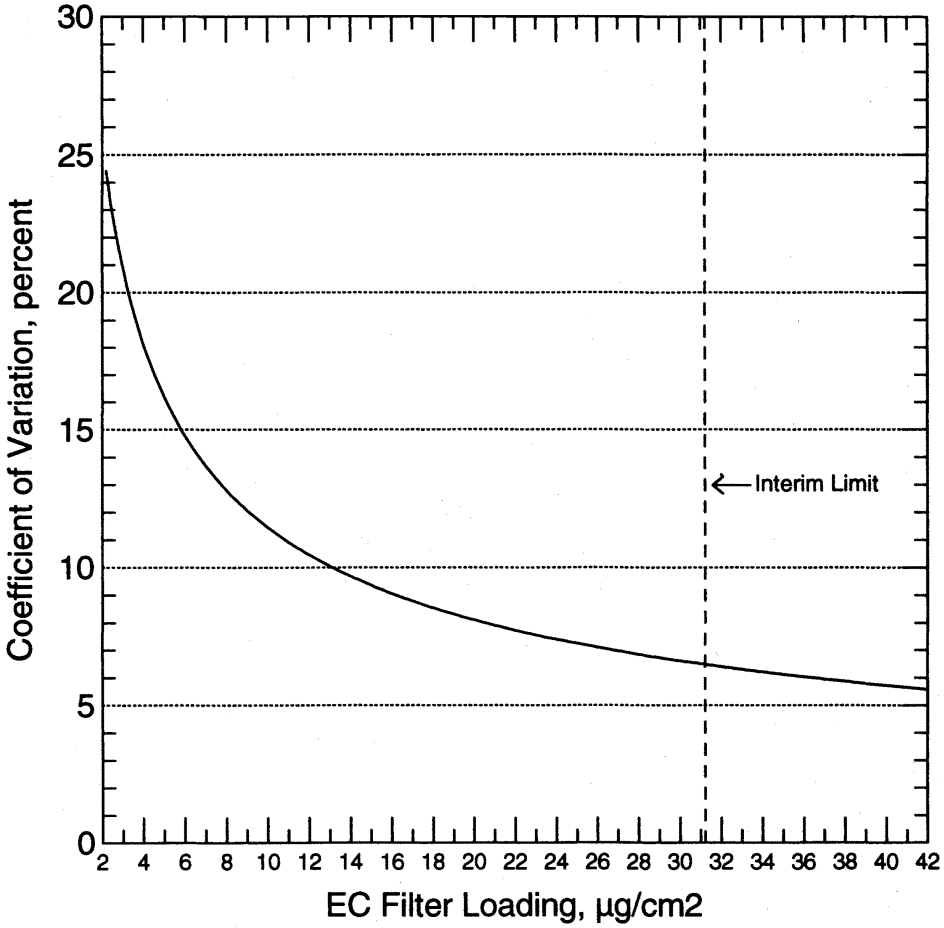


**Figure IX-2. Analytical imprecision of a single EC measurement (µg/cm$^2$), based on paired-punch comparison in 31-Mine Study. Vertical line marked "Interim Limit" refers to EC loading corresponding to a concentration of 308 EC µg/m$^3$ sampled for 480 minutes at a pump airflow rate of 1.7 Lpm. CV represents analytical imprecision for result from a single punch and would be reduced by a factor of $\sqrt{2}$ if results from two punches are averaged. Plotted CV incorporates both intra- and inter-laboratory variability. Because CV is based on comparing punches taken from two locations on each filter, it combines purely analytical imprecision with heterogeneity of the deposit on the filter (a form of sampling variability). CV does not, however, reflect other sources of sampling imprecision such as variability in deposit area or pump performance. Effects of any adjustment based on a control filter are also not included.**

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Baseline Paired Punches

The baseline paired-punch data examined in the Borak/Sirianni analysis consisted of laboratory results from 223 samples, collected during MSHA's baseline compliance assistance program, that were analyzed twice for EC content.[13] In accordance with MSHA's interim policy for DPM noncompliance determinations, a second punch was analyzed from each of these samples because the first punch showed EC ≥ 30

[13] The Borak/Sirianni analysis erroneously states that all 223 of these samples were ''collected using an older version of the SKC impactor that differs from the impactor proscribed [sic] in the proposed final rule.'' We assume that the intended word was ''prescribed.'' As explained in the 2003 NPRM at 68 FR 48679–80 and 48706, there has been no change to the impactor in the SKC sampler. For reasons explained elsewhere in this preamble, an improvement was made in the SKC filter capsule, but this change has no bearing on the comparison of paired punches taken from within the area of deposit on the filter. The older design, employing a crimped foil capsule, was used for 93 of the 223 samples. The remaining 130 samples utilized the newer design, in which a retaining ring replaced the crimped foil.

μg/cm² or TC ≥ 40 μg/cm² (see 2003 NPRM, 68 FR 48672). Results from the two punches were then averaged for purposes of determining compliance or noncompliance with the interim exposure limit.

The Borak/Sirianni analysis of these 223 paired-punch results consisted of calculating, for each pair, the ''percentage difference'' between the two punch results and tabulating the frequency of cases in which that quantity fell into three categories: 0–4.99%, 5–9.99%, and ≥10%. The ''percentage difference'' was apparently calculated as $100_X|X_1 - X_2| \div X_1$, where $X_1$ is the first measurement recorded within each pair. No explanation was given of the statistical properties of this quantity, and no discussion was presented of its mathematical relationship to a CV, which is defined quite differently. In particular, Borak/Sirianni made no attempt to relate the ''percentage difference'' mathematically to $CV_A$, which refers to the coefficient of variation for the average (not difference!) of two punch results. Nevertheless, the authors concluded (without explanation) that the frequency of cases in which the ''percentage difference'' exceeded MSHA's estimate of $CV_A$ indicates that MSHA's estimate is too low. They also asserted that ''it is almost certain'' that these data ''document failure to meet the NIOSH and MSHA acceptability criteria.''

The Borak/Sirianni analysis of these data commits the following five errors. The first three of these distort their analysis sufficiently to render its conclusions entirely without merit.

1. Our best estimate of the true carbon loading on a filter is given by the average of the two available punch results from that filter. Therefore, individual measurement errors are best estimated as the distance of each result from the midpoint between them. In contrast, the ''percentage difference,'' as defined by the Borak/Sirianni formula, is twice the size of the percentage deviation of either punch result from the midpoint between them. This serves to exaggerate the deviation of each result from the true value. Mathematically, the relative standard deviation (RSD) of the difference exceeds the RSD of an individual punch result by a factor of √2 (prior to any blank adjustment).

2. Borak/Sirianni fail to account for the fact that MSHA's estimate of $CV_A$ applies to the average of two punch results, rather than to an individual analytical measurement. The RSD of an individual punch result exceeds the RSD of the two-punch average by another factor of √2 (again, prior to any blank adjustment).

3. The combined effect of (1) and (2) is that, when blank adjustments are negligible, variability in the ''percentage difference,'' as expressed by an appropriate CV within pairs, would be expected to exceed analytical imprecision in a 2-punch average by a factor of 2. However, Borak/Sirianni made no attempt to calculate such a CV or make any other meaningful comparison. Instead, they simply tabulated instances in which the ''percentage difference'' exceeded $CV_A$. $CV_A$, like any coefficient of variation, does not represent an upper bound on individual deviations or differences. Indeed, approximately one-third of individual errors (without regard to direction) would normally be expected to exceed the corresponding CV. (This is why MSHA multiplies the appropriate CV by a ''confidence coefficient'' when establishing a 1-tailed 95% confidence error factor for noncompliance determinations.) Combining the factor of 2 explained above with a 95% 2-tailed confidence coefficient (1.96), ''percentage differences,'' as defined by Borak/Sirianni, are expected to exceed 2×1.96×CV more than 5% of the time. (The reason such excesses would be expected more than 5% of the time is given below, under point 4.)

4. The Borak/Sirianni method of calculating ''percentage difference'' causes such differences to take on more extreme values than they would if they were calculated relative to the average of the two punch results (*i.e.,* if the denominator of the calculation were the average of $X_1$ and $X_2$ rather than just the $X_1$ result). For example, using the Borak/Sirianni formula, a sample with two punch results of 192 and 212 would yield a ''percentage difference'' of either 10.4% or 9.4%, depending on which one of the two measurements is recorded as $X_1$. If, instead, the average of $X_1$ and $X_2$ were used as the denominator, then the percentage difference would be calculated as 9.9%.[14] So long as the smaller result is equally likely to be $X_1$ as $X_2$, the Borak/Sirianni formula for ''percentage difference'' increases some percentage differences and decreases others. Nevertheless, as shown in this example, the Borak/Sirianni formula artificially increases the count of differences exceeding 10% (or any other specified value). Furthermore, as will be explained later, the Borak/Sirianni formula for ''percentage difference'' induces an even greater systematic bias in their analysis of the 31-Mine Study subset.

5. The Borak/Sirianni analysis ignores heterogeneity of the analytical CV within the range of EC loadings considered. As indicated by Figure IX–2, the frequency of relatively large percentage differences would be expected to increase at low EC loadings. The method shown in ''Metal and Nonmetal Diesel Particulate Matter (Dpm) Standard Error Factor for TC Analysis,'' published on MSHA's Web site at *http://www.msha.gov/01–995/dieselerrorfactor.pdf,* provides one way of properly estimating analytical variability from the baseline paired punches while accounting for such heterogeneity. This method was also published as Appendix II of the 31-Mine Study (BKG–54–2) and as Appendix 2 of MSHA's web document on the error factor (AB29–BKG–61, cited as Ref. #4 by Borak/Sirianni).

To properly analyze the baseline paired punch data by the method of MSHA's web document on the error factor, the square root of each punch result (μg/cm²) is first calculated. Next, we calculate the difference between square roots within each pair and compute the standard deviation of these differences. The result for these data is an estimated SD of $\sigma = 0.175$. Contrary to the Borak/Sirianni conclusions, this is substantially less than the corresponding value, $\sigma_\tau = 0.256$, derived from EC analyses on 621 pairs of punches obtained during the 31-Mine Study and published in MSHA's web document on the error factor (Borak/Sirianni Ref. #4). Although Borak/Sirianni stated that ''MSHA has not evaluated its proposed method by means of systematic determinations of the CV for samples obtained under real mining settings,'' their Ref. #4 contains such an evaluation based on real mine data (621 pairs of punches) obtained during the 31-Mine Study. The lower analytical variability exhibited in these baseline paired punch data, as compared to the 31-Mine Study, is not surprising, since, for the baseline samples, both punches within each pair were analyzed by the same laboratory. For the 31-Mine Study, this was not generally the case, so both intra- and inter-laboratory variability are included in $\sigma_\tau$.

As shown in MSHA's web document on the error factor, the analytical CV for an individual punch result ($X$) at a specified loading ($\mu$) is given by

[14] Note that, in this example, the relative deviation of either $X_1$ or $X_2$ from the midpoint between them is actually 10/202 = 4.95%. This would be the appropriate value for comparison to a CV or RSD quantifying measurement imprecision.

$$CV_{\mu}[X] = \sigma\sqrt{\frac{2}{\mu}}.$$

This quantity, which is plotted in Figure IX–2 using $\sigma = 0.256$, must be further divided by $\sqrt{2}$ to specify analytical imprecision for a 2-punch average, as in the value of $CV_A$ cited by Borak/Sirianni. Therefore, at an EC loading of $\mu = 10$ μg/cm², the estimated analytical error CV for a 2-punch average is 8.1% using $\sigma = 0.256$ (as in MSHA's web document on the error factor) or 5.5% using $\sigma = 0.175$ (based on the baseline paired-punch data). For simplicity, the effect of applying a blank adjustment (by means of a control filter) has been left out of these calculations. However, the formula for $CV_A$ provided in MSHA's web document (AB29–BKG–61) does account for the effect of a blank adjustment on analytical variability.

31-Mine Study Subset

The third body of data examined in the Borak/Sirianni analysis consisted of 63 pairs of EC results extracted from the 31-Mine Study. As in the baseline paired punches, each pair consisted of the results for two punches taken from the same sample filter. Each analytical EC punch result was converted to a blank-adjusted EC concentration (μg/m³) and multiplied by 1.3.

No explanation was provided as to why these particular 63 pairs were included in the Borak/Sirianni analysis while about 750 other paired punch results available from the 31-Mine Study were excluded. However, by examining the identification numbers of the 63 samples included, MSHA determined that they included 52 samples collected from the three trona mines involved in the 31-Mine Study, along with 11 samples collected from one of the lead/zinc mines. All 63 of these samples had one of the punches acidified so that the effects of such acidification could be evaluated. But this was apparently not the only inclusion criterion, since the Borak/Sirianni analysis excluded approximately 150 other paired-punch samples in which one of the punches was acidified. Acidification is the process by which carbonates ($CaCO_3$) are chemically removed from a DPM sample prior to the Method 5040 analysis. The collected DPM filter is exposed to hydrochloric (HCl) acid vapors. The chlorine combines with the calcium; carbon dioxide and water are evolved from the sample. Results from the 31-Mine Study showed that the submicron impactor successfully removed the carbonate minerals from the sample, and that acidification was not required prior to the analysis.

MSHA based its statistical analysis of EC analytical precision (AB29–BKG–61) on all 621 paired-punch samples from the 31-Mine Study for which (1) valid analytical results were available on both punches and (2) both punches had received identical treatment with respect to acidification. Since all 63 samples included in the Borak/Sirianni analysis had one punch acidified and the other not acidified, they, along with approximately 150 other such samples were excluded from MSHA's statistical analysis of analytical precision.

The Borak/Sirianni method of analyzing these data was, with one notable exception, identical to the method they used for the baseline paired punches. As in their statistical analysis of the baseline paired punches, they tabulated, for these 63 samples, the frequency of cases in which the ''percentage difference'' fell into three categories: 0–4.99%, 5–9.99%, and ≥10%. The only methodological difference was that, for these data, the percentage difference was always calculated relative to the lower of the two punch results within each pair. Borak/Sirianni provided no explanation or justification for why they rearranged the data within each pair so that the lower value always appears as ''Punch A'' and thus forms the denominator in their calculation of percentage difference.

The Borak/Sirianni analysis reached the same conclusion with respect to this dataset as with the baseline paired punches: that ''it is almost certain'' that these data ''document failure to meet the NIOSH and MSHA acceptability criteria.'' Likewise, since they used essentially the same statistical method, the authors reproduced the same five fallacies described earlier in connection with the baseline paired punches. There are, however, at least three more reasons why the Borak/Sirianni analysis of this particular dataset is invalid, in addition to points 1–5 above:

6. One of the punches in each pair was acidified, and the other was not. Therefore, differences in the analytical results within pairs confound analytical variability with the potential effects of acidification and differential handling. For this reason, these 63 samples (along with all others that were similarly treated) were excluded from MSHA's paired-punch analysis of analytical variability (AB29–BKG–61).

7. Fifty of the 63 Punch A results (79%) fell below 10 μg/cm² and 33 of them (52%) fell below 5 μg/cm². As shown in Figure 2, EC loadings below 5 μg/cm² exhibit substantially greater analytical variability than loadings corresponding to EC concentration limits anticipated in the second partial settlement agreement. Indeed, results for the three samples showing the greatest ''percentage difference'' all fell below the minimum value (2 μg/cm²) normally reported by a laboratory EC analysis.

8. In addition to the bias explained under point 4 above, the Borak/Sirianni calculation of ''percentage difference'' was further biased by rearranging the data within each pair so that the ''Punch A'' result ($X_1$) is always less than ''Punch B'' ($X_2$). If the Punch A and B designations (as provided in the original 31-Mine Study spreadsheet) had been left unchanged, then the ''percentage difference'' would sometimes have been calculated relative to the lower value and sometimes relative to the higher, as in the Borak/Sirianni analysis of the baseline paired punches. In their analysis of the 31-Mine Study subset, however, the lower of the two values always forms the denominator for the ''percentage difference.'' This yields systematically higher percentages than a denominator equal to the average of the two punches.

The sample identified as SKC–1D–166 illustrates the impact of points 7 and 8 on the Borak/Sirianni analysis and conclusions. In the original spreadsheet, the EC results for Punch A and B, prior to any blank adjustment, were 0.92 μg/cm² and 0.76 μg/cm². Under normal procedures, EC values this low would not even be reported by the laboratory. However, the percentage difference, relative to the average of these two values, is 9.5%. A percentage difference of this magnitude is inconsequential, given that the mean EC loading is only 0.84 μg/cm². In the Borak/Sirianni analysis, however, a blank adjustment of 0.58 μg/cm² was applied to both punch results, yielding adjusted values of 0.34 and 0.18 μg/cm². The punch A and B designations were then switched, and the percentage difference was calculated relative to the lower value, yielding a reported 89% difference. (If the punch A and punch B designations had not been switched, then Borak/Sirianni would presumably have reported the ''percentage difference'' as 47%.) Thus, the reported percentage difference is mostly an artifact of applying the blank adjustment to such small EC loadings and of calculating the percentage relative to the lower value.

Despite the additional potential variability attributable to differential handling of the punches, punch-to-punch variability in this dataset appears to be well within acceptable limits when the EC loadings are taken into account. The estimated value of σ calculated for these 63 data pairs by the method of MSHA's web document on

the error factor is 0.090. This is substantially lower than the corresponding value ($\sigma\tau = 0.256$) used in the calculation of $CV_A$ for the average of two blank-adjusted punches as described in MSHA's web document (AB29–BKG–61). Therefore, contrary to the Borak/Sirianni assessment, this dataset exhibits less variability than what MSHA has assumed in determining an appropriate error factor. MSHA believes that this data, when analyzed correctly, verifies that the sampling and analytical method meet the NIOSH criteria.

*B. Section 57.5060(c)*

Section 57.5060(c) of the 2001 final rule allows mine operators to apply to the Secretary for additional time to meet the final concentration limit of $160_{TC}$ $\mu g/m^3$ of air. Operators are allowed only one special extension per mine, which cannot exceed a period of two years. The rule also contains certification and posting requirements and requires operators to provide a copy of the approved application to the authorized representative of miners. The rule, however, does not apply to the interim concentration limit.

In the DPM settlement agreement, MSHA agreed to adapt this provision to apply it to the interim EC limit, include consideration of economic feasibility, and allow for annual renewals of special extensions. MSHA proposed to revise the standard pursuant to the terms of the settlement agreement.

Unlike the 2003 NPRM, final § 57.5060(c)(1) does not expand the scope of the provision to the interim PEL. Instead, MSHA has decided to retain the scope of the 2001 final rule so that a special extension applies solely to the final concentration limit. MSHA believes that the feasibility data in the rulemaking record does not justify providing for an extension of time in which to comply with the interim PEL. MSHA found that the baseline sampling results project that 63% of miners sampled were not overexposed to the interim DPM limit. In the 2001 final rule, MSHA intended that this provision apply to mine operators who needed more time to implement technological solutions to control DPM in their individual mines. Also, MSHA wanted to give mine operators some flexibility where the regulatory scheme prohibited administrative controls and respiratory protection. Under this final rule, MSHA has included its traditional hierarchy of controls. The test for determining if an individual operator has implemented all feasible controls is very similar to that for qualifying for a special extension absent burdensome paperwork requirements.

MSHA believes that by incorporating the hierarchy of controls approach, this final rule addresses the primary concern expressed by industry commenters who supported special extensions: that compliance with the interim DPM limit using engineering and administrative controls alone is not feasible for each individual operator's circumstances. MSHA, however, has decided to retain the 2001 requirement, as revised, for the final concentration limit. At this time, the DPM rulemaking record does not contain sufficient information to delete the requirement as it applies to the final limit.

In final § 57.5060(c)(1), MSHA will consider both economic and technological feasibility when determining whether operators qualify for a special extension for the final concentration limit. MSHA believes that both technological and economic feasibility must be assessed on a case-by-case basis. Therefore, mine operators will have an opportunity to demonstrate to MSHA that there is no cost-effective solution to reducing a miner's exposure to DPM.

Section 57.5060(c)(1) also authorizes the MSHA District Manager, rather than the Secretary, to approve special extensions to the final concentration limit. MSHA believes that the district managers have extensive knowledge of the specific conditions and circumstances that exist at mines within their regions. Consequently, MSHA has determined that they are the appropriate entity to assess technical and economic feasibility issues at mines. In unusual or particularly complex circumstances, district staff may be assisted by personnel from MSHA's Directorate of Technical Support.

When determining whether to grant a special extension for complying with the final concentration limit, MSHA will apply the criteria of the standard. MSHA will conduct an analysis of the circumstances at a mining operation to determine whether the mine operator has exhausted all feasible engineering and administrative controls before using respiratory protection to supplement controls. A mine operator's application for an extension must include information that explains why the operator believes engineering and administrative controls sufficient to achieve compliance with the applicable limit are economically and/or technologically infeasible. The application also must include the most recent DPM monitoring results, and specify the actions the operator intends to take during the extension period to minimize miners' exposures to DPM, such as monitoring, ordering controls, adjusting ventilation, respiratory protection, and other good faith actions of the mine operator. The circumstances under which MSHA requires respiratory protection are in this final § 57.5060(d). In order for MSHA to approve an application for a special extension, MSHA will evaluate whether the mine operator has utilized all feasible controls. Such an evaluation will involve consideration of numerous factors including the specific mining conditions, type of mining equipment used, nature of the overexposure, controls used by the mine operator, and MSHA policy and case law governing the economic and technological feasibility of controls. Comprehensive discussion regarding economic and technological feasibility, and enforcement of feasible controls is included elsewhere in this preamble.

Where an extension is granted, overexposed miners will be required to wear respiratory protection under a respiratory protection program as specified in § 57.5060(d). As MSHA stated in the preamble to the 2003 NPRM, it does not intend for PPE to be permitted during an extension period as a substitute for feasible engineering and administrative controls. Rather, MSHA will require mine operators to implement all feasible engineering and administrative controls to reduce exposures to the applicable limit, or if that is not possible, to the lowest level feasible. Once these controls are implemented, MSHA will consider whether to grant the extension. During the period of the extension, the mine operator will be required to maintain these engineering and administrative controls, along with implementation of a respiratory protection program fully compliant with ANSI Z88.2–1969 for all miners whose exposure to DPM continues to exceed the applicable DPM limit.

Like the 2003 NPRM, § 57.5060(c)(2) of the final rule retains the requirement for the mine operator to certify that one copy of the application was posted at the mine site for at least 30 days prior to the date of application, and another copy was provided to the authorized representative of miners. It is the agency's position that such advance notification provides miners with the opportunity to provide comments to the District Manager regarding the information provided by the mine operator in the application. This record also is subject to access to records requirements under § 57.5075 of the 2001 final rule.

One commenter questioned the need for the requirement under § 57.5060(c)(2) to provide advance notification to a miners' representative when a mine operator is going to submit an application for a special extension. This commenter suggested instead that it is sufficient to give a copy to the miner's representative at the time the application is submitted. MSHA disagrees for the above reasons.

Final § 57.5060(c)(3) limits each special extension to a period of one year from the date of approval, and removes the limit on the number of special extensions that may be granted to each mine. MSHA's determination is based on limited data in the rulemaking record at this time to conclude that mine operators feasibly can meet the final DPM limit.

MSHA also considered longer durations for special extensions. MSHA acknowledges that durations longer than one year would reduce the paperwork burden on mine operators. However, MSHA rejected the concept, since MSHA has observed rapid progress in the development of improved DPM control technology since 2001. Moreover, introduction of new mining equipment models increasingly include features aimed at better reducing DPM exposures, such as cleaner engines and better environmental cabs. It is not MSHA's intent to allow mine operators to use respiratory protection for extended periods of time where controls are feasible.

Other commenters who supported the proposed changes to § 57.5060(c) wanted the criteria used for granting or denying a special extension to be communicated clearly and unambiguously to the mining industry in the body of the standard. Moreover, these commenters wanted MSHA to give a mine operator an extension if the operator meets the criteria under this standard.

Given that each mine has unique circumstances affecting economic or technological feasibility to comply with the DPM standard, MSHA chose to include generic criteria in the standard for mine operators to develop and for MSHA to consider in granting extensions.

Final § 57.5060(c)(4) requires mine operators to comply with the terms of an approved application for a special extension. This provision also requires mine operators to post a copy of the approved application at the mine site for the duration of the extension, and provide a copy to the authorized representative of the miners.

One commenter stated that posting a copy of the application on the mine bulletin board for the duration of the extension is excessive. As an alternative, this commenter suggested posting the application for a sufficient time for miners to view it. MSHA believes that miners and their representatives should have the right to review the approved special extension at the mine site for the duration of its effectiveness. Consequently, MSHA has retained the posting requirement in this final rule.

MSHA requested comments on whether proposed § 57.5060(c) would be necessary in light of MSHA's recommendations to prescribe use of feasible engineering and administrative controls supplemented by respiratory protection. MSHA also requested that the public give examples of how this requirement would benefit mine operators if it were included in the final regulatory framework. MSHA stated in the preamble to the 2003 NPRM that it was interested in avoiding duplication and increased paperwork for the mining industry to resolve feasibility issues at individual mining operations. Therefore, MSHA was seeking further input from the public on the need for proposed § 57.5060(c) and how this provision fits within the comprehensive structure of the current rulemaking.

With respect to the interim limit, MSHA agrees with the commenter who observed that MSHA routinely handles compliance problems that are due to circumstances beyond the control of the mine operator without special extensions, and that therefore, if these same procedures are followed with respect to DPM, special extensions of the interim DPM limit are not justified. The commenter's other suggestion that remaining issues regarding special extensions be deferred until rulemaking begins on the final DPM limit will be considered by MSHA at that time. Until then, provisions relating to special extensions to the final DPM limit have been retained in this final rule.

MSHA apprised the mining community in the proposed preamble of its concerns over whether a special extension is necessary given the changes to the methods of compliance in the new final rule. MSHA believes that these revisions accomplish the same objective as a special extension, but without the associated paperwork and recordkeeping. MSHA explained that it believed special extensions were appropriate in the context of the original 2001 final rule, because it prohibited respiratory protection and administrative controls as means of compliance. The 2001 final rule would have required mine operators to comply with the applicable DPM limit using only engineering and work practice controls. Respiratory protection and administrative controls (defined uniquely as job rotation) were expressly prohibited as means of compliance.

Numerous comments to the 2003 NPRM were received concerning this provision. Several commenters supported the proposed changes to § 57.5060(c). Some other commenters supported the proposed changes, but suggested that an appeals process should be specified so a mine that is denied a special extension by the District Manager could appeal that decision to a higher authority. Several commenters who supported the addition of an appeals process suggested that a time limit of 30 days be imposed on the District Manager to determine whether to grant a special extension. In addition, they suggested that an additional 60 days be provided for an appeal if the District Manager does not grant the special extension. MSHA believes that the Mine Act currently affords mine operators adequate due process rights to a hearing on the merits before an administrative law judge (ALJ) of the independent Commission. If an operator disagrees with the ALJ's decision, the operator may request an appeal before the Commission, which is composed of five independent commissioners. Any person adversely affected by a determination of the Commission may obtain review from a U.S. court of appeals for the applicable circuit. For the foregoing reasons, MSHA sees no reasonable basis for creating parallel procedures to accomplish the same objective as existing procedures.

One of the commenters suggested that MSHA grant extensions prior to issuance of a citation for an overexposure to DPM, rather than using the citation as the triggering event that initiates the special extension process. Under the final provision, a citation does not need to be issued before MSHA can grant an extension. MSHA, however, must assess feasibility of compliance before granting an extension or denying an application for an extension. If MSHA finds a miner overexposed to DPM and the mine operator does not comply with all aspects of § 57.5060(d), MSHA will cite the operator for noncompliance.

Several comments were received that were opposed to any form of special extension or any mechanism by which mine operators could delay compliance with the applicable DPM limits using exclusively engineering or work practice controls. Commenters who opposed special extensions stated that MSHA lacks evidence to substantiate the need

for expanding the scope of the special extension provision to include the interim limit. These commenters believe that the rulemaking record adequately documents feasibility of the mining industry, as a whole, to comply with the DPM limits. Commenters noted that MSHA requested examples that substantiate this need, but none were submitted by the mining industry. One commenter suggested that just because some operators require technical help doesn't mean the rule is infeasible for the industry as a whole. This commenter also noted that the proposed changes to the special extension provision address both the interim and final DPM limits, despite the fact that the preamble to the 2003 NPRM stated that MSHA, ''is only now seeking information about whether the final limit needs to be changed.''

MSHA wishes to clarify that it proposed making changes to § 57.5060(c) that would have applied special extensions to both the interim and final DPM limits. MSHA strongly agrees that the mining industry, as a whole, can comply with the interim PEL. Also, the 31-Mine Study, baseline sampling results, compliance assistance visits, and MSHA's current experience with enforcing a comparable interim limit all sustain MSHA's determination regarding the interim PEL. MSHA, however, does not have adequate evidence at this time to delete the special extension requirement for the final concentration limit.

Commenters opposed to special extensions also expressed that the proposed changes to the special extension provision are less protective than the existing provision because respirators could be substituted for more protective engineering and work practice controls. These commenters stated further that such action violates the Mine Act requirement in Section 101(a)(6)(a) that such rules attain the highest degree of protection for miners, with feasibility as a consideration. Since these commenters believe feasible engineering and work practice controls exist for the industry as a whole to comply with the applicable DPM limits, they reasoned that a provision permitting compliance by respirators would constitute a diminution of protection to miners. MSHA disagrees. Nowhere does this final rule allow respiratory protection in lieu of feasible engineering and administrative controls. If anything, MSHA has provided greater protection for miners by allowing prompt usage of supplemental protection for miners when feasible controls have been exhausted.

*C. Sections 57.5060(d) and 57.5060(e)*

Section 57.5060(d) of the 2001 final rule permits miners engaged in specific activities involving inspection, maintenance, or repair activities to work in concentrations of DPM that exceed the interim and final limits, with advance approval from the Secretary. MSHA specifies in the standard that advance approval is limited to activities conducted as follows:

(i) For inspection, maintenance or repair activities to be conducted:

(A) In areas where miners work or travel infrequently or for brief periods of time;

(B) In areas where miners otherwise work exclusively inside of enclosed and environmentally controlled cabs, booths and similar structures with filtered breathing air; or

(C) In shafts, inclines, slopes, adits, tunnels and similar workings that the operator designates as return or exhaust air courses and that miners use for access into the mine or egress from the mine;

Operators must meet the conditions set forth in the standard for protecting miners when they engage in the specified activities in order to qualify for approval of the Secretary to use respiratory protection and work practices. MSHA considers work practices a component of administrative controls.

In tandem with this requirement is § 57.5060(e) of the 2001 final rule which prohibits use of respiratory protection to comply with the concentration limits, except as specified in an approved extension under § 57.5060(c), and then, only for activities related to inspection, repair, or maintenance activities. Additionally, Section 57.5060(f) of the 2001 final rule prohibits use of administrative controls to comply with the concentration limits. On July 18, 2002, MSHA stayed §§ 57.5060(d), (e) and (f) of the 2001 final rule (67 FR 47296) pending completion of their revisions in this final rulemaking.

Pursuant to the DPM settlement agreement, MSHA proposed to adopt the same hierarchy of controls as required in MSHA's other exposure-based health standards for M/NM mines, and considered requiring application to the Secretary before respirators could be used to comply with the DPM standard. MSHA further specified that employee rotation would not be allowed as an administrative control for compliance with this standard.

As proposed, the new final rule on the interim limit requires that when a miner's exposure exceeds the PEL, operators must reduce the miner's exposure by installing, using and maintaining feasible engineering and administrative controls; except operators are prohibited from rotating a miner to meet the DPM limits. When controls do not reduce a miner's exposure to the DPM limits, controls are infeasible, or controls do not produce significant reductions in DPM exposures, operators must continue to use all feasible controls and supplement them with a respiratory protection program, the details of which are discussed below in this preamble. The new final rule does not include requirements for written administrative control procedures, written respiratory protection programs, medical examinations of respirator wearers or transfer of miners unable to wear respirators. Additionally, the new final rule deletes § 57.5060(e), prohibiting respiratory protection as a method of compliance with the DPM rule, and § 57.5060(f), prohibiting the use of administrative controls for compliance with the 2001 final rule.

The new final rule does not give preference to engineering controls over administrative controls. MSHA will require all feasible controls, of both types if necessary, to be implemented to reduce a miner's exposure to DPM. Employee rotation, however, is not permitted as an administrative control under this standard. Under the new final rule, mine operators have a choice of which control method they will use first. MSHA intended for mine operators to have the flexibility to choose to start with engineering or administrative controls, or a combination of both, for the control method that best suits their circumstances.

MSHA, however, believes that engineering controls should be included in the first tier of any control method for protecting miners against exposure to airborne contaminants. Engineering controls provide a permanent method of modifying the exposure source, or they modify the environment of the exposed miner. As a result, they decrease the miner's exposure to hazardous levels of DPM. Moreover, engineering controls are more consistent and reliable protection for miners. The effectiveness of engineering controls can be readily determined and assessed. Routine maintenance of engineering controls provides greater effectiveness.

In the 2001 final rule, MSHA uniquely defined administrative controls as ''worker rotation.'' MSHA historically has considered other types of controls, besides worker rotation, to be administrative controls, including work practice controls which MSHA permits under this new final rule.

Work practice controls are changes in the manner work tasks are performed in

order to reduce or eliminate a hazard. MSHA strongly believes that these types of administrative controls do not compromise miners' health and safety and do not reduce the level of protection provided miners under the existing final rule. Moreover, mine operators should be given the flexibility to choose to start with either engineering or administrative controls, or a combination of both, for the control method best suited for their mines. Some examples of work practice controls include: Minimizing engine idling; limiting number of diesel-powered equipment operating in an area; reducing or limiting engine horsepower; hauling upgrade in exhaust drifts rather than in intake; and limiting the number of persons working in high exposure areas.

MSHA's regulatory scheme for its hierarchy of controls is based on its current enforcement policy for its airborne contaminants which are included in MSHA's M/NM air quality standards (30 CFR 56/57.5001–.5006). Under these standards, MSHA requires mine operators to abate a citation for an overexposure to airborne contaminants by using feasible engineering and administrative controls to reduce the miner's exposure to the contaminant's exposure limit. Respiratory protection is required to supplement feasible controls that do not reduce a miner's exposure to the permissible level. The air quality standards do not contain a requirement for mine operators to develop written administrative control procedures, nor does MSHA's enforcement policy require a written respiratory protection program. (See *MSHA Program Policy Manual, Volume IV, Parts 56 and 57, Subpart D, §§ .5001 and .5005, August 30, 1990*).

Some commenters opposed changing the control method from that of the 2001 final rule, while others supported removing the prohibition on administrative controls and respirators in order to have greater compliance flexibility. MSHA agrees that operators should be afforded greater flexibility of compliance where such modifications to the DPM standard do not compromise or lower miners' health protection from that provided under the 2001 final rule. Additionally, miners should be afforded the added protection of respirators when engineering and administrative controls are not feasible, cannot reduce DPM exposures to within permissible limits, or cannot achieve significant reduction in DPM levels.

MSHA evaluated the potential consequences of relying on the hierarchy of controls in the final rule. MSHA also examined different control methods but abandoned them since they were less protective than those in the 2001 final rule. These approaches included allowing rotation of miners, and respiratory protection upon application to the Secretary of Labor. MSHA also examined giving preference for engineering controls as a first resort with a lesser role for administrative controls, including work practices. Though some of these approaches would save money for the mining industry, MSHA found that they either could be less protective or, in some cases, too restrictive for the mining industry in complying with the DPM rule. There is also insufficient scientific evidence in the rulemaking record to justify some of these changes for controlling exposure to a potential human carcinogen. For example, allowing worker rotation would increase the number of persons exposed to a potential carcinogen and thereby increase the number of individuals at risk.

Commenters suggested that MSHA lacks legal justification for its hierarchy of controls and reliance on other MSHA rules does not justify this approach. Many commenters believe that MSHA should allow mine operators to use respiratory protection on an equal footing with engineering and administrative controls. In fact, some commenters believe that respiratory protection is an engineering control. MSHA disagrees. MSHA believes that it has adopted an approach that is supported by the best available evidence and sustains the standard industrial hygiene practice to rely first upon engineering and administrative controls to reduce a person's exposure to hazardous airborne contaminants.

Throughout this rulemaking, MSHA has asked the mining community for their views on the appropriate role for administrative controls, and whether it would be necessary for MSHA to require written administrative procedures. In response to the 2003 NPRM, the mining industry strongly objected to written administrative procedures. Commenters stated that such a requirement would increase compliance costs and reduce efficiency and personnel availability. Organized labor recommended that MSHA require operators to have written administrative control strategies and post them on the mine's bulletin board.

MSHA's M/NM air quality standards do not require that administrative controls be in writing. However, written administrative controls are required under MSHA's more recently promulgated noise standard at 30 CFR part 62. Although the 2001 final rule specifically prohibits the use of administrative controls, it does not prohibit other types of work practices which MSHA considers to be administrative controls. The 2001 final rule does not include a requirement that mine operators develop a written work practice control strategy when using such controls to achieve compliance with the PEL, however, MSHA recommends it as a good industrial hygiene practice. MSHA is relying upon its current experience under the air quality standards that do not include written administrative control procedures. Thus far, the lack of these written procedures has not hindered MSHA's effective enforcement of its air quality standards. Where possible, MSHA is avoiding additional paperwork burdens under the final DPM rule.

MSHA also proposed to prohibit rotation of miners as an administrative control to comply with the final DPM rule. Most commenters requested that job rotation be allowed because it is a low cost control method and it increases management flexibility to achieve compliance. These commenters, however, offered no scientific evidence in support of their position. Organized labor and some other commenters opposed allowing worker rotation. They stated that rotation may reduce the risk to an individual miner, but it will not necessarily reduce the overall risk to the population of miners; also, depending on the shape of the dose response curve, it may actually increase the population risk, resulting in more cancer overall.

As stated earlier, the 2001 risk assessment upon which this rule is based classifies DPM as a probable human carcinogen. The majority of scientific data for regulating exposures to carcinogens supports that job rotation is an unacceptable method for controlling exposure to both known and probable human carcinogens because it increases the number of persons exposed. Recent OSHA chemical-specific regulations for both known human carcinogens and probable human carcinogens prohibit job rotation as a means of compliance. Examples include the OSHA standards for asbestos, butadiene, and ethylene oxide, which are known human carcinogens (based on the CDC National Toxicology Program (NTP) Report on Carcinogens for 2002 (*Report on Carcinogens, Tenth Edition; U.S. Department of Health and Human Services, Public Health Service, National Toxicology Program, December 2002.*)), and OSHA standards for methylenedianiline at 29 CFR § 1910.1050 and methylene chloride, (29 CFR § 1910.1052), which are reasonably anticipated to be human carcinogens (based on the same NTP report). DPM

also appears on the NTP listing of chemicals that are reasonably anticipated to be human carcinogens. Therefore, based on the scientific data in the DPM rulemaking record, final § 57.5060(e) retains the prohibition on the rotation of miners as an administrative control used for compliance with this the DPM rule.

Engineering controls are intended to refer to controls that remove the DPM hazard by applying such methods as modification, substitution, isolation, enclosure, and ventilation. MSHA would consider a control to be effective in reducing DPM exposure if credible scientific or engineering studies conclude that a control will achieve a significant reduction in exposure. Additionally, MSHA will consider a control to be effective if MSHA finds that similar diesel equipment operating under similar conditions has demonstrated that the equipment is capable of significantly reducing exposures. These significant reductions may be achieved either by a single control, or in combination with other controls, and in either laboratory or field trials. MSHA believes that a 25% or greater reduction in DPM exposure is significant. MSHA discusses this issue in more detail in the Feasibility section of this preamble.

MSHA considers certain traditional methods for control of exposure to airborne contaminants to be technologically feasible for controlling exposures to DPM, such as improved ventilation (main and/or auxiliary) and enclosed cabs with filtered breathing air. Improving ventilation may involve upgrading main fans, use of booster fans, and use of auxiliary fans that may or may not be connected to flexible or rigid ventilation duct, as well as installation of ventilation control structures such as air walls, stoppings, brattices, doors, and regulators. At most mines, cabs with filtered breathing air are technologically feasible for many newer model trucks, loaders, scalers, drills, and other similar equipment. However, use of enclosed cabs with filtered breathing air may not be feasible as a retrofit to certain older equipment or where the function performed by miners using a particular piece of equipment is inconsistent with any type of cab (*e.g.*, loading blastholes from a powder truck, installing utilities from a scissors-lift truck) or where the height of the mine roof is insufficient for cab clearance. Other examples of effective DPM engineering controls that MSHA would consider to be technologically feasible include: DPM exhaust filters; certain alternative fuels; fuel blends; fuel additives; fuel pre-treatment devices; and replacement of older, high-emission engines with modern, low-emission engines.

MSHA asked for comments on the appropriate role for respiratory protection in controlling DPM exposure. Although commenters disagree on the types of restrictions that MSHA should place on their use, most commenters indicated that respirators with some restriction on their use should be permitted as a means of compliance with the DPM limits. Some commenters believe MSHA DPM regulations should conform verbatim to the current respirator requirements in MSHA's air quality standards at 30 CFR 57.5005. Other commenters felt that the only change MSHA should make to the existing requirements for respirator use in 30 CFR 57.5005, would be to add requirements for filters. Comments were received from those who believe that PPE such as respiratory protection may be far more effective in protecting miners from suspected DPM health effects than any available and feasible engineering control technology.

Other commenters suggested MSHA model its respirator program after OSHA's generic standard for respiratory protection at 29 CFR 1910.134. One commenter said that routine use of respirators for any normal production job or activity should be allowed only under a special extension and only for the final exposure limit, or where controls are in the process of being installed. They and other commenters also said that respirators are hard to tolerate under the best of conditions, and that a 10-minute break should be allowed every two hours, so the miner can remove the respirator in clean air. Another commenter requested that respirators not be used for the purpose of determining compliance. Some of the objections to the use of respirators that were given by commenters are: Respirators leak, interfere with communication, increase the work of breathing, and are stressful; instead of creating one system to protect all workers, use of respirators creates one system per worker, each of which needs maintenance; some workers cannot wear respirators for a variety of reasons; and routine use of respirators breeds carelessness.

MSHA agrees that respiratory protection does not provide comparable protection to that of engineering and administrative controls. Therefore, the new final rule only requires respiratory protection as a supplement to feasible engineering and administrative controls. When controls do not reduce a miner's DPM exposure to the limit, controls are infeasible, or controls do not produce significant reductions in DPM exposures, then controls must be used to reduce the miner's exposure to as low a level as feasible and be supplemented with respiratory protection in accordance with 30 CFR 57.5005(a), (b), and 30 CFR 57.5060(d)(1) and (d)(2).

Based on observations and experience in underground M/NM mines, MSHA continues to believe that feasible engineering and administrative controls exist to adequately address most overexposures to the interim DPM limit. However, MSHA is not persuaded that all DPM overexposures can be eliminated through implementation of feasible engineering and administrative controls alone. Extra protective measures such as those afforded by respiratory protection must be taken to protect miners in such circumstances. Therefore, MSHA's final § 57.5060(d) conforms to the current respirator requirements in MSHA's air quality standards in § 57.5005, with the addition that the types of filters appropriate for protection from DPM are specified.

Type of Respiratory Protection

In the 2003 NPRM, MSHA proposed that filters for air purifying respirators, used to comply with the DPM limits, be certified in accordance with 30 CFR part 11 as a high efficiency particulate air (HEPA) filter; certified per 42 CFR part 84 as 99.97% efficient; or, certified by NIOSH for DPM. Additionally, the 2003 NPRM would have required that non-powered, negative-pressure, air purifying, particulate-filter respirators use an R-or P-series filter or any filter certified by NIOSH for DPM. It also specified that R-series filters not be used for longer than one work shift.

MSHA requested comments on the type of respirators that would be suitable for protection against DPM. Some commenters suggested that various commercially available respirators, including those with filtering facepieces, were suitable for protection against particles smaller than DPM, and would therefore be suitable for DPM as well. NIOSH recommended that respirators used for protection against DPM have an R–100 or P–100 certification per 42 CFR part 84. NIOSH also recommended against using N-rated respirators since diesel exhaust contains oil, and aerosols containing oil can degrade the performance of N-rated filters.

As some commenters suggested, MSHA is adhering to the provisions for respiratory protection afforded in accordance with § 57.5005(a) and (b). However, § 57.5005(a) requires that respirators approved by NIOSH under

42 CFR part 84 which are applicable and suitable for the purpose intended be furnished and miners use the protective equipment in accordance with training and instruction. Currently, there is no non-powered, negative-pressure, air purifying, particulate-filter respirator certified by NIOSH as appropriate for protection from DPM. In order to protect miners from DPM exposure, MSHA is adopting the NIOSH recommendation that respirators be NIOSH certified per 42 CFR part 84 as a high-efficiency particulate air (HEPA) filter, certified per 30 CFR part 11 as 99.97% efficient, or certified by NIOSH for DPM. MSHA is technology-forcing in its rulemaking, and therefore, addressed the likelihood that a respirator may be approved in the future by NIOSH for DPM. MSHA is also adopting the NIOSH recommendation that filters used in non-powered, negative-pressure, air purifying respirators be either R- or P-series.

In MSHA PPL No. P03–IV–1, effective August 8, 2003, MSHA addressed the question of whether a powered air-purifying respirator (PAPR) could provide suitable respiratory protection from DPM. MSHA stated, ''Yes, if the PAPR is equipped with filters that meet one of the following criteria:

- Certified by NIOSH under 30 CFR part 11 as high efficiency particulate air (HEPA) filter;
- Certified by NIOSH under 42 CFR part 84 as 99.97% efficient; or
- Certified by NIOSH for DPM.''

This holds true for compliance with final § 57.5060, and MSHA's position will be reiterated in MSHA's compliance guide for the new final rule. MSHA believes that most workers who are medically unable to use a negative pressure respirator will be able to use a PAPR, which offers considerably less breathing resistance than a negative pressure respirator. Employees who cannot use a negative pressure respirator could be provided with a less physiologically burdensome respirator that will enable them to continue in their jobs protected against DPM exposure.

NIOSH also recommended that combination filters capable of removing both particulates and organic vapor be specified, since organic vapors and gases can be adsorbed onto DPM. MSHA, however, does not have data substantiating that a DPM overexposure would necessarily indicate an associated overexposure to organic vapors. Therefore, the final rule does not require respirators to be certified for organic vapor. If simultaneous sampling for DPM and organic vapors indicate overexposure to both contaminants, any subsequent citation(s) relating to the overexposures would require that respirators be used and equipped with a filter or combination of filters rated for both DPM and organic vapors.

Based on the above comments and discussion, MSHA's final rule on the interim limit requires that when respirators are used for compliance with the DPM limits, that air purifying respirators be equipped with either:

(i) Filters certified by NIOSH under 30 CFR part 11 as a high efficiency particulate air (HEPA) filter;

(ii) Filters certified by NIOSH under 42 CFR part 84 as 99.97% efficient; or

(iii) Filters certified by NIOSH for DPM.

Additionally, when non-powered, negative-pressure, air purifying, particulate-filter respirators are used for compliance, the final rule requires the use of an R- or P-series filter, or any filter certified by NIOSH for DPM, and that an R-series filter not be used for longer than one work shift.

*Written Respiratory Protection Program.* The 2003 NPRM recommended that when respirators were used for compliance with the DPM limits, their use be in accordance with MSHA Air Quality Standard, § 57.5005(a), (b), and § 57.5060(d)(1) and (d)(2). Section 57.5005(b) incorporates by reference, ANSI Z88.2–1969, ''American National Standards Practices for Respiratory Protection.'' ANSI 1969 contains numerous recommended practices for the appropriate selection, use, and maintenance of respirators. Included among these is a recommendation that written standard operating procedures governing the selection and use of respirators be established. MSHA's enforcement policy on its air quality standards has focused on several of the key recommendations in ANSI 1969, including fit testing, maintenance, and cleaning of respirators. MSHA's policy, however, is silent regarding the ANSI recommendation on written standard operating procedures. Accordingly, under the 2003 NPRM, a written respirator program would not have been required.

In MSHA's 2003 NPRM, it asked the mining community to submit further information for justifying a written respiratory protection program, including cost data, benefits to miners' health, and projected paperwork burden.

One commenter stated that it was wrong to create a respiratory protection requirement that treats exposure to DPM differently than other gaseous substances requiring the use of such protective means. Another commenter stated that proposing changes to MSHA's respirator standard creates multiple technical, scientific, medical, and economic issues that must be closely examined from the perspective of MSHA's statutory mandates. This commenter suggested that given the vast number of issues involved, it would be inappropriate to consider respirator standard changes in an ''expedited'' rulemaking limited to the DPM standard. Other commenters also suggested that MSHA address any additional respiratory protection requirements in a separate, generic rulemaking applicable to all contaminants. Some commenters opposed a written program because they believe the rule already carries too heavy a paperwork burden.

Commenters supporting a requirement for a written respirator program suggested that it is an essential element of a respiratory protection plan and that MSHA's requirements for respiratory protection should be modeled after OSHA's requirements in 29 CFR 1910.134.

MSHA agrees with commenters who believe that the final respiratory protection provisions should be consistent with the current air quality requirements. Therefore, MSHA has decided not to require that respiratory protection programs be in writing in this final rule.

*Medical Evaluation and Miner Transfer.* The 2003 NPRM did not include provisions addressing the medical evaluation of respirator wearers or the transfer of miners unable to wear respirators due to medical and psychological conditions. MSHA, however, asked for further information from the public as to whether the final rule should include requirements for medical examination and transfer. Commenters were asked to submit cost implications of such a program.

In MSHA's 2003 NPRM, it discussed this issue at length and asked commenters to provide their views for consideration in the final rule. Moreover, MSHA included in this discussion its statutory authority to promulgate, where appropriate, medical surveillance and transfer of miner requirements to prevent miners from being exposed to health hazards. The Mine Act provision addressing this issue is Section 101(a)(7) which states, in pertinent part:

> Where appropriate, such mandatory standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring miner exposure at such locations and intervals, and in such manner so as to assure the maximum

protection of miners. In addition, where appropriate, any such mandatory standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazards in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification.

Currently, MSHA standards do not require medical transfer of M/NM miners. Existing standards at 30 CFR 56/57.5005(b) for control of miners' exposures to airborne contaminants require that mine operators establish a respiratory protection program consistent with the ANSI Z88.2–1969 ''American National Standard for Respiratory Protection'' which includes medical determinations for potential respirator wearers. However, MSHA's air quality enforcement policy for M/NM mines is silent regarding this recommendation. ANSI Z88.2–1969 also does not include any recommendations regarding the transfer of persons unable to wear a respirator.

OSHA acknowledges within its current standards addressing respiratory protection at 29 CFR 1910.134(e) that use of a respirator may place a physiological burden on workers while using them. OSHA requires employers to provide medical evaluations before an employee is fit tested or required to use respiratory protection. Employers are required to have a physician or other licensed health care professional have the worker complete a questionnaire, or in the alternative, conduct an initial medical examination in order to make the determination. If the worker has a positive response to certain specified questions, the employer must provide a follow-up medical examination. The questionnaire is contained in the body of the OSHA rule. The preamble to the OSHA final rule states:

Specific medical conditions can compromise an employee's ability to tolerate the physiological burdens imposed by respirator use, thereby placing the employee at increased risk of illness, injury, and even death (Exs. 64–363, 64–427). These medical conditions include cardiovascular and respiratory diseases (e.g., a history of high blood pressure, angina, heart attack, cardiac arrhythmias, stroke, asthma, chronic bronchitis, emphysema), reduced pulmonary function caused by other factors (e.g., smoking or prior exposure to respiratory hazards), neurological or musculoskeletal disorders (e.g., ringing in the ears, epilepsy, lower back pain), and impaired sensory function (e.g., a perforated ear drum, reduced olfactory function). Psychological conditions, such as claustrophobia, can also impair the effective use of respirators by employees and may also cause, independent of physiological burdens, significant elevations in heart rate, blood pressure, and respiratory rate that can jeopardize the health of employees who are at high risk for cardiopulmonary disease (Ex. 22–14). One commenter (Ex. 54–429) emphasized the importance of evaluating claustrophobia and severe anxiety, noting that these conditions are often detected during respirator training. (See 63 FR 1152, at 330, 01/08/1998)

NIOSH, in its response to MSHA's proposed DPM rule, recommended that ''mine operators be required to have a written respiratory protection program, analogous to that required by OSHA for general industry in 29 CFR 1910.134 Respiratory Protection, that is work-site specific and includes administration by a trained program administrator, respirator selection criteria, worker training, a program to determine that the workers are medically able to use respiratory protective equipment, and provisions for regular evaluation of the program's effectiveness.''

Organized labor and industry were divided on this issue. In general, industry commenters oppose any additions to the respiratory protection requirements for compliance with the current air quality standards. Some commenters also suggested that MSHA address any additional respiratory protection requirements in a separate rulemaking applicable to all airborne contaminants. Organized labor strongly emphasized in their comments that to protect miners' jobs, the final rule must contain requirements for an effective respiratory protection program, including a written program, medical evaluation of respirator wearers, and transfer of miners unable to wear respirators. Some commenters stated that their respiratory protection programs already provide for medical examination of miners before they are required to wear respiratory protection. One commenter stated that in an underground mine, transfer of employees to areas free of diesel exhaust would be extremely difficult.

MSHA believes that it is feasible for mine operators to achieve compliance with the interim limit by using effective engineering and administrative controls in most circumstances. As a result, MSHA projects that there will be very few instances where miners will be required to wear respirators for long-term compliance. Further, mine operators have several alternatives in respirator selection. They can choose either positive- or negative-pressure respirators, or powered or non-powered air purifying respirators. Those few miners who have a medical condition that would prevent them from wearing a negative-pressure respirator could be provided with and could normally wear a powered air purifying respirator. MSHA believes that it would be a rare occurrence to encounter a miner who could not wear any type of respirator due to a medical condition.

Whereas MSHA agrees that there is sound evidence establishing that some persons may have difficulty wearing respirators and should be prohibited from wearing these devices, MSHA finds that many mine operators have voluntarily established programs to medically evaluate miners' ability to wear respirators. One document in the rulemaking record that supports this position was developed by the Bureau of Labor Statistics of the Department of Labor and the National Institute for Occupational Safety and Health. These two agencies issued a recent joint survey report entitled ''Respirator Usage in Private Sector Firms, 2001.'' This publication summarizes the results of a questionnaire mailed to over 40,000 general industry and mining companies. The survey found that 64% (2,246) of the estimated 3,493 mining companies that used respirators during the 12 months prior to the survey assess employees' medical fitness to wear respirators. The survey also found that 61% (2,138) of these mining companies have written procedures and schedules for maintaining respirators. The 3,493 mining companies, however, included establishments that extract oil and gas.

Although the Mine Act requires, where appropriate, that MSHA standards prescribe the type and frequency of medical examinations to determine whether the health of miners is adversely affected by exposure to hazards, it does not mandate medical examinations to determine a miner's ability to wear PPE for protection from those hazards.

Based on the above, MSHA believes a requirement for medical evaluation of respirator wearers, and transfer of miners unable to wear respirators is inappropriate for this rulemaking. Such requirements would have minimal application, particularly considering the extent to which mine operators are voluntarily implementing such

provisions and the limited long term use of respirators envisioned under the interim rule.

Application To Use Respirators

Section 57.5060(d) of the 2001 final rule permits miners engaged in specific activities involving inspection, maintenance, or repair activities to work in concentrations of DPM that exceed the interim and final limits, to use respiratory protection with advance approval from the Secretary. In MSHA's 2003 NPRM, it proposed several changes to its requirements on respiratory protection, including deleting the requirement that mine operators apply in writing to the Secretary for approval to use respiratory protection.

Although some commenters recommended requiring approval by the Secretary before respiratory protection should be permitted as a means of compliance with the applicable DPM limit, MSHA was not persuaded that such a step would be necessary, and the final § 57.5060(d) does not include this recommendation. Respiratory protection functions as a supplemental control. Operators must have ready access to respirators when they must be used to supplement protection provided by controls. When a mine operator is issued a citation under § 57.5060(d) for a miner's exposure exceeding the applicable DPM limit, and the mine operator intends to use respiratory protection as an interim control measure, MSHA will make certain that a respiratory protection program is established and appropriate respirators are used in accordance with § 57.5005(a), (b) and § 57.5060(d)(1) and (d)(2) concerning filter selection for air-purifying respirators. Accordingly, the requirement to apply in writing to the Secretary for approval to use respiratory protection can be deleted from the existing rule without reducing protection to the miners.

*D. Section 57.5061 Compliance Determination*

(1) Section 57.5061(a)

Under existing 57.5061(a), the Secretary determines compliance with ''an applicable limit on the concentration of [DPM] pursuant to § 57.5060.'' MSHA only proposed conforming changes to § 57.5061(a). As proposed, final § 57.5061(a) deletes the term ''concentration limit'' and replaces it with the term ''DPM limit'' to reflect a permissible exposure limit in § 57.5060(a) and a concentration limit in existing § 57.5060(b). MSHA did not receive comments specific to this conforming change. MSHA did not propose changes to the single sample compliance determination but received comments from industry on this issue. Those comments are beyond the scope of this rulemaking and not included in this preamble discussion.

(2) Section 57.5061(b)

Compliance determinations under existing § 57.5061(b) are based on TC measurements. As in the 2003 NPRM, final § 57.5061(b) reflects that compliance determinations will be based on EC measurements instead of TC. This change conforms to the proposed change in the interim limit in § 57.5060(a). Copies of the NIOSH 5040 Analytical Method can be obtained at *www.cdc.gov/niosh* or it can be obtained by contacting MSHA's Pittsburgh Safety and the Health Technology Center, P.O. Box 18233, Cochrans Mill Road, Pittsburgh, PA 15236. As a result, the address in the existing rule is removed from the regulatory language.

MSHA did not receive comments on this conforming change.

(3) Section 57.5061(c)

Under existing § 57.5061(c), the Secretary determined the appropriate sampling strategy for conducting compliance sampling utilizing personal sampling, occupational sampling, or area sampling, based on the circumstances of a particular exposure. MSHA proposed that § 57.5061(c) specify that only personal sampling would be utilized for compliance determinations. The final rule adopts this change which does not alter compliance requirements for mine operators.

MSHA believes that, since it has adopted EC as the surrogate for DPM, personal sampling alone will result in an accurate determination of miner exposure to DPM. Section 57.5060(a) establishes a DPM limit that specifically relates to the exposure of miners to DPM. Since the limit relates to the exposure of miners, the appropriate sampling method to determine compliance is personal sampling. In this respect, the sampling method for compliance determination with this rule is consistent with MSHA's longstanding practice of utilizing personal sampling to determine compliance with exposure limits for other airborne contaminants in the M/NM sector.

MSHA anticipates several benefits of standardizing personal sampling as the compliance sampling method. MSHA expects that mine operators and miners are already familiar with personal sampling, since MSHA utilizes it routinely when compliance sampling for noise, dust, and other airborne contaminants. Utilizing personal sampling eliminates possible disputes that could have arisen over whether an area sample was obtained ''where miners normally work or travel.'' Mine operators who choose to conduct environmental monitoring for DPM under § 57.5071 using MSHA's compliance sampling method will not need to anticipate which sampling method MSHA would most likely have selected (personal, area, or occupational) based on the circumstances of a particular exposure. Personal sampling avoids situations where area sampling is intended to capture the exposure of a particular miner for the full work shift even if that miner moves to a new location during the shift. Personal sampling for EC avoids the problem of determining compliance for an equipment operator who is a smoker and who works inside an enclosed cab. The measurement of DPM using EC as the surrogate is not affected by ETS. Under the existing rule, this miner could not be sampled inside the cab due to interference from tobacco smoke, and area sampling outside the cab would not indicate that miner's DPM exposure or the impact of the environmental cab.

Most industry and labor commenters supported personal sampling. A few commenters, however, were opposed to the elimination of area and occupational sampling for compliance determination. Two commenters suggested that relying on personal sampling alone would enable a mine operator to influence the sampling result to the mine operator's advantage by re-assigning a miner being sampled to an area with lower DPM levels. MSHA believes that although a mine operator may attempt to defeat compliance sampling by re-assigning the miner being sampled, MSHA's existing enforcement authority is adequate to ensure a valid and representative sample can nonetheless be obtained. If the miner being sampled for DPM is re-assigned to a different workplace with lower DPM levels, or the miner's DPM exposure is deliberately manipulated by some other means, such as by withdrawing a ''dirty'' piece of equipment from the area where the miner is working, the inspector has the authority to investigate the circumstances, and invalidate the sample if the inspector determines that the miner's workday was not representative.

Other commenters supported the retention of area and occupational sampling to give inspectors flexibility and to avoid sample tampering. While MSHA is sensitive to these issues, it

believes it has the authority to address them in existing enforcement procedures.

One commenter suggested that exposure be defined for this regulation as ''the exposure that would occur if the employee were not using respiratory protective equipment.'' MSHA agrees with this position but believes that it is unnecessary to be this specific in the regulation. MSHA's longstanding practice for assessing exposure to an airborne contaminant is to not give credit for respiratory protection in determining a worker's exposure. MSHA, however, does encourage workers to use respiratory protection.

MSHA believes that the use of EC as the DPM surrogate allows the exclusive use of personal sampling to establish compliance with the DPM limit. MSHA believes that this consistency in sampling strategy outweighs concerns of commenters.

*E. Section 57.5062 DPM Control Plan*

Existing § 57.5062 requires mine operators to establish a DPM control plan, or modify the plan, upon receiving a citation for an overexposure to the concentration limit in § 57.5060. A single citation triggers the plan. A violation of the plan is citable without consideration of the current DPM concentration level. The operator must demonstrate that the new or modified plan will be effective in controlling the DPM concentration to the limit. The existing rule also sets forth a number of other specific details about the plan, including a description of controls that the operator will use to maintain the DPM concentration; a list of diesel-powered units maintained by the mine operator; information about each unit's emission control device; demonstration of the plan's effectiveness; verification sampling; retention of a copy of the control plan at the mine site for the duration of the plan plus one year; and a plan duration of three years from the date of the violation requiring establishment of the plan. By notice of July 18, 2002, MSHA stayed the effectiveness of this standard pending completion of this rulemaking (67 FR 47296).

In accordance with the DPM settlement agreement, MSHA agreed to publish a notice of proposed rulemaking to revise current § 57.5062. The settlement agreement, however, did not specify how MSHA should revise this section. In its 2003 NPRM, MSHA proposed provisions to modify and simplify the plan requirements, including deleting the requirement for operators to demonstrate plan effectiveness by monitoring.

MSHA's rationale for requiring a DPM control plan was derived from the rule's initial approach to setting control requirements. MSHA recognized that every mine covered by this rule had unique conditions and circumstances that affect DPM exposures such as the number and sizes of diesel-powered engines, idling duration and frequency, emission controls, diesel maintenance practices, and ventilation. MSHA was also interested in developing uniform DPM control requirements that would be effective in protecting miners' health and practical for the mining industry to implement. MSHA acknowledges that there are numerous approaches in accomplishing this objective.

In the existing rule, the control plan would only have to include a description of the controls the operator would use to maintain the concentration of DPM to the applicable limit, a list of diesel-powered units maintained by the mine operator, information about any units emission control device, and the parameters of any other methods used to control the concentration of DPM. Operators could also consolidate the DPM control plan with ventilation plan.

In proposed § 57.5062, MSHA would require an operator to establish a written control plan, or modify an existing control plan, if it will take the mine operator more than 90 calendar days from the date of a citation to achieve compliance. A single violation of the PEL would continue to be the basis for triggering the requirement for a control plan. The control plan would remain in effect for a one-year period following termination of the citation. Mine operators would also be required to include in the plan a description of the controls that will be used to reduce the miners' exposures to the PEL.

Although MSHA proposed to retain the control plan, MSHA clearly alerted the mining community of the possibility that it would delete the control plan in the final rule. MSHA raised concerns with justifying the need for a control plan requirement in light of the other proposed revisions to the DPM rule, including MSHA's traditional hierarchy of controls for exposure-based standards. MSHA also currently maintains an inventory of the diesel-powered equipment in each mine. Consequently, MSHA asked the mining community for its views on this alternative approach in light of the other proposed changes to the DPM standard. MSHA received a number of comments on this issue.

Some commenters were in favor of retaining the control plan provisions and stated that MSHA had provided no evidence indicating that control plans are infeasible. Several other commenters who oppose deleting the control plan requirement stated that planning is essential for any complex activity, and that mine operators have spent a great deal of time and money in this rulemaking, arguing that the control of DPM is exceedingly complex. They felt it was hard to understand how mine operators could simultaneously argue that control plans are unnecessary.

Other commenters favored deleting existing § 57.5062 because the hierarchy of controls would ensure that operators employ all reasonable means to maintain allowable levels of DPM. Some of these commenters stated that if compliance cannot be achieved through engineering and administrative controls, they were required to use respiratory protection, and the end result would be that miners are protected from overexposure. They stated that a mine operator would get a citation if miners are not protected, and during the abatement period the operator must comply with DPM requirements addressing maintenance, after-treatment controls, low sulfur fuel, proper idling practices and tagging requirements.

Commenters opposed to retention of the control plan provisions felt that a control plan would add nothing to miner health, and create a paperwork burden. They stated the enforcement process provides all the documentation necessary for compliance. They also believe that the requirement for a control plan is a disproportionate response to a single overexposure. MSHA initially intended to apply a concentration limit that would result in controlling DPM in the underground mine environment. Since MSHA has changed the compliance approach from a concentration limit to a personal exposure limit, the control plan would have to address each miner's overexposure, rather than reducing mine-wide concentrations.

MSHA agrees with commenters who believe that the control plan is unjustifiable in the final rule. Moreover, the DPM rulemaking record contains little, if any, rationalization in support of retaining this provision. The hierarchy of controls in the final rule ensures that operators employ all means to maintain allowable exposure levels of DPM. MSHA is, therefore, deleting existing § 57.5062, DPM control plan. MSHA can monitor an operator's good faith efforts and obtain supporting documentation during regular inspections. Operators may choose to control DPM emissions by filtering the diesel-powered equipment; installing cleaner-burning engines; increasing ventilation; improving fleet

management; utilizing administrative controls; or using a variety of other readily available controls, all without consulting with, or seeking approval from MSHA.

MSHA also agrees with those commenters that expressed concerns about the increase in paperwork requirements. In promulgating standards for the mining industry, MSHA takes considerable initiative to avoid placing an unreasonable burden upon mine operators, especially small mine operators. It was never MSHA's intent to have unnecessary duplication of effort in obtaining compliance under the DPM rule.

The existing rule also contained a requirement in § 57.5062(c) that the operator must demonstrate plan effectiveness by monitoring. Although MSHA has deleted the control plan requirements in this final rule, MSHA believes that monitoring to verify the effectiveness of DPM controls is adequately addressed under § 57.5071, which requires mine operators to monitor in order to determine, under conditions that can be reasonably anticipated in the mine, whether DPM exposures exceed the applicable limits specified in § 57.5060. These requirements provide an effective alternative to the existing requirement in § 57.5062(c) for operators to demonstrate plan effectiveness by monitoring. Further, MSHA will conduct additional compliance sampling whenever MSHA suspects that miners' exposures to DPM are not being maintained to the PEL.

Although a control plan might serve to deter repeat overexposures, MSHA can utilize existing enforcement tools to accomplish this purpose. For example, MSHA often asks operators to provide a control strategy to justify extending citations. MSHA also documents action taken by the operator to comply when terminating a citation. Further, repeat overexposures can be cited with a higher degree of negligence that typically require a higher penalty assessment. Failure to correct overexposure conditions in a timely manner could also be addressed through existing mechanisms such as Section 104(b) of the Mine Act that includes sanctions currently employed for failure to abate violations.

*F. Section 57.5075 Diesel Particulate Records*

Existing § 57.5075(a) summarizes the recordkeeping requirements of the DPM standards contained in §§ 57.5060 through 57.5071. As proposed, MSHA has renumbered the Diesel Particulate Recordkeeping Requirements table and added the recordkeeping requirement established in existing § 57.5071(c) for records of corrective actions taken. This notation was inadvertently omitted from the table in the 2001 final rule.

MSHA also proposed that the record of corrective action be retained ''until the citation is terminated.'' MSHA has changed this retention period in the final rule to ''Until the corrective action is completed.''

As proposed, MSHA also has deleted the table entry for existing § 57.5060(d), ''approved plan for miners to perform inspection, maintenance or repair activities in areas exceeding the concentration limit,'' as the corresponding provision of the rule was deleted.

MSHA also deleted, as proposed, records relating to § 57.5062(c), ''compliance plan verification sample results.''

Finally, the final rule eliminates the additional recordkeeping requirements relating to control plans pursuant to § 57.5062 since this final rule deletes the existing requirements for such plans.

Of the comments received on the general subject of recordkeeping, only two were directed at the proposed changes to the recordkeeping requirements. Of the comments that were relevant to the scope of this rulemaking, most of the comments expressed concern about the recordkeeping burden required by § 57.5062(a) as related to control plans. As noted above, the control plan requirement has been removed from the final rule.

One of the two comments that addressed proposed changes to the recordkeeping requirements identified possible errors in the Diesel Particulate Recordkeeping Requirements table in § 57.5075(a) (Recordkeeping Requirements table). The commenter noted that the existing rule requires that a record of applications approved for extensions of time to comply with the exposure limits must be retained one year beyond the duration of the extension. The commenter stated that this requirement did not reflect MSHA's intent as stated in the preamble to the existing rule to retain this record for the duration of the extension. MSHA agrees that the recordkeeping requirement listed in the existing rule was in error. MSHA proposed to correct this error in the 2003 NPRM and has adopted the change in this rule. The final rule clarifies that the required retention time for this record is for the duration of the extension.

This commenter also noted that the retention time for evidence of corrective action taken as a result of a mine operator's environmental monitoring per § 57.5071(c) was listed in Table 57.5075(a) in the 2003 NPRM as, ''Until the citation is terminated.'' MSHA agrees that this table entry is in error, as a citation would not be issued on the basis of an operator's environmental monitoring. MSHA has corrected the table entry in the final rule to read ''Until the corrective action is completed.''

The other comment relating to proposed changes in recordkeeping requirements expressed the general concern that the information collection provisions of the rule are not necessary for MSHA to perform its functions. The commenter suggested reducing the paperwork burden by relying on current testing for gaseous emissions and deleting the final DPM limit from the rule.

MSHA believes that each record specified in § 57.5075 relates to information that MSHA must have access to in order to determine that the mine operator is complying with the corresponding provisions of the rule.

## X. Distribution Table

| Old section | New section |
|---|---|
| 57.5060(a) | 57.5060(a) |
| 57.5060(b) | 57.5060(b) |
| 57.5060(c) | 57.5060(c) |
| 57.5060(d) | 57.5060(d) |
| 57.5060(e) | 57.5060(d) |
| 57.5060(f) | 57.5060(d) and (e) |
| 57.5061 | 57.5061 |
| 57.5062 | Removed |
| 57.5065 | 57.5065 |
| 57.5066 | 57.5066 |
| 57.5067 | 57.5067 |
| 57.5070 | 57.5070 |
| 57.5071 | 57.5071 |
| 57.5075 | 57.5075 |

## XI. Regulatory Impact Analysis

This part of the preamble reviews several impact analyses which MSHA is required to provide in connection with its final rulemakings. The full text of these analyses can be found at MSHA's Regulatory Economic Analysis (REA) Web page which is available from MSHA at *http://www.msha.gov/REGSINFO.HTM.*

*A. Costs and Benefits: Executive Order 12866 Regulatory Planning and Review and Regulatory Flexibility Act*

Executive Order 12866, as amended by Executive Order 13258, requires that regulatory agencies assess both the costs and benefits of regulations. The final rule will result in estimated net cost savings (negative costs) for underground M/NM mine operators of $3,634 per

year. This represents an average yearly savings of $20 per mine for the 177 underground metal/non-metal mines that will be affected by this final rule. Of these 177 mines, 66 have fewer than 20 workers; 107 have 20 to 500 workers; and 4 have more than 500 workers. For a complete breakdown of the compliance costs and savings of the final rule, see Chapter IV of the REA associated with this rulemaking.

The amended provisions in this final rule will increase flexibility of compliance with the existing final rule, but continue to reduce significant health risks to underground miners. Benefits of the existing final rule are those discussed by MSHA in the REA for the January 19, 2001 final rule and include reductions in lung cancers. In the long run, as the mining population turns over, MSHA estimates that a minimum of 8.5 lung cancer deaths will be avoided per year. Other benefits noted in the 2001 REA were reductions in the risk of death from cardiovascular, cardiopulmonary, or respiratory causes and reductions in the risk of sensory irritation and respiratory symptoms.

*B. Regulatory Flexibility Act (RFA) and Small Business Regulatory Enforcement Fairness Act (SBREFA)*

The Regulatory Flexibility Act (RFA) requires regulatory agencies to consider a rule's economic impact on small entities. Under the RFA, MSHA must use the Small Business Administration's (SBA's) criterion for a small entity in determining a rule's economic impact unless, after consultation with the SBA Office of Advocacy, MSHA establishes an alternative definition for a small mine operator and publishes that definition in the **Federal Register** for notice and comment. For the mining industry, SBA defines ''small'' as a mine operator with 500 or fewer employees. Traditionally, MSHA has also looked at the impacts of its final rules on a subset of mines with 500 or fewer employees—those with fewer than 20 employees, which the mining community refers to as ''small mines.'' These small mines differ from larger mines not only in the number of employees, but also, among other things, in economies of scale in material produced, in the type and amount of production equipment, and in supply inventory. Therefore, their costs of complying with MSHA rules and the impact of MSHA rules on them would also tend to be different. It is for this reason that ''small mines,'' as traditionally defined by the mining community, are of special concern to MSHA.

Therefore, MSHA's analysis complies with the legal requirements of the RFA for an analysis of the impacts on ''small entities'' while continuing MSHA's traditional look at ''small mines.'' Using SBA's definition of a small mine operator, the estimated yearly net compliance cost savings of this final rule on small underground M/NM mine operators is approximately $3,675. These estimated yearly net compliance cost savings compare with estimated annual revenues of approximately $2.35 billion for small underground M/NM mine operators with 500 or fewer employees. Using MSHA's definition of a small mine operator, the estimated yearly net compliance cost savings of this final rule on small underground M/NM mine operators is approximately $4,795. These estimated yearly net compliance cost savings compare with estimated annual revenues of approximately $0.14 billion for small underground M/NM mine operators with 20 or fewer employees.

MSHA concludes that the final DPM rule would not have a significant economic impact on a substantial number of small entities that are covered by this rulemaking. MSHA has determined that this is the case both for mines affected by this rulemaking with fewer than 20 employees and for mines affected by this rulemaking with 500 or fewer employees. MSHA has certified these findings to the SBA. The factual basis for this certification is discussed in Chapter V of the REA associated with this rulemaking.

*C. Paperwork Reduction Act (PRA)*

This final rule contains changes to information collection requirements in various provisions. Most of these paperwork requirements were previously approved by OMB as part of OMB Control Number 1219–0135. The information collection requirements are summarized below and explained in detail in the REA that accompanies the rule. The REA includes the estimated costs and assumptions for the paperwork requirements related to this final rule. A copy of the REA is available on our Web site at *http://www.msha.gov/regsinfo.htm* and can also be obtained in hard copy from MSHA. These information collection requirements have been submitted to OMB for review under 44 U.S.C. 3504(h) of the Paperwork Reduction Act of 1995, as amended. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number.

As a result of this rule, mine operators will obtain burden hour and cost savings for the first two years that the rule is in effect. In the third year that the rule is in effect, mine operators will incur a net increase in burden hours and costs. For every year thereafter, burden hours and costs will be the same as in the third year.

In the first year of the rule, mine operators will incur burden hour savings of approximately 274 hours. These savings will result from mine operators (1) not having to apply for approval from the Secretary to work in concentrations of DPM exceeding the applicable limit under § 57.5060(d) of the 2001 final rule and maintaining the conditions of the approval during the period that the interim concentration limit is in effect; and (2) not having to write a DPM Control Plan under § 57.5062.

In the second year of the rule, mine operators' burden savings increase to about 961 hours. These savings will result from mine operators (1) not having to apply for approval from the Secretary to work in concentrations of DPM exceeding the applicable limit under § 57.5060(d) of the 2001 final rule and maintaining the conditions of the approval during the period that the final concentration limit is in effect; and (2) not having to write a DPM Control Plan under § 57.5062.

In the third year of the rule, mine operators will incur a net increase of about 368 burden hours. This increased burden occurs because mine operators will no longer experience the savings from not having to apply for approval from the Secretary to work in concentrations of DPM exceeding the applicable limit under § 57.5060(d) of the 2001 final rule and maintaining the conditions of the approval during the period that the final concentration limit would be in effect; and will incur an increase in burden associated with requesting special extensions of the final concentration limit under § 57.5060(c).

Mine operators incur a net increase in paperwork burden costs of $12,250 per year. This net increase is composed of an annualized cost increase of $24,181 per year from changes to § 57.5060(c); an annualized cost decrease of $6,394 per year from changes to § 57.5060(d); and an annualized cost decrease of $5,537 per year from changes to § 57.5062.

In comparison with the 2003 NPRM, this final rule revises two provisions (§§ 57.5060(c) and 57.5062) in a manner that reduces the burden hours and associated costs. These reductions in burden hours and associated cost savings relative to the 2003 NPRM are incorporated into the calculations of the previous paragraphs, which compare the final rule with the existing rule.

Sections 57.5071 and 57.5075 both involve information collection activities. Section 57.5071 triggers notice requirements when environmental monitoring indicates that the DPM limit has been exceeded. The paperwork burden for this provision has not changed from the former requirements. Section 57.5075 summarizes in chart form the recordkeeping requirements of the rule. The paperwork burden has only changed for three of the provisions listed, §§ 57.5060(c), 57.5060(d), and 57.5062. These provisions are discussed more fully above and in the REA.

MSHA received several comments regarding information collection. Some commenters stated that the paperwork requirements for developing a control plan were too burdensome, and others stated that they were justified. MSHA has removed the requirement for control plans due to the establishment of the hierarchy of controls for meeting the interim PEL. Removal of the control plan requirement is discussed at length under the section-by-section discussion for § 57.5062.

Some commenters stated that all information collection activities associated with the rule including DPM sampling and analysis mandates, the plan provisions, the posting requirements, and all of the required records are unnecessary because MSHA can perform its job without such requirements as demonstrated by the existence of standards that control other diesel exhaust components. MSHA disagrees. Although MSHA has deleted certain information collection requirements in this final rule, it considers those included to be necessary to determine whether mine operators are in compliance with the rule.

*D. The Unfunded Mandates Reform Act of 1995*

This final rule does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments; nor does it increase private sector expenditures by more than $100 million annually; nor does it significantly or uniquely affect small governments. Accordingly, the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*) requires no further agency action or analysis.

*E. National Environmental Policy Act*

MSHA has reviewed this final rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 U.S.C. 1500), and the Department of Labor's NEPA procedures (29 CFR part 11).

This final rule has no significant impact on air, water, or soil quality; plant or animal life; the use of land; or other aspects on the human environment. MSHA solicited public comment concerning the accuracy and completeness of this environmental assessment when this rule was first proposed, and received no comments relevant to this environmental assessment. MSHA finds, therefore, that the final rule has no significant impact on the human environment. Accordingly, MSHA has not provided an environmental impact statement.

*F. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families*

This final rule has no affect on family well-being or stability, marital commitment, parental rights or authority, or income or poverty of families and children. Accordingly, Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires no further agency action, analysis, or assessment.

*G. Executive Order 12630: Government Actions and Interference With Constitutionally Protected Property Rights*

This final rule does not implement a policy with takings implications. Accordingly, Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, requires no further agency action or analysis.

*H. Executive Order 12988: Civil Justice Reform*

This final rule was written to provide a clear legal standard for affected conduct, and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. Accordingly, this final rule meets the applicable standards provided in Section 3 of Executive Order 12988, Civil Justice Reform.

*I. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

This final rule has no adverse impact on children. Accordingly, Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, as amended by Executive Orders 13229 and 13296, requires no further agency action or analysis.

*J. Executive Order 13132: Federalism*

This final rule 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.'' Accordingly, Executive Order 13132, Federalism, requires no further agency action or analysis.

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

This final rule does not have ''tribal implications,'' because it does not ''have substantial direct effects 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.'' Accordingly, Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

*L. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

Regulation of the M/NM sector of the mining industry has no significant impact on the supply, distribution, or use of energy. This final rule is not a ''significant energy action,'' because it is not ''likely to have a significant adverse effect on the supply, distribution or use of energy'' * * * (including a shortfall in supply, price increases, and increased use of foreign supplies).'' Accordingly, Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, requires no further agency action or analysis.

*M. Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking*

MSHA has thoroughly reviewed this final rule to assess and take appropriate account of its potential impact on small businesses, small governmental jurisdictions, and small organizations. As discussed in Chapter V of the REA, MSHA has determined and certified that this final rule will not have a significant economic impact on a substantial number of small entities. MSHA solicited public comment concerning the accuracy and completeness of this potential impact when the rule was first proposed. The agency took appropriate account of comments received relevant to the rule's potential impact on small entities. Accordingly, Executive Order

13272, Proper Consideration of Small Entities in Agency Rulemaking, requires no further agency action or analysis.

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## List of Subjects in 30 CFR Part 57

Diesel particulate matter, Metal and Nonmetal, Mine Safety and Health, Underground mines.

■ Accordingly, chapter I of title 30 of the Code of Federal Regulations is amended as follows:

## PART 57—SAFETY AND HEALTH STANDARDS—UNDERGROUND METAL AND NONMETAL MINES

■ 1. The authority citation for part 57 continues to read as follows:

**Authority:** 30 U.S.C. 811 and 813.

### § 57.5062 [Removed]

■ 2. Section 57.5062 is removed.

■ 3. Also, in part 57:

■ A. Sections 57.5060, 57.5061, 57.5071, and 57.5075 are revised; and

■ B. Sections 57.5065, 57.5066, 57.5067, and 57.5070 are republished without change.

The text reads as follows:

### § 57.5060 Limit on exposure to diesel particulate matter.

(a) A miner's personal exposure to diesel particulate matter (DPM) in an underground mine must not exceed an average eight-hour equivalent full shift airborne concentration of 308 micrograms of elemental carbon per cubic meter of air ($308_{EC}$ g/m$^3$). [This interim permissible exposure limit (PEL) remains in effect until the final DPM exposure limit becomes effective. When the final DPM exposure limit becomes effective, MSHA will publish a document in the **Federal Register**.]

(b) After January 19, 2006, any mine operator covered by this part must limit the concentration of diesel particulate matter to which miners are exposed in underground areas of a mine by restricting the average eight-hour equivalent full shift airborne concentration of total carbon, where miners normally work or travel, to 160 micrograms per cubic meter of air (160TC μg/m$^3$). (c)(1) If a mine requires additional time to come into compliance with the final DPM limit established in § 57.5060 (b) due to technological or economic constraints, the operator of the mine may file an application with the District Manager for a special extension.

(2) The mine operator must certify on the application that the operator has posted one copy of the application at the mine site for at least 30 days prior to the date of application, and has provided another copy to the authorized representative of miners.

(3) No approval of a special extension shall exceed a period of one year from the date of approval. Mine operators may file for additional special extensions provided each extension does not exceed a period of one year. An application must include the following information:

(i) A statement that diesel-powered equipment was used in the mine prior to October 29, 1998;

(ii) Documentation supporting that controls are technologically or economically infeasible at this time to reduce the miner's exposure to the final DPM limit.

(iii) The most recent DPM monitoring results.

(iv) The actions the operator will take during the extension to minimize exposure of miners to DPM.

(4) A mine operator must comply with the terms of any approved application for a special extension, post a copy of the approved application for a special extension at the mine site for the duration of the special extension period, and provide a copy of the approved application to the authorized representative of miners.

(d) The mine operator must install, use, and maintain feasible engineering and administrative controls to reduce a miner's exposure to or below the DPM limit established in this section. When controls do not reduce a miner's DPM exposure to the limit, controls are infeasible, or controls do not produce significant reductions in DPM exposures, controls must be used to reduce the miner's exposure to as low a level as feasible and must be supplemented with respiratory protection in accordance with § 57.5005(a), (b), and paragraphs (d)(1) and (d)(2) of this section.

(1) Air purifying respirators must be equipped with the following:

(i) Filters certified by NIOSH under 30 CFR part 11 (appearing in the July 1, 1994 edition of 30 CFR, parts 1 to 199) as a high efficiency particulate air (HEPA) filter;

(ii) Filters certified by NIOSH under 42 CFR part 84 as 99.97% efficient; or

(iii) Filters certified by NIOSH for DPM.

(2) Non-powered, negative-pressure, air purifying, particulate-filter respirators shall use an R- or P-series filter or any filter certified by NIOSH for DPM. An R-series filter shall not be used for longer than one work shift.

(e) Rotation of miners shall not be considered an acceptable administrative control used for compliance with the DPM standard.

### § 57.5061 Compliance determinations.

(a) MSHA will use a single sample collected and analyzed by the Secretary in accordance with the requirements of this section as an adequate basis for a determination of noncompliance with the DPM limit.

(b) The Secretary will collect samples of DPM by using a respirable dust sampler equipped with a submicrometer impactor and analyze the samples for the amount of elemental carbon using the method described in NIOSH Analytical Method 5040, except that the Secretary also may use any methods of collection and analysis subsequently determined by NIOSH to provide equal or improved accuracy for the measurement of DPM.

(c) The Secretary will use full-shift personal sampling for compliance determinations.

### § 57.5065 Fueling practices.

(a) Diesel fuel used to power equipment in underground areas must not have a sulfur content greater than 0.05 percent. The operator must retain purchase records that demonstrate

compliance with this requirement for one year after the date of purchase.

(b) The operator must only use fuel additives registered by the U.S. Environmental Protection Agency in diesel powered equipment operated in underground areas.

**§ 57.5066 Maintenance standards.**

(a) Any diesel powered equipment operated at any time in underground areas must meet the following maintenance standards:

(1) The operator must maintain any approved engine in approved condition;

(2) The operator must maintain the emission related components of any non-approved engine to manufacturer specifications; and

(3) The operator must maintain any emission or particulate control device installed on the equipment in effective operating condition.

(b)(1) A mine operator must authorize each miner operating diesel-powered equipment underground to affix a visible and dated tag to the equipment when the miner notes evidence that the equipment may require maintenance in order to comply with the maintenance standards of paragraph (a) of this section. The term evidence means visible smoke or odor that is unusual for that piece of equipment under normal operating procedures, or obvious or visible defects in the exhaust emissions control system or in the engine affecting emissions.

(2) A mine operator must ensure that any equipment tagged pursuant to this section is promptly examined by a person authorized to maintain diesel equipment, and that the affixed tag not be removed until the examination has been completed. The term promptly means before the end of the next shift during which a qualified mechanic is scheduled to work.

(3) A mine operator must retain a log of any equipment tagged pursuant to this section. The log must include the date the equipment is tagged, the date the equipment is examined, the name of the person examining the equipment, and any action taken as a result of the examination. The operator must retain the information in the log for one year after the date the tagged equipment was examined.

(c) Persons authorized by a mine operator to maintain diesel equipment covered by paragraph (a) of this section must be qualified, by virtue of training or experience, to ensure that the maintenance standards of paragraph (a) of this section are observed. An operator must retain appropriate evidence of the competence of any person to perform specific maintenance tasks in compliance with those standards for one year after the date of any maintenance, and upon request must provide the documentation to the authorized representative of the Secretary.

**§ 57.5067 Engines.**

(a) Any diesel engine introduced into an underground area of a mine covered by this part after July 5, 2001, other than an engine in an ambulance or fire fighting equipment which is utilized in accordance with mine fire fighting and evacuation plans, must either:

(1) Have affixed a plate evidencing approval of the engine pursuant to subpart E of part 7 of this title or pursuant to part 36 of this title; or

(2) Meet or exceed the applicable particulate matter emission requirements of the Environmental Protection Administration listed in Table 57.5067–1, as follows:

TABLE 57.5067–1

| EPA requirement | EPA category | PM limit |
|---|---|---|
| 40 CFR 86.094–8(a)(1)(i)(A)(2) | light duty vehicle | 0.1 g/mile. |
| 40 CFR 86.094–9(a)(1)(i)(A)(2) | light duty truck | 0.1 g/mile. |
| 40 CFR 86.094–11(a)(1)(iv)(B) | heavy duty highway engine | 0.1 g/bhp-hr. |
| 40 CFR 89.112(a) | nonroad (tier, power range) | varies by power range: |
| | tier 1 kW<8 (hp<11) | 1.0 g/kW-hr (0.75 g/bhp-hr). |
| | tier 1 8≤kW<19 (11≤hp<25) | 0.80 g/kW-hr (0.60 g/bhp-hr). |
| | tier 1 19≤kW<37(25≤hp<50) | 0.80 g/kW-hr (0.60 g/bhp-hr). |
| | tier 2 37≤kW<75(50≤hp<100) | 0.40 g/kW-hr (0.30 g/bhp-hr). |
| | tier 2 75≤kW<130(100≤hp<175) | 0.30 g/kW-hr (0.22 g/bhp-hr). |
| | tier 1 130≤kW<225(175≤hp<300) | 0.54 g/kW-hr (0.40 g/bhp-hr). |
| | tier 1 225≤kW<450(300≤hp<600) | 0.54 g/kW-hr (0.40 g/bhp-hr). |
| | tier 1 450≤kW<560(600≤hp<750) | 0.54 g/kW-hr (0.40 g/bhp-hr). |
| | tier 1 kW≥560(hp≥750) | 0.54 g/kW-hr (0.40 g/bhp-hr). |

Notes:
"g" means grams.
"hp" means horsepower.
"g/bhp-hr" means grams/brake horsepower-hour.
"kW" means kilowatt.
"g/kW-hr" means grams/kilowatt-hour.

(b) For purposes of paragraph (a):

(1) The term ''introduced'' means any engine added to the underground inventory of engines of the mine in question, including:

(i) An engine in newly purchased equipment;

(ii) An engine in used equipment brought into the mine; and

(iii) A replacement engine that has a different serial number than the engine it is replacing; but

(2) The term ''introduced'' does not include engines that were previously part of the mine inventory and rebuilt.

(3) The term ''introduced'' does not include the transfer of engines or equipment from the inventory of one underground mine to another underground mine operated by the same mine operator.

**§ 57.5070 Miner training.**

(a) Mine operators must provide annual training to all miners at a mine covered by this part who can reasonably be expected to be exposed to diesel emissions on that property. The training must include—

(1) The health risks associated with exposure to diesel particulate matter;

(2) The methods used in the mine to control diesel particulate matter concentrations;

(3) Identification of the personnel responsible for maintaining those controls; and

(4) Actions miners must take to ensure the controls operate as intended.

(b) An operator must retain a record at the mine site of the training required by this section for one year after completion of the training.

**§ 57.5071 Exposure monitoring.**

(a) Mine operators must monitor as often as necessary to effectively determine, under conditions that can be reasonably anticipated in the mine, whether the average personal full-shift airborne exposure to DPM exceeds the DPM limit specified in § 57.5060.

(b) The mine operator must provide affected miners and their representatives with an opportunity to observe exposure monitoring required by this section. Mine operators must give prior notice to affected miners and their representatives of the date and time of intended monitoring.

(c) If any monitoring performed under this section indicates that a miner's exposure to diesel particulate matter exceeds the DPM limit specified in § 57.5060, the operator must promptly post notice of the corrective action being taken on the mine bulletin board, initiate corrective action by the next work shift, and promptly complete such corrective action.

(d)(1) The results of monitoring for diesel particulate matter, including any results received by a mine operator from sampling performed by the Secretary, must be posted on the mine bulletin board within 15 days of receipt and must remain posted for 30 days. The operator must provide a copy of the results to the authorized representative of miners.

(2) The mine operator must retain for five years (from the date of sampling), the results of any samples the operator collected as a result of monitoring under this section, and information about the sampling method used for obtaining the samples.

**§ 57.5075(a) Diesel particulate records.**

(a) Table 57.5075(a), ''Diesel Particulate Recordkeeping Requirements,'' lists the records the operator must retain pursuant to §§ 57.5060 through 57.5071, and the duration for which particular records must be retained.

TABLE 57.5075(A).—DIESEL PARTICULATE RECORDKEEPING REQUIREMENTS

| Record | Section reference | Retention time |
|---|---|---|
| 1. Approved application for extension of time to comply with exposure limits. | § 57.5060(c) | Duration of extension. |
| 2. Purchase records noting sulfur content of diesel fuel | § 57.5065(a) | 1 year beyond date of purchase. |
| 3. Maintenance log | § 57.5066(b) | 1 year after date any equipment is tagged. |
| 4. Evidence of competence to perform maintenance | § 57.5066(c) | 1 year after date maintenance performed. |
| 5. Annual training provided to potentially exposed miners | § 57.5070(b) | 1 year beyond date training completed. |
| 6. Record of corrective action | § 57.5071(c) | Until the corrective action is completed. |
| 7. Sampling method used to effectively evaluate a miner's personal exposure, and sample results. | § 57.5071(d) | 5 years from sample date. |

(b)(1) Any record listed in this section which is required to be retained at the mine site may, notwithstanding such requirement, be retained elsewhere if the mine operator can immediately access the record from the mine site by electronic transmission.

(2) Upon request from an authorized representative of the Secretary of Labor, the Secretary of Health and Human Services, or from the authorized representative of miners, mine operators must promptly provide access to any record listed in the table in this section.

(3) An operator must provide access to a miner, former miner, or, with the miner's or former miner's written consent, a personal representative of a miner, to any record required to be maintained pursuant to § 57.5071 to the extent the information pertains to the miner or former miner. The operator must provide the first copy of a requested record at no cost, and any additional copies at reasonable cost.

(4) Whenever an operator ceases to do business, that operator must transfer all records required to be maintained by this part, or a copy thereof, to any successor operator who must maintain them for the required period.

Dated: May 23, 2005.

**David G. Dye,**

*Acting Assistant Secretary for Mine Safety and Health.*

[FR Doc. 05–10681 Filed 6–3–05; 8:45 am]

BILLING CODE 4510–43–U

Federal Register

Monday,
June 6, 2005

# Part III

# The President

**Proclamation 7907—Black Music Month, 2005**

**Proclamation 7908—Great Outdoors Month, 2005**

**Memorandum of June 2, 2005—Order of Succession of Officers To Act as Secretary of Defense**

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# Presidential Documents

**Title 3—**

## The President

**Proclamation 7907 of June 1, 2005**

## Black Music Month, 2005

**By the President of the United States of America**

**A Proclamation**

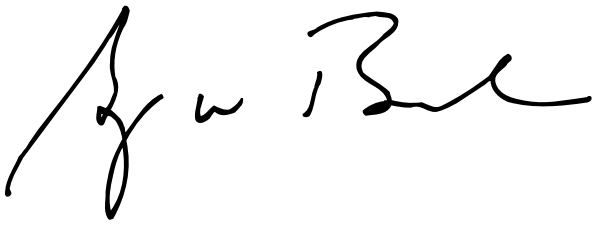
During Black Music Month, we pay tribute to a rich musical tradition and honor the many contributions African-American musicians, singers, and composers have made to the culture of our Nation and to the world. This powerful, moving, and soulful music speaks to every heart, lifting us in times of sorrow and helping us celebrate in times of joy.

Black music's origins are found in the work songs and spirituals that bore witness to the cruelty of bondage and the strength of faith. In the strains of those songs, we hear the voice of hope in the face of injustice. From those roots, black music has grown into a diverse collection of styles, and it continues to evolve today. Black music captures a part of the American spirit and continues to have a profound impact on our country.

This month is an opportunity to reflect upon the achievements of African-American artists and to look forward to the future. We remember Robert Johnson, Bessie Smith, Louis Armstrong, Nat King Cole, Ray Charles, Ella Fitzgerald, Billie Holiday, and countless others for their love of music and their pioneering and passionate spirit. We celebrate today's musicians who continue to build upon the rich and vital heritage of black music.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim June 2005 as Black Music Month. I encourage all Americans to learn more about the history of black music and to enjoy the great contributions of African-American musicians.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of June, in the year of our Lord two thousand five, and of the Independence of the United States of America the two hundred and twenty-ninth.



[FR Doc. 05–11343
Filed 6–3–05; 9:46 am]
Billing code 3195–01–P

# Presidential Documents

**Proclamation 7908 of June 1, 2005**

## Great Outdoors Month, 2005

**By the President of the United States of America**

**A Proclamation**

During Great Outdoors Month, we celebrate our Nation's natural heritage, reaffirm our commitment to conserve our environment, and recognize the many volunteers who help maintain our natural spaces.

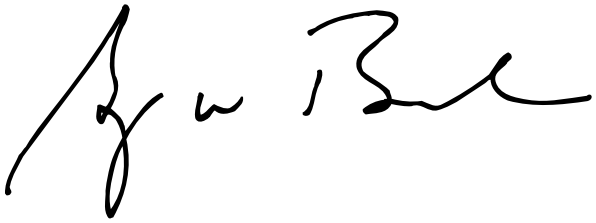
Americans are blessed by our country's expansive landscapes, diverse wildlife, and beautiful public lands. Outdoor recreation provides an opportunity to enjoy the splendor of our Nation's remarkable natural treasures and reminds us of our responsibility to be good stewards of the environment.

Across our great Nation, Americans are taking that responsibility seriously and volunteering to help keep our natural areas beautiful for future generations. I commend these citizens for helping to protect our public lands, and I encourage all Americans to do their part. The Department of the Interior's Take Pride in America website and the USA Freedom Corps website offer examples of ways to participate in environmental stewardship projects.

We have an obligation to protect the Earth, and my Administration is pursuing responsible initiatives to make our air cleaner, our water purer, and our land better protected. In doing so, we are demonstrating the important principle that environmental protection and economic prosperity are both vital parts of being good stewards in the land we call home. Through these and other efforts, we will continue to build a cleaner, safer, and healthier environment for all Americans.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim June 2005 as Great Outdoors Month. I call on all Americans to observe this month with appropriate programs and activities and to enjoy safe outdoor recreational activities.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of June, in the year of our Lord two thousand five, and of the Independence of the United States of America the two hundred and twenty-ninth.



[FR Doc. 05–11344

Filed 6–3–05; 9:46 am]

Billing code 3195–01–P

# Presidential Documents

**Memorandum of June 2, 2005**

## Order of Succession of Officers to Act as Secretary of Defense

**Memorandum for the Secretary of Defense**

Pursuant to the Constitution and laws of the United States, including section 3345(a) of title 5, United States Code, and notwithstanding Executive Order 13000 of April 24, 1996, I direct as follows:

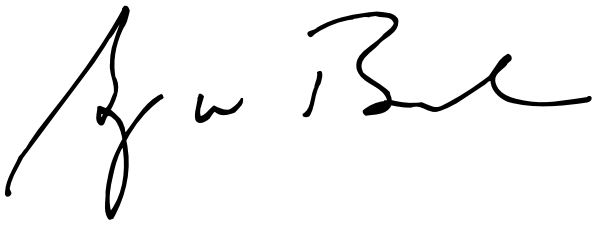
(1) In the event of the death, permanent disability, or resignation of the Secretary of Defense, the Secretary of the Navy shall act for and perform the duties of the Secretary of Defense as Acting Secretary of Defense.

(2) In the event of the temporary absence or temporary disability of the Secretary of Defense, the Secretary of the Navy shall act for and perform the duties of the Secretary of Defense as Acting Secretary of Defense. In these instances, the designation as Acting Secretary of Defense applies only for the duration of the Secretary's absence or disability, and does not affect the authority of the Secretary to exercise during the absence, or to resume when the disability no longer exists, the powers of his office.

(3) In all other respects, Executive Order 13000 of April 24, 1996, shall remain in effect.

(4) This memorandum shall expire upon the appointment of a Deputy Secretary of Defense, unless sooner terminated by operation of law or by the President.

(5) You are authorized and directed to publish this memorandum in the **Federal Register**.



THE WHITE HOUSE,
*Washington, June 2, 2005.*

[FR Doc. 05–11345
Filed 6–3–05; 9:46 am]
Billing code 5000–04–P

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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period January 1, 2004, through January 1, 2005. The CFR volume issued as of January 1, 2004 should be retained.

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